THE
CANADIAN TEN-YEAR DIGEST
1901 TO 1910

(INCLUSIVE)

OF CASES REPORTED IN ALL THE CANADIAN PROVINCES AND IN THE FEDERAL COURTS, AND ON APPEALS THEREFROM TO THE PRIVY COUNCIL, WITH TABLES OF CASES AFFIRMED, REVERSED OR SPECIALLY CONSIDERED, AND OF THE CASES DIGESTED

COMPILED BY

W. J. TREMEEAR

OF OSGOODE HALL, TORONTO, BARRISTER-AT-LAW

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IN TWO VOLUMES

VOL. I

(TITLES *A* TO *L* INCLUSIVE)

A CONTINUATION AS TO ONTARIO OF THE "DIGEST OF ONTARIO CASE LAW" UNDER ARRANGEMENT WITH THE LAW SOCIETY OF UPPER CANADA

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TABLE OF CONTENTS

VOL. I.

DIGEST OF CASES UNDER HEADINGS *A* TO *L* INCLUSIVE

VOL. II.

DIGEST OF CASES UNDER HEADINGS *M* TO *Z* INCLUSIVE

APPENDIX OF WORDS AND PHRASES

TABLE OF CASES AFFIRMED, REVERSED OR SPECIALLY CONSIDERED

TABLE OF CASES DIGESTED

A

A
B
C
C
C
C
C
C
C.
C.
C.
C.
C.
Ca
C.I
C.R
C.S
Cr.
E.L
Edv
Geo
Imp
M.C
M.M
Man
N.B.
N.B.
N.S.
N.W.
O....
Ont..
O.L.R

O.R.
P.E.I.
Que.
R.J.K
Que.
Que.
R.S.B.
R.S.C.
R.S.M.
R.S.N.
R.S.O.
R.S.Q.
Sask.
S.C.R.
Terr.
W.L.R.
Y.T. . .

ABBREVIATIONS USED IN THIS DIGEST.

A.C.	Law Reports, Appeal Cases, of the year indicated in brackets.
Alta. R.	Alberta Law Reports.
B.C.R.	British Columbia Reports.
Can. C.C.	Canadian Criminal Cases.
Can. Cr. Cas.	Canadian Criminal Cases.
Can. Com. R.	Canada Commercial Reports.
Can. Ex. R.	Reports Exchequer Court of Canada.
Can. Ry. Cas.	Canadian Railway Cases.
Can. S.C.R.	Reports Supreme Court of Canada.
C.A.	Court of Appeal (Ontario).
C.A.D.	Canadian Annual Digest.
C.C.	Civil Code (Quebec).
C.C.P. C.P.C.	Code of Civil Procedure (Quebec).
Can. Law Journal C.L.J.	Canada Law Journal
C.R.	Court of Review (Quebec).
C.S.B.C.	Consolidated Statutes, British Columbia.
Cr. Code	Criminal Code of Canada.
E.L.R.	Eastern Law Reporter.
Edw. VII.	Year of Reign of King Edward VII.
Geo.	Year of Reign of King George V.
Imp.	Imperial (Statutes).
M.C.	Municipal Code (Quebec).
M.M.C.	Martin's Mining Cases.
Man. R.	Manitoba Reports.
N.B.R.	New Brunswick Reports.
N.B. Eq.	New Brunswick Equity Reports.
N.S.R.	Nova Scotia Reports.
N.W.T.	North-West Territories (Canada).
O. Ont.	Province of Ontario.
O.L.R.	Ontario Law Reports (Current series from 1901).
O.R.	Ontario Reports (Series ending 1900).
P.E.I.	Prince Edward Island.
Que. K.B. R.J.K.B.	Quebec Reports, King's Bench.
Que. S.C.	Quebec Reports, Superior Courts.
Que. P.R.	Quebec Practice Reports.
R.S.B.C	Revised Statutes, British Columbia.
R.S.C.	Revised Statutes, Canada.
R.S.M.	Revised Statutes, Manitoba.
R.S.N.S.	Revised Statutes, Nova Scotia.
R.S.O.	Revised Statutes, Ontario.
R.S.Q.	Revised Statutes, Quebec.
Sask. R.	Saskatchewan Law Reports.
S.C.R.	Reports Supreme Court of Canada.
Terr. L.R.	Territories Law Reports.
W.L.R.	Western Law Reporter.
Y.T.	Yukon Territory.

ALL REPOR
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Service—In
1237 C.P.Q.]—
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McNally v.
(Q.B.).

—Special au
C.C.P.]—An
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Gauthier v.
Ct.).

—Procedure.]—
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See LIMITAT
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A DIGEST

—OF—

ALL REPORTED CASES DECIDED BY THE FEDERAL AND PROVINCIAL COURTS IN THE DOMINION OF CANADA, AND BY THE PRIVY COUNCIL ON APPEAL THEREFROM, DURING THE YEARS 1901 TO 1910 INCLUSIVE.

ABANDONMENT.

Service—Intervention—Arts. 276, 787, 1237 C.P.Q.]—An abandonment is only effective when it has been served on all the parties to the cause. An abandonment not so served does not put an end to the instance nor prevent a party from intervening to protect his rights.

McNally v. Prefontaine, 3 Que. P.R. 401 (Q.B.).

—Special authority—Proof of—Art. 548 C.C.P.]—An abandonment of a judgment should be signed by the party in whose favour it was rendered, or by his attorney furnished with special authority. If the judgment is for a sum of more than $50 proof cannot be given by oral testimony that the attorney who signed the abandonment was authorized by the party or that the latter had ratified it, unless there has been a commencement of proof by writing.

Gauthier v. Barcelo, 4 Que. P.R. 224 (Sup. Ct.).

—Procedure.]—The prothonotary has no jurisdiction to give acte or issue an order on abandonment of proceedings; therefore, when notice of abandonment is filed by one party in the district in which the action should be tried, the opposite party should apply, by inscription, to the Court in order to obtain judgment pursuant to the notice.

Mageau v. Montreal Mutual Ins. Co., Q.R. 24 S.C. 208 (Sup. Ct.).

And see DISCONTINUANCE; BANKRUPTCY.

ABATEMENT.

See LIMITATION OF ACTIONS; PRE-EMPTION; WILL.

ABDUCTION.

Abduction of young girl.]—An application by the prisoner for leave to appeal from a conviction for unlawfully taking an unmarried girl under the age of sixteen out of the possession and against the will of her mother, then having the lawful care and charge of her, contrary to sec. 315 of the Criminal Code, was refused, there being evidence to sustain the conviction, and the object or intention with which the girl was taken being immaterial.

Rex v. Yorkema, 21 O.L.R. 193, 16 Can. Cr. Cas. 189.

Unlawful taking or enticement of child —Decree of foreign Court awarding custody to mother — Validity.]—The decree of a foreign Court having jurisdiction over the parties and subject-matter, awarding the custody of a child of six years old to his mother, is of such validity and effect in Ontario—no fraud or collusion being shown—as to render the child's father liable, under s. 316 of the Criminal Code, to conviction for the offence of unlawfully taking or enticing away the child with intent to deprive the parent (mother) of the possession thereof. The Courts will recognize the validity of a divorce granted by a Court of the country where the parties were legally domiciled at the time when the proceedings were taken, although the decree was founded upon causes which would not be considered sufficient in an English Court.

Rex v. Hamilton, 22 O.L.R. 484.

ABORTION.

Counselling a person in Canada to submit in the United States to an operation.] —Counselling a person in Canada, to submit in a foreign jurisdiction to an operation which, if performed in Canada, would be a crime, is not an offence against the criminal law of Canada.

Rex v. Walkem, 14 B.C.R. 1, 14 Can. Cr. Cas. 122.

—Defence—Lawful operation—Evidence in reply of previous criminal act.]—Upon an indictment of the defendants (P., a physician and surgeon, and T., a boarding-house keeper), for procuring an abortion, the case for the Crown was that the defendants had

performed an unlawful operation upon a certain woman, for the purpose of procuring a miscarriage. Of this there was evidence to go to the jury. The defence was then entered upon, and the defendant, P., swore that the operation was performed for a lawful purpose, and without any criminal intent. He was cross-examined as to whether he had not, some few weeks previously, performed an operation upon a person then in Court. He denied having done so, and all knowledge of having treated her at all. This person and the man whom she had subsequently married were, against objection, called in reply, and gave evidence that P. had been employed to operate, and had operated, upon her so as to procure a miscarriage. It was contended that this evidence was admissible, as tending to rebut the evidence of P., or, in other words, to prove the unlawful intent:—Held, that the testimony of these witnesses was improperly admitted, there being no evidence of a system which would let in proof of a single prior criminal act as part of it. The King v. Bond, [1906] 2 K.B. 389, discussed. The conviction of the defendants was set aside, and a new trial was directed under sec. 1018 (b) and (d) of the Criminal Code.

Rex v. Pollard, 19 O.L.R. 96, 15 Can. Cr. Cas. 74.

—Abortion—Intent to procure—Indictment.]—In an indictment laid under sec. 303 of the Criminal Code, R.S.C. (1906) c. 146, which enacts that "everyone is guilty of an indictable offence . . . who, with intent to procure the miscarriage of any woman, whether she is or is not with child . . . unlawfully uses on her any instrument or other means whatsoever with the like intent," the first count charged that the accused, with the intent to procure a miscarriage, etc., did unlawfully use upon the person of the woman an instrument, etc.; the second count charged that with like intent the accused did unlawfully "operate" on the said woman. The evidence submitted by the Crown was directed solely to proof of the fact of the performance of an operation by the use of an instrument, substantially negativing the use of the hand or finger alone for the alleged purpose. The jury, however, were charged—after they had intimated that they were not satisfied that the evidence established the use of an instrument—that the use of the hand or finger might be considered in dealing with the second count. The jury found the accused not guilty on the first count, but guilty on the second count:—Held, that the second count might not unnaturally be regarded as a mere repetition in another form of the gravamen of the first count, and that by the finding of not guilty on that count the whole case against the accused failed, and the finding on the second count, therefore, could not be supported.

Rex v. Cook, 19 O.L.R. 174, 15 Can. Cr. Cas. 40.

ABSCONDING DEBTOR.

See ARREST; ATTACHMENT.

ACCEPTANCE.

See BILLS AND NOTES; SALE OF GOODS; SALE OF LANDS.

ACCIDENT INSURANCE.

See INSURANCE.

ACCORD.

Plea of compensation—Allegation of acknowledgment—Tender.]—1. A plea of compensation, setting forth a contra-account, followed by an allegation of acknowledgment and promise to pay by the plaintiff, will not be dismissed on an answer in law. 2. The Judge presiding at the trial, has, however, power to order that the settlement of account and acknowledgment by the plaintiff, alleged by the defendant, be proved by him before he is allowed to prove his counterclaim. 3. The validity of a tender, especially in commercial matters, may be a question of fact, and allegations relating to a tender will not be rejected on answer in law, although the tender may appear not to have been made in the manner prescribed by law for legal tenders. Laurentide Pulp Company, Limited v. Curtis, 4 Que. P.R. 109.

—Payment—Accord and satisfaction—Mistake—Principal and agent.]—On being pressed for payment of the amount of a promissory note, the defendant offered to convey to the plaintiffs a lot of land, then shown to the plaintiffs' agent, in satisfaction of the debt. The agent, after inspecting the land, made a report to the plaintiffs but gave an erroneous description of the property to be conveyed. On being instructed by the plaintiffs to obtain the conveyance, the plaintiffs' solicitor observed the mistake in the description and took the conveyance of the lot which had actually been pointed out and inspected at the time the offer was made. More than a year afterwards, the plaintiffs sued the defendant on the note and he pleaded accord and satisfaction by conveyance of the land. In their reply the plaintiffs alleged that the property conveyed was not that which had been accepted by them and, at the trial, the plaintiff recovered judgment. The full Court reversed the trial Court judgment and dismissed the action:—Held, affirming the

judgment appealed from (9 B.C.R. 257) that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt and could not recover on the promissory note.

Pither v. Manley, 32 Can. S.C.R. 651.

ACCOUNT.

Action to account—Alternative condemnation to pay.]—The plaintiff in an action to account who prays that, in the alternative of failure by the defendant to account, he be condemned to pay a specified sum, is entitled, on establishing the accountability of the defendant, to a judgment accordingly. Hence, if the defendant, examined as a witness as to his accountability, produces an account and is permitted to offer explanations on it, the Court will not thereby be justified in reducing the alternative condemnation prayed for, to the balance shown in the account so produced. Such a power vests in the Court only after a regular contestation of an account filed.

McCallum v. Bangs, 37 Que. S.C. 407.

Action for—Onus—Particulars.]—In an action en reddition de compte by a company against its president it is for the defendant who alleges that the board of directors of the plaintiff is not complete to prove it. The plaintiff, which demands that in default of rendering an account the defendant be condemned to pay a certain amount which it has been informed he has received under certain contracts, is not bound to state at what date and from what persons such sum was received.

Temiscouata Railway Co. v. Macdonald, 3 Que. P.R. 462 (S.C.).

—Reddition de compte—Omissions—Incidental demand—Arts. 516-522 C.C.P.]—Omissions made in an action en reddition de compte may, notwithstanding the provisions of Arts. 516 and 522 C.C.P., be the object of an incidental demand.

Roe v. Hood, 4 Que. P.R. 333 (Sup. Ct.).

—Reddition de compte—Delay—Death of accounting party—Suspension of delay—Acquiescence — Reprise d'instance — Arts. 267-71, 605 C.C.P.]—On Nov. 16th, 1901, a judgment condemned the defendant to render to the plaintiffs within thirty days an account of a quantity of wood he had disposed of for the latter, and in default that he be and remain condemned to pay to the plaintiff $9,000 to compensate him for the balance, with interest and costs of all the proceedings. On Nov. 30th, 1901, defendant died, leaving his wife his universal legatee. The fact of his death was not entered on the record. On December 2nd, 1901, the universal legatee paid the cost of the action. On January 13th, 1902, the plaintiff caused the judgment of Nov. 16th to be served on the universal legatee with a demand for payment of the sum of $9,000 within eight days or otherwise the judgment would to be executed against her. On Jan. 21st the universal legatee presented a petition, alleging the death of her husband, her status as universal legatee, and requesting permission to take up the instance and carry on the necessary proceedings of the original action. The plaintiff pleaded that, the thirty days having expired, the judgment as to the $9,000 had become final and executory; that the petitioner had acquiesced in the judgment of Nov. 16th by paying the costs on Dec. 2nd, and that there was no instance to take up:—Held, (1) that the condemnation for the $9,000 was not acquiesced by the plaintiff at the time of defendant's death since it could only come into existence at the end of the thirty days, and only on default to file the account within that delay. (2) That on the death of the defendant during the thirty days the cause was not pending as to the $9,000. (3) That the death of defendant suspended the delay of thirty days, as a dead man cannot render an account, and this is not a case within Arts. 268 and 269 C.C.P., which provides that proceedings are valid up to the day of notice of the party's death, for there were no proceedings against the deceased after his death. (4) That the universal legatee, in paying the costs of the action on Dec. 2nd, acquiesced in the judgment of Nov. 16th, but did not acquiesce in the default in rendering an account and paying the $9,000. (5) That she was in time to take up the instance where it stood on defendant's death. (6) Quære. What was the effect of the judgment of Nov. 16th? Could the defendant, had he lived, have demanded and obtained, after the thirty days expired, a new delay to render an account?

Girard v. Letellier, 21 Que. S.C. 192 (Sup. Ct.).

—Reddition de compte—Amendment—Art. 578 C.C.P.]—The plaintiff in an action en reddition de compte will not be allowed to allege in detail a former process between him and the defendant, and such allegations will be dismissed on a defence en droit. But, as he is entitled to allege these facts in a general way to justify himself for not having sooner brought his action, the Court will allow him propeio motee to amend his declaration by alleging the former action and the judgment therein.

Cheval v. Senecal, 4 Que. P.R. 241 (Sup. Ct.)

—Reddition de compte—Form—Reformation.]—A reddition de compte containing separate statements of receipts, disbursements and bills payable is only required by law for accounts prepared in conformity with a judgment ordering them. When an

account of an administration is rendered the person entitled to it has no right, on the ground that it is incomplete or inexact, to bring an action en reddition de compte; his proper course is by action for reformation of the account.

Beaudry v. Prevost, Q.R. 22 S.C. 32 (Sup. Ct.) confirmed by Queen's Bench.

—Co-heirs—Account and partition.]—Held, that an heir has no right of action against one of his co-heirs for an account, but that his only action is one for account and partition. (Affirmed on appeal by the Court of Review.)

Renaud v. Delfausse, 5 Que. P.R. 230.

—By Agent.]—See PRINCIPAL AND AGENT; BROKER.

—By Employee.]—See MASTER AND SERVANT.

—By executors.]—See EXECUTORS.

—Between partners.]—See PARTNERSHIP.

—By trustees.]—See TRUSTS.

ACKNOWLEDGMENT.

See LIMITATION OF ACTIONS; EVIDENCE.

ACQUIESCENCE.

See ESTOPPEL; WAIVER.

ACQUITTAL.

See FALSE ARREST; MALICIOUS PROSECUTION; CRIMINAL LAW; SUMMARY CONVICTION; SPEEDY TRIAL; SUMMARY TRIAL.

ACTION.

See SERVICE OF PROCESS; WRIT.

ADEMPTION.

See WILL.

ADMINISTRATION.

See EXECUTORS; WILL.

ADMIRALTY LAWS.

See SHIPPING.

ADMISSION.

Running account for goods sold and delivered—Acknowledgment of debt.]—Where regular entries of sales of goods were made, and invoices were rendered and demands for payment frequently made, and the debtor only questioned one small item of 50 cents, and, promising to pay, asked for delay, the indebtedness was held to be sufficiently established.

Laporte v. Duplessis, 20 Que. S.C. 244 (C.R.).

And see EVIDENCE.

ADULTERY.

See HUSBAND.

AFFIDAVIT.

Marksman—Jurat.]—An affidavit of a marksman is sufficient if the jurat reads "seemed fully to understand the same," instead of the usual form "who seemed perfectly to understand the same." Ex parte Alain, 35 N.B.R. 107.

—Oaths—Commissioner.]—See OATHS.

—Review—Affidavit—Before whom sworn.]—An affidavit on review from a justice's Court may be sworn before a commissioner who acted as attorney for the appellant in the court below. Northrup v. Perkins, 37 C.L.J. 706.

AFFILIATION.

Evidence—Commencement of proof by writing—Proof of paternity—Arts. 227, 232, 233 C.C.]—An affidavit under oath before a justice of the peace by the mother of a natural child cannot serve as a commencement of proof by writing under Art. 233 C.C. in an action en declaration de paternite subsequently brought by the tutor of the child although the affidavit had been filed of record without objection by the adverse party. However, it is of no importance whether the existing circumstances which may, in an action en paternite, authorize proof by witnesses (Art. 232 C.C.) be established before or during the enquete; it suffices that these existing facts are established and proved before parol evidence is admitted. When, in an action en declaration de paternite the defendant admits having had sexual intercourse with the mother of the child, but at a date outside of, though nearly approaching to, the period fixed by Art. 227 C.C. as the longest period of gestation, this avowal of the defendant constitutes a presumption and an indication resulting from

the existing facts sufficiently strong to permit of the admission of parol evidence; and then if it appears that the mother has not had intercourse with other men from the time of her conception, the Court put faith in her declaration under oath that the defendant is the father of the child, especially if this declaration is borne out by circumstances and strengthened by the evidence of witnesses.

McAuley v. McLennan, 20 Que. S.C. 205 (Sup. Ct.).

AGENT.

See PRINCIPAL AND AGENT.

AGISTMENT.

See ANIMALS.

ALIEN.

Alien—Deportation—Immigrant passenger—Convict—Moral turpitude.]—The applicant came to Canada from the United States of America on the 27th February, 1910. She then resided in the city of Vancouver continuously for more than three years. On the 4th March, 1910, she was convicted in Vancouver of being an inmate of a house of ill-fame. She then went on a visit to the State of Washington, and, on attempting to return to Canada, was arrested and ordered by the immigration authorities to be deported:—Held, on a motion for a habeas corpus, that she came within s. 3 (d) of the Immigration Act, as an immigrant passenger who had been convicted of a crime involving moral turpitude; and not come within the exception, not being a Canadian citizen and not having a Canadian domicile, as defined by s. 3. A person claiming a Canadian domicile must show this to have been acquired "after having been landed in Canada," within the meaning assigned to "landed" by s. 2 (p).

Re Murphy, 15 W.L.R. 381, 15 B.C.R. 401.

Naturalization.]—See that title.

—Chinese.]—See CHINESE IMMIGRATION.

ALIEN LABOUR.

Action brought with written consent of Judge.]—Under section 4 of the Alien Labour Act, R.S.C. 1906, c. 97, it is only the party or parties who obtain the written consent of a Judge of the Court that can be plaintiff or plaintiffs in an action to recover the prescribed penalty for violation of the Act. The action in this case was accordingly dismissed with costs because it was brought by Ira S. Murray, whereas the consent was given on the application of Murray Brothers.

Murray v. Henderson, 19 Man. R. 649.

Importing aliens under contract to labour—Scienter.]—Conviction of defendant under 60-61 Vict. c. 11 (D.), as amended by 1 Edw. VII. c. 13 (D.), for unlawfully causing the importation of an alien from the United States into Canada under contract to perform labour in Canada by working at a factory, quashed as bad on its face, because not stating that he "knowingly" did the act charged, which indeed neither did the information allege:—Held, also, that this omission from the information and conviction was not a mere irregularity or informality or insufficiency within the meaning of s. 889 of the Criminal Code, 55-56 Vict. c. 9 (D.).

Rex v. Hayes, 5 O.L.R. 198 (D.C.), 6 Can. Cr. Cas. 357.

—Advertisement for labourers—Whether promise of employment.]—The company published in a Seattle newspaper this advertisement: "Wanted. First-class machinists. Apply Vancouver Engineering Works, Limited, Vancouver, B.C.:—Held, the advertisement did not contain a promise of employment within the meaning of the Alien Labour Act as amended by 1 Edw. VII. c. 13, s. 4.

Downie v. Vancouver Engineering Works, 10 B.C.R. 367, 8 Can. Cr. Cas. 66.

—Penalty—Qui tam action.]—In the Province of Quebec the plaintiff in an action to recover a penalty is bound to give security for costs.

Laurin v. Raymond, 7 Que. P.R. 209, Davidson, J.

—Alien Labour Act—Consent to prosecution.]—The written consent required by sub-sec 3 of the Alien Labour Act, 60 and 61 Vict. c. 11 (D) as amended by Edw. VII. c. 13 (D.) for the bringing of the proceedings for the recovery of a penalty for an offence against the Act must contain a general statement of the offence alleged to have been committed, the name of the person in respect of whom the offence is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offence intended to be charged. A consent "to a summary prosecution being maintained under the provisions of the Alien Labour Act against A. for violations of the above Act and amendments thereto," is not sufficient. Conviction quashed.

Rex v. Breckenridge, 10 O.L.R. 459.

—Act to restrict importation and employment of—Offence under—Jurisdiction.]—A Judge of a County Court has no juris-

diction to convict for an offence under the Act to restrict the importation and employment of aliens (60-61 Vict. c. 11), and the Act in amendment thereof (1 Edw. VII. c. 13), for an offence not committed within his territorial jurisdiction.

The King v. Forbes; Ex parte Chestnut, 37 N.B.R. 402.

—Power of Dominion Parliament—Validity of Dominion Act, 60 and 61 Vict. c. 11, s. 6, amended by 1 Edw. VII. c. 13—Power to expel and deport aliens.]—Held, that s. 6 of the Dominion statute 60 & 61 Vict. c. 11, as amended by 1 Edw. VII. c. 13, s. 13, is intra vires of the Dominion Parliament. The Crown undoubtedly possessed the power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government, which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power. Re Gilhula and Cain, 10 O.L.R. 469, reversed.

Attorney-General v. Cain, [1906] A.C. 542.

—Penalty — Recorder's Court — Prescription of action.]—(1) Penalties, concerning the importation and employment of aliens mentioned in 1 Edw. VII. c. 13, s. 1, may be recovered before the recorders, subject to the formalities therein mentioned. (2) The prescription of an action, suit or information for any penalty is two years according to Art. 930 of the Criminal Code. (1).

Montreal Harbour Commissioners v. Recorder's Court, 8 Que. P.R. 63, affirmed in appeal.

—Right of exclusion and deportation—Tort committed in foreign country—Conditions on which right of action depends—Foreign law.]—The Court on appeal will not disregard the finding of a Judge who tries a question of fact without a jury on viva voce evidence and substitute for it a finding which they may think should have been made, unless they are satisfied the Judge was wrong, and the onus of showing that is on the party moving. If the question is left in doubt the presumption that the Judge was right is not displaced.

The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore the plaintiff, an alien, being unlawfully within the United States territory in violation of an Act of Congress, and a person liable to be deported, has no right of action in this Court against an officer of the United States Government for his arrest in, and deportation from, that country.

Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law. Where the evidence is unsatisfactory and conflicting the Court will for itself examine the decisions of the foreign Courts and text-writers referred to in order to arrive at a satisfactory conclusion upon the question of foreign law. (Con. Stat. (N.B.), 1903, c. 127, s. 60.)

By international law, and apart from any civil enactment, a sovereign state has the right at its pleasure to exclude or deport any alien from its dominions; therefore no action will lie in a British Court against an official exercising that right at the command and on behalf of the state, of which he is the servant.

Papageorgiouv v. Turner, 37 N.B.R. 449.

—Action of penalties—Security for costs.]—The action given to "any person who first brings his action, etc.," to recover the penalties imposed by the Act 60 and 61 Vict. c. 11, as amended by 1 Edw. VII. c. 13, is a qui tam or popular action and the plaintiff may be required under article 180 C.C.P. to give the security judicatum solvi.

Laurin v. Raymond, 29 Que. S.C. 101 (Davidson, J.).

—Alien Labour Act—Importation of foreign labour—Act of agent and his liability—"Skilled labour for the purpose of a new industry."]—(1) A person who, as the agent of a company, procures the immigration into Canada of an alien labourer, in violation of the Alien Labour Act, is guilty of the offence created, and liable for the fine imposed therein, as if he were a principal acting for himself. (2) It is a violation of the Alien Labour Act to import, or assist in importing, an alien labourer who resides in a foreign country that enacts and retains in force laws of a similar character, even though such labourer should be a citizen of, and have his domicile in another foreign country that does not enact and retain in force such laws. (3) On the establishment of steel car manufacturing as a new industry in Canada, rivetters may be imported from a foreign country for the purpose under s. 9 of the Alien Labour Act, if, in consequence of an unusual demand, they cannot be otherwise obtained, though rivetters are employed in other industries in Canada.

R. v. Disney; Francq v. Disney, 14 Can. Cr. Cas. 152, 17 Que. K.B. 488.

ALIMENTS.

Equivalents.]—When a father is in need of maintainance which his son is in a position to furnish for him, the son cannot refuse to do so under the pretext that his father is living with people whom he does not consider reputable. The son who owes maintainance to his father has no right to offer instead thereof, to receive him into

his house and at his table or to place him in an asylum when he is not an interdict.

Ouimet v. Ouimet, 21 Que. S.C. 479 (Sup. Ct.).

—Action for maintainance—Temporary alimony—Daughter-in-law.]—In an action for an alimentary pension by a daughter-in-law against her father-in-law a provisional pension will not be granted.

Leclerc v. Guerin, 8 Que. P.R. 363.

—Alimentary allowance—Support of grandparents.]—The husband of a grand-daughter cannot be compelled to contribute to the support of her grand-parents.

Deschenes v. Morin, Q.R. 35 S.C. 95.

ALIMONY.

Husband and wife.]—See that title.

AMENDMENT.

See PLEADINGS.

ANIMALS.

Maiming—Castration of stallion not authorized by owner—Stallion running at large.]—The castration of a stallion running at large contrary to the provisions of the Entire Animals Ordinance is a "maiming" of the stallion within the meaning of s. 510 (B. b.) of the Criminal Code. The fact that the owner of the stallion had expressed an intention to castrate it was held to be no justification of the unauthorized act of the defendant. The interference by the stallion with the defendant's mares also running at large was also held to be no justification, the defendant being in such case at best a mere licensee of the land over which the mares grazed: McLean v. Rudd, A.L.R. 505, followed. The proper test in such a case is the question, Did the defendant do what he did honestly believing the act to be necessary for the protection of his property? Proof of actual malice is not necessary under this section, but although the word "maliciously" is not used, legal malice such as would establish that mens rea, without which there can be no criminal intent, must be proven. The fact that the defendant committed the act without any attempt to avail himself of the provisions of the Ordinance relating to impounding stallions, and the evidence adduced not showing that he honestly believed the act necessary to protect his property:—Held, that legal malice was sufficiently proven.

Rex v. Kroesing, 2 Alta. R. 275.

—Destruction of dog while at large—Justification under statute.]—

Fraser v. Sinclair, 8 E.L.R. 3.

—Vicious animal—Damage—Liability.]—

Messenger v. Stevens, 9 E.L.R. 91 (N.S.).

Warranty of soundness — Failure of warranty — Conditional sale — Return.] — Defendant had given plaintiff a note in payment for a mare sold by plaintiff to the defendant with a warranty of soundness. The sale was a conditional one, the note providing that the property in the mare should remain in the plaintiff until the note or any renewal thereof was paid. After getting possession, the defendant immediately discovered that the mare was unsound and at once took the mare to the plaintiff, pointed out such unsoundness, and asked plaintiff to take the mare back and return the note. The plaintiff refused. The defendant thereupon housed and fed the mare until a sale could be arranged, and sold the mare at auction for the best price obtainable. On an action by the plaintiff against the defendant for the amount of the note, it was held, (1) That although the sale was not an absolute one so as to enable the defendant to maintain an action against the plaintiff for breach of warranty, the defendant could nevertheless set up such breach by way of counterclaim to the plaintiff's action against him on the note. (2) That the defendant having acted promptly was entitled to reject the mare and return her to the plaintiff. (3) That the plaintiff, having refused to accept the mare back when he ought to have done so, had waived his right to take possession and had clothed the defendant with the absolute property in the mare if the defendant had chosen to exercise such right. (4) That the plaintiff, having refused to take the mare back when he ought so to have done, the defendant was justified in selling her. (5) That the defendant was entitled to damages in a sum equal to the amount of the difference between the price for which the defendant purchased the mare and her real value, and also to a reasonable sum for her keep, and the expenses attending the sale.

Hogg v. Park, 3 Terr. L.R. 171.

—Unlawful detention — Estray — Care of.] —Domestic animals are not liable to be distrained damage feasant in the absence of a lawful fence surrounding the property damaged, but if an estray comes upon a person's premises, although not lawfully fenced and commits damage or becomes troublesome, the owner of the premises has the right to tie such animal up and retain possession until the costs of keep are paid, which costs would include the trouble to which the owner of the premises was put: —Held, further, that an owner of premises tieing up an estray is bound to properly care for, feed and water the estray.

Bolton v. MacDonald, 3 Terr. L.R. 269.

—Agistment.] — An agister of cattle who has indemnified the owner for lost or missing cattle has a special property therein to entitle him to maintain an action respecting them in his own name. A denial by a defendant that he "unlawfully took . . . or unlawfully detained the plaintiff's steer," is merely a plea of non cepit, and non detinet, and does not put in issue any right of property.

Simpkinson v. Hartwell, 6 Terr. L.R. 472.

—Runaway horse — Art. 1055 C.C.] — A person who leaves on a public street a horse harnessed to a carriage, unhitched and uncared for, is liable for any damages caused by the horse if he runs away, and it does not matter if the person injured, who is riding in a carriage, was so injured while endeavouring on foot to avoid the runaway, if it appears that he would not have escaped even if he had remained in his wagon.

Laflamme v. Staines, 18 Que. S.C. 105 (S. C.).

— Driving on the wrong side of the road — Collision.] — In an action on the case for negligence in driving the defendant's horse whereby his wagon came into collision with and damaged that of the plaintiff, it is not sufficient to prove merely that the defendant was driving on the wrong side of the road, especially as it was shown that the defendant just before the collision had crossed from the left side of the road for the purpose of speaking to a man sitting on a doorstep on the other side and that the plaintiff's horse at the time of the accident was running away and beyond control.

Stout v. Adams, 35 N.B.R. 118.

— Keeping vicious dog — Scienter — Remoteness of damage — Permanent disfigurement—Financial position of parties.] — In an action brought to recover damages from the owner of a dog, which had bitten the plaintiff, a child a little over five years of age, the jury, in answer to questions put by the learned trial Judge, found that the dog had attempted to bite one G. B., and the defendant had knowledge of this before the plaintiff was bitten; that the dog had never, before the injury to the plaintiff, evinced a cross, savage or vicious disposition to the knowledge of the defendant; that the dog was in the habit of jumping upon or against people, and in such acts scratching them, and the defendant knew this before the plaintiff was injured; that one of the acts of jumping on or against people referred to one W. B.; that the defendant knew of it before the plaintiff was injured, and that the dog did not do it playfully; that they considered that if G. B. had left the dog alone he would not have attempted to bite him. Upon an application by the defendant to have a verdict entered for him:—Held (per Tuck, C.J., Landry, Barker, VanWart and McLeod, JJ., Hanington, J., dissenting), that, as the answers established that the defendant had kept the dog after he had knowledge that he was apt to do injury to mankind, the application should be refused. The learned Judge, in charging the jury, told them that if they thought the scar on the plaintiff's face, caused by the bite, were likely to be permanent, and that such lasting disfigurement might affect her prospects of making a good marriage, they might consider such possible loss of marriage in assessing the damages. Held, per totam curiam, misdirection, as such damages were too speculative and remote. The jury were further directed that in assessing the damages they might take into consideration the financial position of the defendant and the condition in life of the plaintiff. Held, as before, misdirection.

Price v. Wright, 35 N.B.R. 26.

— Highway — Horse straying upon.] — The defendant's horse strayed from his field to the highway, the fence being defective, and, being frightened by a boy, ran upon the sidewalk and knocked down and injured the plaintiff. A municipal by-law made it unlawful for any person to allow horses to run at large:—Held, that the horse was unlawfully on the highway and that the defendant was liable in damages for the injury suffered by the plaintiff, the injury being the natural result of, and properly attributable to, his negligence. Judgment of a Divisional Court, 1 O.L.R. 412, affirmed.

Patterson v. Fanning, 2 O.L.R. 462 (C.A.).

—Action for price of horse—Acceptance.]

Knight v. Hanson, 3 W.L.R. 414 (Terr.).

—Animal — Evidence of identity — Misdescription.]—

Pearce v. Hart, 1 W.L.R. 476 (N.W.T.).

—Sale of animals — Defective title of vendor — Approbation of contract of sale after discovery of defect.]—

Primeau v. Mouchelin, 1 W.L.R. 434 (Man.).

—Warranty — Horse's pedigree and age.]—

Griffen v. Ruller, 3 W.L.R. 374 (Terr.).

—Wilfully killing a dog—Compensation to owner.]—1. On a summary conviction under Code s. 537 for wilfully killing a dog, the whole penalty, which is not to exceed $100 "over and above the amount of injury done," belongs to the Crown, and there is no jurisdiction to award damages to be paid to the owner of the dog. 2. Where the adjudication was that the defendant pay a fine of $1 and costs and further pay the owner $20 damages for the loss of the dog, the summary conviction will be amended by striking out the award of damages. 3.

An amended conviction imposing a fine of $21 is bad as not conforming with the adjudication. 4. Code s. 539, which empowers the magistrate in certain cases to award compensation up to $20 to the person aggrieved does not apply to the offence of killing a dog for which Code s. 537 provides a punishment.

The King v. Cook, 16 Can. Cr. Cas. 234 (P.E.I.).

—Duty of agister of animals—Exposure.] —The plaintiff, on the afternoon of the 24th April, delivered to the defendant, for agistment, a healthy colt, 10 months old; the colt died on the night of the same day or early the next morning, and the plaintiff sued the defendant for negligence, alleging that it was improper to leave the colt in a shed for the night. The evidence showed that there were 5 degrees of frost that night:—Held, in the absence of any clear evidence as to the cause of death, and accepting expert evidence that 5 degrees of frost would not effect a 10 months old colt, that there was no negligence on the part of the defendant within the authorities reviewed in the judgment.

O'Connor v. Reid, 13 W.L.R. 401.

—Maiming or wounding cattle or horses—Unauthorized castration of stray stallion.] —1. The unauthorized castration of a stallion is a damage by maiming or wounding, and if done wilfully and with malicious intent constitutes an offence under Code s. 510 as to mischief. 2. Legal malice is essential to the offence of "wilful destruction or damage" of property under Code s. 510.

The King v. Kroesing, 16 Can. Cr. Cas. 312 (Alta.).

—Stud book—Contract—Wager.]—The parties deposited with H. $1,250, of which the defendant contributed $1,000 and the plaintiff $250, and signed a document in which it was set forth that the money was to be held by H. until the determination of the question whether a certain horse in the possession of the defendant (describing it) was the same horse as described in the British Hackney Stud Book as "Towthorpe Rupert;" the question to be decided by a report from that book. "Should such report show that the horse . . . be the horse described in the . . . book, the whole $1,250 shall be paid to" the defendant. "Should the said report show that the said horse . . . is not the horse described . . . in the . . . book, the said money shall be paid to" the plaintiff:—Held, a wager.

Evans v. Robert, 13 W.L.R. 380.

—Horses—Warranty as to soundness—Animals Contagious Diseases Act.]—Plaintiff sold defendant a team of horses which, it was found as a fact, were at the time of the sale inflicted with glanders, a contagious disease within the Animals Contagious Diseases Act. There was no evidence that the seller knew that the animals were so infected when sold. The horses were subsequently destroyed by the government officials, and plaintiff sued to recover the price of the same. Defendant alleged that the plaintiff warranted the horses sound, and two other witnesses testified to a conversation between plaintiff and defendant wherein plaintiff said certain horses were sound, but could not say to what horses he referred. Plaintiff denied any warranty. Defendant also pleaded that the horses were infected with glanders at the time of sale, and that the sale was, therefore, contrary to the Act above referred to, and the contract, therefore, void:—Held, that the onus of establishing a warranty being on the defendant, the evidence to establish it in cases such as this should be clear and unequivocal, and the corroboration herein was not sufficient to so establish a warranty. 2. That, taking into consideration the intention of the Act respecting Contagious Diseases of Animals and the fact that in the section in question in this case the word "knowingly" did not appear, while it was found in other sections of the Act, it was not necessary under the Act to prove knowledge of the presence of disease on the part of the seller, but any sale of diseased animals was contrary to the Act, and, therefore, the seller, being liable to a penalty thereunder, the contract was void, and the plaintiff could not recover.

Nickle v. Harris, 3 Sask. R. 200.

—Trespassing animal—Eating poisoned grain — Duty of owner.]—Plaintiff, before the Herd Law came into force, permitted his horse to run at large. While so at large the horse strayed on defendant's land, which was unfenced, and then, after being driven off several times, ate of a quantity of poisoned grain and died as a result. In an action brought by plaintiff it was given in evidence that it was the custom of the country for cattle to roam at large before the Herd Law season, and it was argued that the Legislature by several laws had recognized such custom as modifying the common law. Judgment was given for the plaintiff, and defendant appealed:—Held, that at common law the plaintiff's horse was a trespasser, and no action lay in respect of the loss thereof. 2. That the common law cannot be deemed to be modified except by the express declaration of the Legislature, and, as by the passage of various laws affecting cattle running at large, the Legislature had recognized the law as giving no such right, the common law could only be taken as modified as expressly provided by such statutes.

Kruse v. Romanowski, 3 Sask. R. 274.

—Animal ferae naturae—Raccoon—Liability of owner for damages.]—A raccoon is an animal feræ naturæ and a person who keeps

one in a town is liable in damages for any injury inflicted by it on a neighbour upon escaping from captivity, although the animal has been kept in the defendant's house for a long time and was supposed to have been tame.

Andrew v. Kilgour, 19 Man. R. 545, 13 W.L.R. 608.

—Animals running at large—Fences—Damages.]—The power of a municipal council, under sub-section (d) of section 644 of the Municipal Act, R.S.M. 1902, c. 116, to pass a by-law limiting the right of a land owner to recover damages for any injury done by trespassing animals to cases in which the land is enclosed by a fence of the nature, kind and height required by the by-law, should be held to be restricted to cases in which the animals go upon the land from some adjoining land where they have a right to be, and such by-law is no protection to the owner of animals trespassing from a highway, if the council has not passed a by-law under sub-section (b) of section 643, for allowing and regulating the running at large of animals in the municipality.

Jack v. Stevenson, 19 Man. R. 717.

—Animals running at large—Damages.]—Action for damages caused to plaintiff by defendant's cattle trespassing on his lands which were not fenced. Defendant relied on a by-law of the municipality, presumably passed under the powers conferred by sub-section (b) of section 643 and sub-section (d) of section 644 of the Municipal Act, R.S.M. 1902, c. 116, and declaring that "it shall be lawful for any person to permit his horses or cattle . . . to run at large in any season of the year . . . and no one shall be at liberty to claim damages against the owner of such horses or cattle running at large or doing damage unless he shall have surrounded his lands and premises with a lawful fence as defined by by-law of this municipality. At the trial there was no by-law proved which showed what should constitute a lawful fence in the municipality except one which related only to barbed wire fences. Held: —that the defence failed and the plaintiff was entitled to recover.

Dalziel v. Zastre, 19 Man. R. 353, 13 W.L.R. 488.

—Breach of implied warranty—Opportunity for inspection.]—The rule caveat emptor only protects the vendor against damages resulting to him by decrease in the actual value of the articles sold, but where there is collateral damage to person or property of the purchaser occasioned by a defect in the article sold, which is known to the vendor, the rule caveat emptor will not protect him. A vendor of horses, some of which are horses affected with a contagious disease, is not liable to the purchaser for damage occasioned to the sound horses by reason of their mingling together when delivered, where the purchaser has an equal opportunity with the vendor of inspecting the animals before delivery. Collateral damages, however, which flow from the negligence of the vendor in not warning the purchaser of the existence of the contagious disease in some of the horses, such as the cost of keeping the horses in quarantine, etc., are chargeable to the vendor.

Urch v. Strathcona Horse Repository, 2 Alta. R. 183.

—Negligence—Presumption.]—The liability, under Art. 1055 C.C., of the owner of an animal arises from negligence, but such negligence is presumed and the burden is on him to rebut the presumption. The owner of a horse which takes fright and runs away is not liable for the consequences if he proves that the act was caused by a fortuitous event and without negligence on his part.

Birmingham v. Gallery, Q.R. 36 S. C. 481.

Harbouring vicious dog.]—A wife, separate as to property, is liable for damages caused by a vicious dog belonging to her husband, and harboured at the common domicil, which is her private property, particularly when it is proved that the dog was so harboured not only without any objection or protest on her part, but with her full consent and approval, notwithstanding that she had full knowledge of the dangerous character of the dog.

Hugron v. Statton, 18 Que S.C. 200.

—Injury by dog—Contributory fault—Art. 1055, C.C.]—The respondent's son, aged thirteen, was provoking or exciting a bull-dog owned by the appellant, by stamping on the floor and calling him by name, when the appellant's daughter, aged nineteen, opened the door and allowed the dog to fly at the child and bit him:—Held (affirming the judgment of the Superior Court, Trenholme, J.), that the appellant was responsible for the injuries inflicted on the boy, notwithstanding the fact that he had irritated the dog—a child of that age not being expected to show the prudence and thoughtfulness which would be expected and required from an adult under similar circumstances.

Bernier v. Genereux, 12 Que K.B. 24.

— Negligence — Pasturage of cattle.]—Although the person to whom cattle are sent for pasturage is bound to give them the care of a bon pere de famille the measure of his obligation is determined by the price paid and the custom of the locality. When such price is low it is unreasonable to demand that somebody should be constantly present in care of the cattle and if one of them disappears its owner must stand the loss unless he can prove negligence on the part of the proprietor of the land.

Nadou v. Pesant, Q.R. 26 S.C. 384 (Cir. Ct.).

—Selling animals having contagious disease.]—Knowledge on the part of the seller that the animals sold by him were affected with a contagious disease is not essential to the offence declared by sec. 7 of the Animals Diseases Act, 1903 (Can.).

The King v. Perras, 9 Can. Cr. Cas. 364, 6 Terr. L.R. 58.

—Horses stung by bees—Injury to neighbour—Negligence — Scienter — Danger from number and situation of bees.]—The defendant placed a large number of hives of bees upon his own land within 100 feet of the plaintiff's land. While the plaintiff was at work with two horses upon his own land the bees attacked and stung the horses so that they died, and also stung and injured the plaintiff. In an action to recover damages for his loss and injury, the jury found, inter alia, that the bees were in ordinary flight at the time of the occurrence; that they were the defendant's bees; and that the defendant had reasonable grounds for believing that his bees were, by reason of the situation of the hives, or their numbers, dangerous to persons or horses upon the highway or elsewhere than on the defendant's premises:—Held, that the doctrine of **scienter, or** notice of mischievous propensities of the bees, had no application, nor could the absence of negligence, other than as found by the jury, relieve the defendant; it was his right to have on his premises a reasonable number of bees, or bees so placed as not unfairly to interfere with the rights of his neighbour, but if the number was unreasonable or if they were so placed as to interfere with his neighbour in the fair enjoyment of his rights, then what would otherwise have been lawful became an unlawful act; the finding of the jury meant that the bees, because of their number and situation, were dangerous to the plaintiff; and the defendant was liable for the injury flowing directly from his unlawful act.

Lucas v. Pettit, 12 O.L.R. 448 (D.C.).

—Quasi contract—Keep of horse—Evidence of ownership.]—In order to maintain an action for the value of the keep of a horse based upon the obligation quasi e contractu to reimburse the expense incurred in the preservation of the property of another, there must be evidence adduced to show that the defendant was at the time the expense was incurred, owner of the animal in question.

Richard v. Stevenson, Q.R. 28 S.C. 188 (Ct. Rev.).

—"Property and civil rights"—Animal Contagious Diseases Act (Can.) 1903.]—The Animal Contagious Diseases Act, 1903, is intra vires of the Dominion Parliament.

Brooks v. Moore, 13 B.C.R. 91.

—Trespassing upon public highway—Liability of owner.]—Where cattle are permitted to trespass upon the public highway, the owner is liable for damage which they may cause upon the land of an adjoining proprietor into which they stray, and in such case it is not a sufficient defence that the plaintiff's fence was not a lawful fence, or that there was a custom among the inhabitants of the district to fence against cattle

Smith v. Boutilier, 42 N.S.R. 1.

—Vicious animal—Liability of owner—Proof of scienter.]—Plaintiff sought to recover damages from defendant for injuries to plaintiff's ox caused by defendant's oxen which were at the time upon the public highway in violation of a by-law of the municipality:—Held, that without proof of scienter defendant could not be held liable.

Nass v. Eisenhauer, 41 N.S.R. 424.

—Injury by an animal—Party voluntarily in charge.]—The owner of an animal is liable in damages for an injury caused by it to a person who has voluntarily taken charge of it to lead it, if it be shown that a necessary and customary appliance for doing so, supplied by the owner, was not of sufficient strength. If the person injured, before so taking charge of the animal, saw the appliance and declared it sufficient, the case is one of contributory negligence and the amount of damages payable by the owner will be reduced accordingly.

Grenier v. Wilson, 32 Que. S.C. 193.

—Vicious animals — Contributory negligence.]—The owner of an animal is responsible for injuries which it causes but may be relieved from liability by proving that the accident causing such injury was due to the conduct of the person injured.

Martin v. Hogg, Q.R. 31 S.C. 529 (Ct. Rev.).

—Action for damages — Vicious horse — Liability of owner.]—The owner of an animal is liable for the damage it causes unless he can prove that he was unable to prevent the act causing the injury. Hence, he is liable for the consequences of a bite by a vicious horse which he should have kept muzzled.

Matte v. Meldrum Bros. Co., Q.R. 33 S.C. 396 (Ct. Rev.).

—Stud horse on hire for mares—Negligence of owner during service—Liability in damages for loss of mare.]—The owner of a stud horse on hire is bound to see that the service of mares takes place in a safe and natural manner, and, notwithstanding notice to the public that such service is at the risk and peril of owners of mares, he is liable in damages for the loss of a mare killed, while being covered, by false penetration through want of proper care by those in charge of the animals.

Robidoux v. McGerrigle, 35 Que. S.C. 174 (C.R.).

—Permitting animals to go at large—Liability of owner of lands insufficiently or dangerously enclosed for injuries to animals.]—An owner of a mare allowed her to run at large, and the animal straying on to the lands of the defendant was killed, as the result of coming into contact with a single strand of barb wire stretched on posts about the defendant's property:—Held, that the plaintiff could not recover damages from the defendant, that at most the plaintiff could not stand in a better position than that of a bare licensee, and that owners of animals in this province allowing them to run at large, must take the risk of accidents from ill-constructed or insufficiently constructed fences. Semble, that the owner of unenclosed or insufficiently enclosed lands would be liable for damages resulting to estrays by reason of a dangerous trap, (e.g., an unenclosed well) on his property.

McLean v. Rudd, 1 Alta. R. 505.

—Agistment — Lien — Absence of agreement — Common law.]—
Morrison v. Bryan, 12 W.L.R. 415 (Sask.).

— Wintering cattle — Terms of contract — Redelivery.]—
Still v. Watson, 7 W.L.R. 466 (Sask.).

—Purchase of horse by agent—Liability of principal to vendor.]—
L'Hirendelle v. Taft, 10 W.L.R. 398 (Alta.).

—Purchase price of horse—Warranty.]—
Willoughby v. Conover, 7 W.L.R. 87 (Man.).

— Mortgage given for price of horses — Breach of warranty as to age—Damages—Deduction from amount of mortgage.]—
Lockwood v. McPherson, 6 W.L.R. 277 (N.W.T.).

—Sale of horse—Right of rejection—Existence of disease—Opportunity for inspection—Retention and resale.]—
Ureh v. Strathcona Horse Repository, 10 W.L.R. 475 (Alta.).

—Horses running away—Injury to person lawfully on highway—Liability of owner of horses.]—
Moore v. Crossland, 6 W.L.R. 199 (Man.).

—Conditional sale of horses—Lien notes—Vendor's resuming possession—Claim for feeding and stabling horses.]—
Trotter v. Russell, 5 W.L.R. 67 (N.W.T.).

—Sale of horse—Warranty—Failure of consideration.]—
Burke v. Veinot, 7 E.L.R. 285 (N.S.).

—Sale of infected cow—Ignorance.]—
North v. Martin, 7 E.L.R. 439 (N.S.).

—Killing dog at large—Justification—Sheep protection.]—
Fraser v. Sinclair, 7 E.L.R. 408 (N.S.).

—Agistment—Loss of horse—Negligence — Liability of bailee.]—
Ferrara v. Bligh, 8 W.L.R. 245 (B.C.).

—Warranty—Soundness of animals—Damages—Promissory notes for price.]—
Swilling v. Arnold, 2 W.L.R. 48 (Terr.).

— Hire of horses—Negligence of bailee — Loss of horses—Contributory negligence of bailor.]—
Klassen v. Wright, 1 W.L.R. 158 (N.W.T.).

—Improper driving—Horse killed—Contributory negligence.]—
Lelacheur v. Manuel, 5 E.L.R. 150 (P.E.I.).

—Sale of horse—Resiliation—Unsound animal—Redhibitory vice — Civil Code, Arts. 1233, 2260.]—
Seminary v. Jacobs, 4 E.L.R. 340 (Que.).

—Sheep trespassing on neighbour's land—Using dog to drive off sheep—Injury to sheep—Liability—Absence of negligence.]—
Carmichael v. Feltoe, 9 W.L.R. 15 (B.C.).

—Conditional sale—Lien note—Description of horse—Chattel mortgage—Re-possession and re-sale—Registration of lien note.]—
Aricinski v. Arnold, 4 W.L.R. 556 (Terr.).

—Destruction of animal—Proof of identity —Evidence.]—
Bremner v. Walker, 2 W.L.R. 347 (Terr.).

—Sale—Change of possession—Animals — Conversion — Dispute as to ownership.]—
McNichol v. Brucks, 1 W.L.R. 478 (N.W.T.).

—Contract for keep of animals—Dispute as to terms—Detention — Tender before action.]—
McKinnon v. Minatty, 1 W.L.R. 272 (Y.T.).

ANNUITY.

Charge of annuity—Life tenant and remainderman—Apportionment—Cutting timber.]—A testator seized in fee of land, subject to a mortgage to secure an annuity for his wife, devised the land for life, remainder over in fee. After his death the life tenant continued to pay the annuity to the widow. She also sold the timber on the land, claiming the right to do so on account of her payments on the annuity; and the purchaser having begun to cut the timber, this action was begun by the remainderman to

restrain waste:—Held, following Yates v. Yates (1860) 28 Beav. 637, that the periodical payments of the annuity must be treated partly as interest which the tenant for life had to pay, and partly as principal for which she would have a charge on the inheritance, in the proportion which the value of the life estate bore to the value of the reversion.

Whitesell v. Reece, 5 O.L.R. 352 (D.C.).

—Annuity out of revenues of sheriff's office.]—Pursuant to the terms of his appointment a sheriff and two sureties gave a bond to his predecessor in office to pay him an annuity "out of the revenues of the said office:—Held, that fees received by the sheriff as returning officer at elections of members of Parliament, and commission earned by him as assignee for the benefit of creditors, formed part of the revenues of the office, and that as far as the revenues of each year so ascertained extended, after deducting necessary disbursements connected with the office during such year, the annuity for that year was payable.

Smart v. Dana, 5 O.L.R. 451.

Condition for payment of instalments to obligee for life and after his decease as he might direct—No direction by obligee.] —

Kennedy v. McDonald, 2 E.L.R. 83 (N.S.).

—Sheriff—Bond—Condition on appointment to office—Resignation of office—Re appointment.]—Plaintiff resigned his office of sheriff and defendant was appointed in his place under a commission containing a condition that he should pay plaintiff "out of the revenues of the said office" a certain sum for his life. He gave a bond to the plaintiff for the due fulfilment of the condition. Finding that the revenues were not sufficient to pay the amount, defendant resigned his office and soon afterwards was re-appointed under a commission without any such condition. In an action on the bond, the plaintiff obtained judgment for the amount of the penal sum, and damages were assessed for the breaches up to the time of the defendant's resignation. A petition was subsequently presented by the plaintiff, asking for assessment of damages for alleged breaches since the re-appointment and for execution. On the trial of an issue as to whether the plaintiff was entitled to execution for any further damages:—Held, that want of good faith was not to be imputed to the Crown who had the right to permit, and did permit, defendant's resignation, and by accepting it made it effectual, and thereby discharged the condition and all further liability on the bond; that the condition was attached to the first commission and the annuity was payable only during the occupancy of the office thereunder, and when the commission was gone there ceased to be any contract to pay it. Semble, that there was no implied obligation on the defendant's part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him. Held, lastly, that the question was not res judicata by the principal judgment, and that the judgment upon the issue was appealable as a final judgment as to matters set up as a defence to further liability in respect of alleged breaches subsequent to the new appointment.

Smart v. Dana, 9 O.L.R. 427, C.A.

APPEAL.

I. JURISDICTION.
II. LEAVE TO APPEAL.
III. EXTENSION OF TIME.
IV. INSCRIPTION AND NOTICE.
V. PRELIMINARY OBJECTIONS.
VI. NEW GROUNDS AND EVIDENCE.
VII. REVIEW AND REHEARING.
VIII. EFFECT.
IX. SECURITY FOR COSTS.
X. CRIMINAL APPEAL.

I. JURISDICTION.

Right of appeal to Court of Appeal—Amount in controversy.]—Where the respondent seeks to invoke the power of the Court of Appeal under sec. 51 of the Judicature Act, the proper practice is to move the Court to quash the appeal at the earliest moment after it has been lodged. Upon the motion coming on to be heard, the Court may direct the motion to stand for argument along with the appeal. But it is equally proper, and sometimes more convenient and less expensive to the parties, to dispose of it when brought on pursuant to the notice. And where, before the time for entering the appeal for hearing at the September sittings of the Court had elapsed, i.e., on the 10th August, the respondents served notice of motion to quash, returnable on the first day of the sittings, the Court heard and granted the motion; Meredith, J.A., dissenting. International Wrecking Co. v. Lobb (1887), 12 P.R. 207, followed. Per Meredith, J.A., that, as the appellant had failed to set his proposed appeal down for hearing, there was no appeal to quash; and that, as sec. 51 does not provide for a motion to quash, the Court has no power to create a practice providing for such a motion. The appeal was from an order of a Divisional Court, and it was quashed upon the ground that the sum in controversy was less than the sum or value of $1,000, exclusive of costs: Judicature Act. sec. 76 (1) (b). And held, per curiam, that the word "costs" in that section means the costs incurred in the litigation; and, although the costs of a mortgage action stand on a different footing, speaking generally, from the costs of other actions, the

costs taxed to the mortgagees by the Master, and included in his report in an action for foreclosure, were to be excluded in ascertaining the amount in controversy upon an appeal from an order varying that report.

Federal Life Assurance Co. v. Siddall, 22 O.L.R. 96.

—Awards of arbitrators — Dominion Railway Act.]—An appeal does not lie to the Court of King's Bench from a judgment of the Superior Court on an appeal to it, from the award of arbitrators in an expropriation matter under s. 209 of the Dominion Railway Act, c. 37, R.S.C. 1906.

Vallieres v. Ontario & Quebec Ry. Co., 19 Que. K.B. 521.

—Appeal — Jurisdiction —Amount involved.]—An appeal from the judgment of a County Court Judge for the enforcement of a mechanics' lien for $172.05 was dismissed for want of jurisdiction, "the amount claimed to be owing" having been adjudged to be less than $250; s. 24 of the Mechanics' Lien Act; and there being no adjudication under s. 23. Gabrielle v. Jackson Mines, 2 M.M.C. 399, followed.

Gillis Supply Co. v. Allan, 14 W.L.R. 458 (B.C.).

—Municipal matter—Mandamus.]—An appeal lies to the Court of King's Bench from a judgment refusing a writ of mandamus to compel the mayor of a municipality to sign a resolution passed by the Council authorizing the cancellation of a deed in favour of the municipality and a reconveyance of the lands to the applicant for the writ; the appeal in such case is not in a matter relating to municipal corporations. (Art. 1006 C.P.Q.)

Municipal Homes & Investment Co. v. Légaré, 11 Que. P.R. 226 (K.B.).

—Taxes—Privilege—Amount in dispute.]—The Court of King's Bench (Appeal side) has no jurisdiction over a cause in which a municipal corporation claims a privilege for taxes due when the amount of such taxes is only $80.

City of Montreal v Mitchell, 11 Que. P.R. 252 (K.B.).

—Final judgment—Rule nisi.]—The judgment making absolute a rule nisi against a witness who fails to appear at the trial of an action after summons, is a final judgment from which there is a right of review or appeal. The witness served with the rule nisi is not obliged to appear in person but may show cause by attorney. The witness may appeal from the judgment making the rule absolute without being obliged to appeal also from the judgment ordering the rule to issue and the delay for bringing the appeal runs from the latest judgment only.

Collins v. Canadian Northern Quebec Ry. Co., 11 Que. P.R. 133 (Ct. Rev.).

—Jurisdiction—Order of Divisional Court on appeal from judgment of District Court.]—The Court of Appeal has no jurisdiction to entertain an appeal from the order of a Divisional Court of the High Court made upon appeal from the judgment of a District Court, even where the amount involved exceeds $1,000. There is one appeal only in all cases within the jurisdiction of the District Courts. The provisions of secs. 9 and 10 of the Unorganized Territory Act and of secs. 50, 74, 75, 76, and 77 of the Judicature Act, considered.

Drewry v. Percival, 20 O.L.R. 489.

—Case stated by magistrate—Summary conviction under Provincial Act.]—The Court of Appeal has no jurisdiction to hear an appeal, upon a case stated by a magistrate, from a summary conviction, under the Ontario Summary Convictions Act, for the contravention of a provincial statute. Under Part XV. of the Criminal Code a case may be stated for the opinion of "the court," but that means, in Ontario, the High Court of Justice: sec. 705 (b); sec. 2 (35) (a).

Rex v. Henry, 20 O.L.R. 494.

Matter in controversy—Instalment of municipal tax—Collateral effect of judgment.]—In an action instituted in the Province of Quebec to recover the sum of $1,133.53 claimed as an instalment of an amount exceeding $2,000, imposed on the defendant's lands for special taxes, the Supreme Court of Canada has no jurisdiction to entertain an appeal although the judgment complained of may be conclusive in regard to the further instalments accruing under the same by-law which would exceed the amount mentioned in the statute limiting the jurisdiction of the Court. Dominion Salvage and Wrecking Co. v. Brown (20 Can. S.C.R. 203), followed.

Town of Outremont v. Joyce, 43 Can. S.C. R. 611.

—Matter in controversy—Stare decisis — Municipal by-law — Injunction — Contract —Collateral effect of judgment.] — The action was brought by the respondents and other ratepayers of the Town of Shawinigan, against the town and the hydro-electric company, to set aside a by-law of the town corporation authorizing the purchase of certain lands with an electric power house and plant from the hydro-electric company for $40,750, and for an injunction prohibiting the carrying into effect of the contract of sale. The final judgment in the Superior Court dissolved the injunction and dismissed the action, but on appeal by the plaintiffs the Court of King's Bench, 19 Que. K.B. 546, maintained the action and made the injunction permanent. On a motion to

quash an appeal by the hydro-electric company to the Supreme Court of Canada:—Held, per Fitzpatrick, C.J., and Girouard, J., that the Supreme Court was competent to entertain the appeal under the provisions of s. 39 (e) of the Supreme Court Act. The Bell Telephone Co. v. City of Quebec (20 Can. S.C.R. 230) disapproved. Per Duff and Anglin, JJ.—Semble:—That the decision in The Bell Telephone Co. v. City of Quebec (20 Can. S.C.R. 230) is binding authority on the Supreme Court of Canada, but this case may be decided irrespective of it. Per Idington, Duff and Anglin, JJ. (Davies, J., contra):—That, as the appeal was from the final judgment of the highest Court of final resort in the Province of Quebec in an action instituted in a Court of superior jurisdiction for the purpose of preventing the consummation of a contract for a consideration exceeding $2,000, the Supreme Court of Canada was competent to entertain the appeal under ss. 36 and 46 of the Supreme Court Act. Per Davies, J. (dissenting):—That the controversy related merely to the validity of the by-law and did not involve the sum or value of $2,000 that the collateral or incidental effects of the judgment were not in question on the appeal, and that, therefore, the Supreme Court of Canada was not competent to entertain the appeal. The Bell Telephone Co. v. City of Quebec (20 Can. S.C.R. 230), followed.

Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co., 43 Can. S.C.R. 650.

—Under Mechanics' Lien Statutes.]—

See LIEN.

—Preliminary objections—Order appealed from not issued—Irregularity—Waiver.]—

Bank of Hamilton v. Leslie, 3 W.L.R. 394 (Terr.).

—Order refusing to set aside default judgment except on terms—Interlocutory or final order.]—

Langevin v. Hebert, 4 W.L.R. 367 (Y.T.).

—Quebec appeals.]—No appeal lies to the Supreme Court of Canada from the judgment of a Court of the Province of Quebec in any case of proceedings for or upon a writ of prohibition, unless the matter in controversy falls within some of the classes of cases provided for by section 46 of the Supreme Court Act, R.S.C. 1906, c. 139. Shannon v. The Montreal Park and Island Railway Co., 28 Can. S.C.R. 374, overruled.

Desormeaux v. Village of Ste. Thérèse de Blainville, 43 Que. S.C. 82.

Of Supreme Court of Canada—Amount in controversy—Jurisdiction.]—In an action en reddition de compte, where items in the account filed exceeding in the aggregate two thousand dollars have been contested, the Supreme Court of Canada has jurisdiction to entertain an appeal.

Bell v. Vipond, 91 Can. S.C.R. 177.

—Appeal from summary conviction—Courts of General Sessions in Ontario—No right to a jury on the appeal.]—An appeal from a summary conviction under the Criminal Code is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury.

R. v. Malloy, 4 Can. Cr. Cas. 116.

—Criminal appeal — Reserved case — Crim. Code, ss. 742, 743, 744] —T., a letter carrier employed in the city of Quebec, was accused of having stolen a letter containing $4.50. He was arrested, and, after a preliminary inquiry, was committed for trial. Being afterwards brought before the same magistrate under the provisions of Part LIV. of Criminal Code, he elected to be tried without a jury. Before pleading to the indictment his counsel raised a question of law and asked to have it reserved for the Court of Appeal, namely that it had not been proved that the letter he was accused of stealing (a decoy letter) was "a letter deposited in the post office," as provided by s. 326 (c) of the Code:—Held, that in order to have a case reserved for the Court of Appeal there must be a trial, a decision on a point of law and a verdict or conviction. The case was therefore remitted to the clerk of the peace, district of Quebec, for further proceedings according to law.

The King v. Trépannier, 10 Que. Q.B. 175, 4 Can. Crim. Cas. 259.

—Jurisdiction—Amount in dispute—Art. 43 C.P.Q.]—There is no appeal to the Court of Queen's Bench from a judgment of the Court of Review, reversing that of the Court of first instance, in an action to obtain the discharge of a judgment for $45.20 with interest and costs pronounced against the plaintiff in another action, and also to obtain the radiation of a hypothec resulting from the registry of this judgment.

Fortier v. Noel, 3 Que. P.R. 294 (Q.B.).

—Mandamus—Municipal taxes—Art. 1006 C.P.Q.]—There is no appeal to the Court of Queen's Bench from a judgment of the Superior Court maintaining a writ of mandamus against the secretary-treasurer of a municipal corporation by which he was ordered to receive municipal and school taxes at the time of a municipal election over which he presided.

Moisan v. Petitclerc, 3 Que. P.R. 345 (Q.B.).

—Company—Winding-up—Order for sale of property.]—A judgment authorizing the liquidation of a company being wound up under the Winding-up Act to sell the pro-

perty of the company under certain conditions is not an order subject to appeal within the terms of the statute.

In re Montreal Cold Storage and Freezing Co., 3 Que. P.R. 371 (S.C.).

—Municipal matters—Circuit Court.]—There is an appeal from every final judgment of the Superior Court even in an action to annul a resolution passed by a municipal council. The only exceptions are, 1. Those indicated in Art. 1006 C.P.Q.; 2. In the case of certiorari under Art. 1306 C.P.Q.; 3. In the cases mentioned in Arts. 4178, 4616 R.S.Q. concerning town corporations. There is no longer an appeal from the Circuit Court de chef-lieu in municipal or other matters since the passing of the Act 49 and 50 Vict c. 18.

Lachance v. Corporation of Ste. Anne de Beaupré, 10 Que. K.B. 223.

—Defendant in warranty—Right of appeal.]—A defendant in warranty, in the case of garantie formelle, may appeal from the judgment rendered in the principal action although he has refused, in the first instance, to take up le fait et cause of the principal defendant.

Desjardins v. Robert, 1 Que. Q.B. 286, followed.

La Banque Jacques Cartier v. Gauthier, 10 Que. K.B. 243.

—From Yukon Territorial Court—62-63 Vict. c. 11, s. 7.]—Plaintiff's claim for $408 was dismissed and defendants on their counterclaim got judgment for $735. Plaintiff appealed:—Held, by the full Court that the appeal must be limited to the judgment on the counterclaim as the claim was not for an appealable amount.

Canadian Development Co. v. LaBlanc, 8 B.C.R. 173.

—Case stated—Recognizance, imperative—Cash deposit not good—Criminal Code, s. 900, sub-s. 4.]—The recognizance required by s. 900, sub-s. 4, of the Criminal Code, is a condition precedent to the jurisdiction of the Court to hear the appeal and no substitute therefor is permissible.

Rex v. Geiser, 8 B.C.R. 169, Walkem, J.

—Case stated—Transmitting case to District Registry.]—The provision in s. 87 of the B.C. Summary Convictions Act, that the appellant shall, within three days after receiving the case stated, transmit it to the District Registry, is a condition precedent to the jurisdiction of the Court to hear the appeal.

Cooksley v. Nakashiba, 8 B.C.R. 117, Martin, J.

—Statute conferring right of—Operation.]—An Act which allows an appeal which the prior law refused does not apply in the case of an instance begun under the former law, even when judgment was given after the coming into force of the new statute which can only be invoked, in a cause instituted under the old law, when it has changed the form of an appeal which already existed.

Renéault v. Gagnon, 18 Que. S.C. 127 (C.R.).

—Review from Circuit Court—Municipal Council—Quashing resolution.]—There is no right of review before three Judges of the Superior Court of a judgment rendered by the Circuit Court sitting at Montreal under Art. 100 M.C., annulling a resolution of a municipal council which declared vacant the seat of a councillor.

Clermont v. Parish of St. Martin, 18 Que. S.C. 220 (C.R.).

—Deposit on review—Waiver—Arts. 1020, 1196 C.P.Q.]—The deposit on review is not required to give the Court jurisdiction and counsel may, by consent, permit the appellant to dispense with it.

Jutras v. Corporation of St. Francis, 19 Que. S.C. 206 (C.R.).

—B.C. Water record—Appeal—Right of parties affected to intervene.]—Anyone affected by a decision appealed from under s. 36 of the Water Clauses Consolidation Act, may be let in on the hearing of the appeal even though the month for giving notice of appeal has expired. Such person may make his application on the hearing of appellant's motion for directions.

In re Water Clauses Consolidation Act, 8 B.C.R. 17.

—Value of subject-matter.]—In determining the value of the subject-matter in dispute, upon which the right of appeal is made to depend, the proper course is to look at the judgment as to the extent that it affects the interest of the party prejudiced by it, and seeking to relieve himself from it by appeal.

Macfarlane v. Leclaire, 15 Moo. P.C. 181, followed.

Steele v. Ramsay, 1 Terr. L.R. 1.

—Counsel electing to take judgment in lieu of issue being ordered—Effect of—Whether such judgment appealable.]—Plaintiff's counsel, on motion for judgment after trial, was given the option of having an issue ordered as to a point on which evidence was not sufficiently directed or of taking judgment against one defendant with costs and dismissing the action against the other defendant without costs, and elected to take the latter course:—Held, on appeal to the Supreme Court of Canada, that such judgment was not a compromise judgment and that an appeal therefrom could be entertained.

Sun Life v. Elliott, 31 Can. S.C.R. 91, reversing 1900 C.A. Dig. 6; 7 B.C.R. 189.

—Jurisdiction—Amount in dispute—R.S.C. c. 135, s. 29 (b).]—In an action by the lessee of lands leased for four years and nine months at a rental of $250 per annum, to have the lease cancelled as being simulated as he was, at the time of the lease, owner of the property leased:—Held, that no amount of $2,000 or upwards was in dispute, and that as the appeal did not relate to any title to land or tenements nor to annual rents within the meaning of s. 29 (b) of R.S.C. c. 135, it could not be entertained by the Supreme Court of Canada.

Fréchette v. Simmoneau, 31 Can. S.C.R. 12.

—Jurisdiction—Amount in controversy—60 and 61 Vict. (Can.), c. 34 (c) and (f).]—Section 1, sub-s. (f) of 60 and 61 Vict. c. 34, providing that in appeals from the Court of Appeal for Ontario "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different," is inoperative, being repugnant to sub-s. (c). The fact that sub-s. (f) is placed last in point of order in the section does not require the Court to construe it as indicating the latest mind of Parliament as the whole section came into force at the one time.

City of Ottawa v. Hunter, 31 Can. S.C.R. 7.

—To Supreme Court of Canada—Jurisdiction—Action for separation de corps—Money demand.]—In an action by a wife for separation de corps for ill-treatment the declaration concluded by demanding that the husband be condemned to deliver up to the wife her property valued at $18,000. The judgment in the action decreed separation and ordered an account as to the property:—Held, that no appeal would lie to the Supreme Court from the decree for separation; O'Dell v. Gregory, 24 Can. S.C.R. 661, followed; and the money demand in the declaration being only incidental to the main cause of action could not give the Court jurisdiction to entertain the appeal.

Talbot v. Guilmartin, 30 Can. S.C.R. 482.

—Expiration of time limit—Forfeiture of right—Condition precedent.]—The provisions of articles 1020 and 1209 of the Code of Civil Procedure of the Province of Quebec, limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the Court to hear the appeal and they may therefore be waived by the respondent. Cimon v. The Queen, 23 Can. S.C.R. 62, referred to. Art. 1220 C.P.Q. applies to appeals in cases of petition of right.

Lord v. The Queen, 31 Can. S.C.R. 165.

—To Supreme Court of Canada—From Quebec Court of Review—54 and 55 Vict. c. 25, s. 3 (D.).]—The power of the Parliament of Canada under s. 101 of the British North America Act, 1867, respecting a general Court of Appeal for Canada is not restricted to the establishment of a Court for the administration of laws of Canada and, consequently, there was constitutional authority to enact the provisions of the third section of the Dominion statute, 54 and 55 Vict. c. 25, authorizing appeals from the Superior Court, sitting in review, in the Province of Quebec.

L'Association St. Jean-Baptiste de Montreal v. Brault, 31 Can. S.C.R. 172.

—Yukon cases—62 and 63 Vict., c. 11, s. 7—Application to pending case tried before and decided after passing of.]—The Act, 62 and 63 Vict. c. 11, giving the right of appeal to the Judges of the Supreme Court of British Columbia sitting together as a full Court in cases from the Yukon as therein specified, does not apply to a case tried before the Act came into force and decided after that time.

Canadian and Yukon Prospecting and Mining Company, Limited v. Casey, 7 B.C.R. 373.

—Yukon cases—62 and 63 Vict., c. 11, s. 7—Application to pending case tried and decided after passing of.]—The Act, 62 and 63 Vict. c. 11, s. 7, which gives a right of appeal to the Supreme Court of British Columbia in cases from the Yukon territory as therein specified, applies to an action pending when the Act came into force, but tried and decided afterwards.

Courtney v. The Canadian Development Co., 7 B.C.R. 377.

—Jurisdiction—Withdrawal of defence raising constitutional question—R.S.C. c. 135, s. 29 (a).]—When a motion to quash an appeal has been refused on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal.

L'Association Pharmaceutique de Quebec v. Livernois, 31 Can. S.C.R. 43.

—By-law permitting cattle to graze on highways—Validity of—Divisional Court—Right of appeal to.]—An appeal from the decision of a Judge in Court refusing to quash a by-law, lies either to the Divisional Court or the Court of Appeal; but the appellant must elect his tribunal, and can have only one appeal.

Ross v. Township of East Nissouri, 1 O.L.R. 353.

—Jurisdiction—Yukon territorial Court—Decisions of Gold Commissioner—Special appellate tribunal—Finality of judgment—

Legislative jurisdiction of Governor-in-Council—62 and 63 Vict. c. 11, s. 13—1 Edw. VII. O.-in-C. p. lxii.—2 Edw. VII. c. 35—Mining lands.]—The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the territorial Court of the Yukon Territory, sitting as the Court of Appeal constituted by the ordinance of the Governor-in-Council of the eighteenth of March, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon territory. The Governor-in-Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 and 63 Vict. c. 11 of the Statutes of Canada.

Hartley v. Matson, 32 Can. S.C.R. 575.

—"Matter in dispute"—Injunction.]—The action of the company respondent was for $15,000, but the respondent subsequently consented that judgment should go for $25. In the course of the suit the respondent obtained a writ of injunction against the appellant to restrain any infringement of the respondent's rights under a patent. This injunction was maintained by the final judgment of the Superior Court, but the judgment was reversed in appeal. The respondent now moved for leave to appeal to His Majesty in his Privy Council:—Held, that the "matter in dispute" being the damages which the appellant would suffer if the respondent acted contrary to the order of the Court, and these damages being contingent and not susceptible of determination, it was impossible to say that the matter in dispute exceeded the sum or value of £500 sterling, and the case did not fall within the terms of Article 68, paragraph 3, of the Code of Procedure.

Came v. Consolidated Car Heating Company, 11 Que. K.B. 114.

—Concurrent jurisdiction — Delays — Arts. 1061-2, 1070 M.C.]—When an appeal can be taken, either in a district such as Montreal where each judicial day is a term day, or in another, such as Iberville, in which the terms are regulated by proclamation from the Crown during certain months of the year, the appellant is entirely at liberty to take it, in either of the two. It is the position of the municipalities in the respective districts which governs the jurisdiction of the Circuit Court for one or the other. The delay for the filing of the writ of appeal, under art. 1070 M.C. is always an incident merely of the procedure followed, as to delays, in the district in which the appeal is brought. To hold otherwise would be to deprive the appellant of his election between the jurisdiction of the Circuit Court for the district of Montreal and that of the Circuit Court for the district of Iberville.

Arbec v. Lussier, 20 Que. S.C. 543 (Cir. Ct.).

—Interlocutory judgment—Arts. 43, 1006 C.C.P.]—In matters not susceptible of appeal, such as those provided for by arts. 43 and 1006 C.C.P., there can no more be an appeal from an interlocutory than from a final judgment.

Grier v. David, 4 Que. P.R. 417 (K.B.).

—Interlocutory judgment—Art. 94 C.C.P.]—An appeal lies from an interlocutory judgment maintaining a declinatory exception and transmitting the record to the Court of another district. An action based on a libel and claiming damages for injuries suffered in a district other than that of defendant's domicile, and where the journal publishing the alleged libel is printed may be brought in such district.

Gosselin v. Belley, 4 Que. P.R. 233 (K.B.).

—To Supreme Court of Canada—Claim and counterclaim—Leave ex cautela.]—The plaintiff claimed $1,500 damages for delay in delivery of iron. The defendants, besides denying the charge of non-delivery in due time, counterclaimed for $1,223 demurrage. At the trial judgment was given for plaintiff for $1,000 and the counterclaim was dismissed. Upon appeal to the Court of Appeal the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiff's counsel stated that the plaintiff's claim on the reference would be less than $1,000 and contended that no appeal lay:—Held, however, that as the plaintiff claimed $1,500 and was not limited by the judgment of the Court of Appeal to any particular sum, the matter in controversy on the appeal exceeded the sum of $1,000, so that the appeal lay:—Held, also, that upon the counterclaim the sum of $1,223 was involved and that an appeal lay in respect thereof. The Court of Appeal declined to grant, ex cautela, leave to appeal to the Supreme Court of Canada, the case not being one in which leave, if it were necessary, ought to be granted.

Frankel v. Grand Trunk Railway Company, 3 O.L.R. 703 (C.A.).

—Appeal from Circuit Court—Future rights—Art. 44, and 52 C.C.P.]—A judgment of the Circuit Court condemned the defendants to pay a penalty of $25, for failure to paint their poles erected within the limits of the municipality plaintiff, as provided by a by-law ordering telephone and other poles to be painted and to be kept painted thereafter:—Held, on review, (1) that the demand (which was for $50) did not relate to a matter "in which the rights in future

of the parties may be affected within the meaning of Art. 44, paragraph 3, of the Code of Procedure, and therefore no appeal lay in such case to the Court of King's Bench sitting in appeal from a judgment of the Circuit Court, and consequently such judgment was not susceptible of revision by the Court of Review. (Art. 52 C.C.P.) (2) Assuming that an appeal did lie from such judgment of the Circuit Court to the Court of Review, the council of the municipality plaintiff was authorized, by the Act 59 Vict. (Q.) c. 56, s. 18, paragraph 10, to order by by-law the painting of all poles then or subsequently erected within the town, and the by-law complained of was not ultra vires.

Corporation of Coaticook v. The People's Telephone Company, 19 Que. S.C. 535.

—Judge by consent trying issue summarily —Appeal.]—Plaintiffs in County Court proceedings issued several garnishee summonses, and subsequently in Supreme Court actions judgment creditors of the defendants in the County Court actions issued attaching orders against the same garnishees. The judgment creditors in the Supreme Court actions contended that the County Court garnishee summonses were nullities, as they were issued on an affidavit which did not comply with the statute, and all the interested parties agreed that the County Court Judge might decide the matter in a summary way. He held that the County Court plaintiffs were entitled to the moneys garnished:—Held, on appeal, by the full Court, following Eade v. Winser & Son (1878) 47 L.J.C.P. 584, that the County Judge was in effect an arbitrator, and no appeal lay from his decision.

Harris v. Harris, 8 B.C.R. 307.

—Condition precedent—Affidavits of merits —Jurisdiction.]—The conditions, practice and procedure, in respect of appeals from summary convictions made under the laws enacted by the Legislative Assembly are those which that Assembly has prescribed, and an appeal cannot be heard unless all the statutory requirements imposed as conditions of the right of appeal have been complied with.

The King v. McLeod, 4 Terr. L.R. 513.

—To Supreme Court of Canada—Amount in controversy.]—A judgment for $1,000 damages with interest from a date before action brought is appealable under 60-61 Vict. (Can.), c. 34, s. 1 (c.).

Canadian Railway Accident Insurance Co. v. McNevin, 32 Can. S.C.R. 194.

—B.C. Full Court Reference of motion for judgment to trial Judge—Jurisdiction.]—At the conclusion of the trial of an action for damages for personal injuries, the trial Judge (McColl, C.J.), did not see fit to enter any judgment on the findings of the jury, but left the parties to move the Full Court as they might be advised. Both parties accordingly moved the Full Court for judgment, the arguments being confined to the question of the liability of the defendant company:—Held, per Walkem, Drake and Irving, JJ., the Full Court is an Appellate Court only, and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial Judge. Per Martin, J. (dissenting), that as the question of jurisdiction was not raised by counsel nor by the Court, the case should be dealt with on its merits, and that judgment should be entered in favour of the defendant company.

McKelvey v. Le Roi Mining Co. 8 B.C.R. 268. [Same case 32 Can. S.C.R. 664.]

—Judgment in Chambers—Taxation of costs.]—There is no appeal to the Court of Queen's Bench from a decision of a Superior Court Judge in chambers reviewing the taxation by prothonotary of costs allowed to one of the parties unless the payment of the costs is an essential part of the final judgment in the cause.

East Valley Richelieu Railway Co. v. Menard, 11 Que. K.B. 1.

—To Supreme Court of Canada—Procès-verbal establishing highway.]

See HIGHWAY.

Toussignant v. Nicolet, 32 Can. S.C.R. 353.

—Recusation of arbitrator—Expropriation by a railway company.]—No appeal lies to the Supreme Court of Canada from a judgment of the Court of Queen's Bench, confirming a judgment of the Superior Court, which dismissed a recusation of an arbitrator appointed in an expropriation by a railway company.

Richelieu Ry. v. Ménard, 5 Que. P.R. 179, Wurtele, J.

—Interlocutory order—Varying minutes — County Judge certifying papers.]—An order by a County Court Judge dismissing an application to vary minutes under Con. Rule 625, sub-sec. 2, is an interlocutory and not a final order. But the fact that there may be no appeal from such an order is no reason why the Judge should not certify the papers; the question whether or not there is an appeal from such an order is for the Court appealed to and such certificate should as a rule be given upon request: the Judge's duty being ministerial only.

Re Taggart v. Bennett, 6 O.L.R. 74.

—Judgment in Chambers—Requete civile.] —Held, (reversing the Court of Review and restoring the judgment of Fontaine, J.), that a judgment maintaining a dividend sheet is a final judgment subject to review

or appeal and cannot be varied by the same Court except in one of the modes provided by Arts. 1163 et seq. of the Code of Procedure. 2. That a petition in revocation of such a judgment may be received when it alleges that the creditors condemned did not have notice of the last inscription of the contestation.

Bayeur v. Seath, 5 Que. P.R. 241.

—Matter in controversy — Personal condemnation—Possessory action.]—In a possessory action with conclusions for $200 damages, the defendant admitted plaintiff's title and claimed the right of occupying the premises as her tenant. The judgment appealed from affirmed the trial Court judgment, dismissing the possessory conclusions and adjudging $200 for rent of the premises in question:—Held, that the defendant had no right of appeal to the Supreme Court of Canada.

Davis v. Roy, 33 Can. S.C.R. 345.

—Interlocutory proceeding — Final judgment.]—An order requiring opposants a fin de charge to furnish security that lands seized in execution, if sold by the sheriff subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is merely an interlocutory judgment from which no appeal lies to the Supreme Court of Canada.

Desaulniers v. Payette, 33 Can. S.C.R. 340.

—Amount in controversy — Secretion of estate by insolvent—Judgment of imprisonment.]—On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2.000, the judgment appealed from condemned the appellant, under the provisions of Art. 888 C.P.Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least $6,000:—Held, that there was no pecuniary amount in controversy and there could be no appeal to the Supreme Court of Canada.

Clement v. La Banque National, 33 Can. S.C.R. 343.

—From County Court (N.B.).]—Where the questions of fact which have not been passed upon by the Judge below are not involved, an appeal will lie directly from the County Court Judge to the provincial Supreme Court

Patterson v Larsen, 36 N.B.R. 4.

—Matter in controversy—Removal of executors—Acquiescence in trial Court judgment—Right of appeal—R.S.C. c. 135, c. 29.]—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors though, by the action, an account for over $2,000 had been demanded and refused by the judgment at the trial against which the plaintiff had not appealed.

Noel v. Chevrefils, 30 Can. S.C.R. 327, followed; Laberge v. The Equitable Life Assurance Society, 24 Can. S.C.R. 59, distinguished.

Donohue v. Donohue, 33 Can. S.C.R. 134.

—Findings of jury in County Court—Nova Scotia practice.]—An appeal was taken directly to the Supreme Court from the finding of the jury in a case tried in the County Court:—Held, following Belden v. Freeman, 21 N.S.R. 106, that there should have been an application in the first instance to the Judge of the County Court for a new trial and that the appeal should have been from his decision on that application, and that the present appeal must be quashed.

White, Colwell & Co. v. Hissix, 35 N.S.R. 432.

—Municipal matters—Quebec practice.]—Art. 1006 C.C.P. which states that no appeal lies to the Court of King's Bench from any final judgment rendered under the provisions of chapter 40 in matters relating to municipal corporations and offices, also excludes an appeal from an interlocutory judgment in such matters.

County of Wright v. Tremblay, 12 Que. K.B. 366.

—Costs to third party—Rule 214—Discretion.]—Rule 214 gives power to the Court or a Judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the defendant. Such an order is in the discretion of the Court or Judge, and there is no appeal from it, unless by leave, as provided by the Judicature Act, R.S.O. 1897, c. 51, s. 72. Tomlinson v. Northern R.W. Co. (1886), 11 P.R. 419, 526, is not applicable since rule 214.

Russell v. Eddy, 5 O.L.R. 379 (D.C.).

—Order—Refusal to set aside irregular judgment.]—An order made in an action in a County Court for service of notice of a writ out of the jurisdiction, provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." Within the twelve days an appearance in the usual form was entered, the following words being added: "The defendant admits only $103 but otherwise disputes plaintiff's claim in this action":—Held, that this was in effect a statement of defence; that filing was, under the order, all that was necessary, and that a judgment entered for default of defence was void. A motion by the defendant to set aside the judgment as irregular and void was dismissed by the County Court Judge, who gave the defendant leave, on payment

of $5, to move on the merits for leave to defend:—Held, that this was a final order and that an appeal lay therefrom by the defendant.

O'Donnell v. Guinane (1897), 28 O.R. 389, distinguished.

Voight Brewery Co. v. Orth, 5 O.L.R. 443 (D.C.).

—Contempt of Court—Status of parties—Staying proceedings.]

See PARTIES.

Small v. American Federation, 5 O.L.R. 456 (D.C.).

—Right to—Party interested—Who is—B. C. Rivers and Streams Act, s. 12.]—Sec. 12 of the Rivers and Streams Act provides that if a "party interested" is dissatisfied with the judgment of the County Judge he may appeal to the Supreme Court:—Held, that "party interested" means one who was a party to the proceedings before the Judge appealed from.

In re Smith, 9 B.C.R. 329.

—From Court of Revision in B.C.]

See ASSESSMENT.

Re Vancouver, 9 B.C.R. 373.

—From County Courts—Order dismissing appeal from taxation of costs—Final or interlocutory.]—An order made by a judge of the County Court in a County Court action dismissing an appeal from a ruling as to the scale of costs upon taxation of the plaintiffs' costs of the action awarded by the judgment, is in its nature interlocutory and not final, within the meaning of s. 52 of the County Courts Act, R.S.O. 1897, c. 55, and no appeal lies therefrom to a Divisional Court of the High Court.

Leonard v. Burrows, 7 O.L.R. 316 (D.C.).

—From Division Courts—Amount in dispute—Quashing appeal.]—The plaintiff brought an action in a Division Court for $100.75, the amount of a promissory note for $64.87 and $35.38 interest on it, and recovered a judgment for $83.90; the trial Judge finding against an alleged release set up by the defendant, but only allowing $19.13 for interest, instead of $35.38 as claimed. A motion for a new trial was refused:—Held, that "the sum in dispute upon the appeal" under s. 154 of the Division Courts Acts, R.S.O. 1897, c. 60, was $83.90, and as it did not exceed $100, a motion to quash the appeal was allowed. Petrie v. Machan (1897), 28 O.R. 504, distinguished.

Lambert v. Clarke, 7 O.L.R. 130.

—Time for bringing appeal—Delays occasioned by the Court—Jurisdiction—Controversy involved—Title to land.]—An action au petitoire was brought by the city of Hull against the respondents claiming certain real property which the Government of Quebec had sold and granted to the city for the sum of $1,000. The Attorney-General for Quebec was permitted to intervene and take up the fait et cause of the plaintiffs without being formally summoned in warranty. The judgment appealed from was pronounced on the 25th of September, 1903. Notice of appeal on behalf of both the plaintiff and the intervenant was given on 3rd November, and notice that securities would be put in on 10th November, 1903, on which latter date the parties were heard on the applications for leave to appeal and for approval of securities before Wurtele, J., who reserved his decision until one day after the expiration of the sixty days immediately following the date of the judgment appealed from, and, on the 25th of November, 1903, granted leave for the appeals and approved the securities filed:—Held, that the appellants could not be prejudiced by the delay of the Judge in deciding upon the application, until after the expiration of the sixty days allowed for bringing the appeals, and, following Couture v. Bouchard, 21 Can. S.C.R. 281, that the judgment approving the securities and granting leave for the appeals must be treated as if it had been rendered within the time limited for appealing when the applications were made and taken en delibéré. Held, also, that as the controversy between the parties related to a title to real estate, both appeals would lie to the Supreme Court of Canada notwithstanding the fact that the liability of the intervenant might be merely for the reimbursement of a sum less than $2,000.

Attorney-General v. Scott, 34 Can. S.C.R. 282.

—Amount in controversy—Supreme Court Act, s. 29, sub-s. 4.]—Where the Court of King's Bench affirmed the judgment of the Sperior Court dismissing the action, but varied it by ordering the defendant to pay a portion of the costs:—Held, that though $2,217 was demanded by the action, the defendant had no appeal to the Supreme Court of Canada as the amount of the costs which he was ordered to pay was less than $2,000. Allan v. Pratt, 13 App. Cas. 780, and Monette v. Lefebvre, 16, Can. S.C.R. 387, followed.

Beauchemin v. Armstrong, 34 Can. S.C.R. 285.

—Jurisdiction—Petitory action—Bornage—Surveyor's report.]—Where, in an action au pétitoire and en bornage, the question as to title has been finally settled, a subsequent order defining the manner in which the boundary line between the respective properties shall be established is not appealable to the Supreme Court of Canada. Cully v. Ferdais, 30 Can. S.C.R. 330, followed.

Hull City v. Scott, 34 Can. S.C.R. 617.

—Right of appeal—Amount in dispute—Title to land—Future rights.]—L. had given a mortgage to the Standard Loan and Savings Co., as security for a loan, and had received a certain number of the company's shares. All the business of that company was afterwards assigned to the Canadian Mutual, and L. paid the latter the amount borrowed with interest, and $460.80 in addition, and asked to have the mortgage discharged. The company refused, claiming that L., as a shareholder in the Standard Co., was liable for its debts, and demanding $79.20 therefor by way of counterclaim. At the trial of an action by L. for a declaration that the mortgage was paid and for repayment of the said $460.80, such action was dismissed (1 Ont. L.R. 191), but on appeal the Court of Appeal ordered judgment to be entered for L. for $47.04 (5 Ont. L.R. 471). The defendants appealed to the Supreme Court:—Held, that the appeal would not lie; that no title to land or any interest therein was in question; that no future rights were involved within the meaning of sub-s. (d) of 60 & 61 Vict. c. 34; and that all that was in dispute was a sum of money less than $1,000, and therefore was not sufficient to give jurisdiction to the Court. Held, also, that the time for bringing the appeal cannot be extended after expiration of the sixty days from the pronouncing or entry of the judgment appealed from.

Canadian Mutual Loan and Investment Company v. Lee, 34 Can. S.C.R. 224.

—Right of appeal—Amount in controversy—Future rights.]—Though the amount in controversy on an appeal from the Province of Quebec may exceed $2,000, yet if the amount demanded in the action is less, the Supreme Court of Canada has no jurisdiction to entertain the appeal. In an action en séparation de corps, the decree granted $1,500 per annum as alimony to the wife, and, her husband having died, she brought suit to enforce the judgment as executory against his universal legatees. Judgment having been given against her by the Court of King's Bench, she sought an appeal to the Supreme Court of Canada:—Held, that the further payments to which she would have been entitled had she been successful in her suit were not "future rights" which might be bound within the meaning of R.S.C. c. 135, s. 29.

Winteler v. Davidson, 34 Can. S.C.R. 274.

—Right of appeal—Local improvements—Assessment—Future rights.]—In proceedings by the city of Montreal to collect the amount assessed on defendants' land, together with other lands assessed for local improvements, the defendants filed an opposition to the seizure of their land, alleging that the claim was prescribed. The opposition was maintained and the city appealed to the Supreme Court of Canada:—Held, that there was nothing in controversy between the parties but the amount assessed on defendants' land, and, that amount being less than $2,000, the Court had no jurisdiction to entertain the appeal.

City of Montreal v. Land and Loan Company, 34 S.C.R. 270.

—Partition judgment—Right of appeal—Con. Rules 767, 956.]—Semble, that an appeal lies under Con. Rule 767 from the decision of a local Master acting in a partition matter under Con. Rule 956, whether the local Master was acting in Chambers or not.

Stroud v. The Sun Oil Company, 7 O.L.R. 704. [Same case 8 O.L.R. 748.]

—Life pension—Amount in controversy—Actuaries' tables.]—The action was for $62.50, the first monthly instalment of a life pension, at the rate of $750 per annum, claimed by the plaintiff, for a declaration that he was entitled to such annual pension from the society, payable by equal monthly instalments of $62.50 each, during the remainder of his life, and for a condemnation against the society for such payment during his lifetime. On a motion to quash the appeal, the appellant filed affidavits showing that, according to the mortality tables used by assurance actuaries, upon the plaintiff's average expectation of life, the cost of an annuity equal to the pension claimed would be over $7,000:—Held, following Rodier v. Lapierre, 21 Can. S.C.R. 69; Macdonald v. Galivan, 28 Can. S.C.R. 258; La Banque du Peuple v. Trottier, 28 Can. S.C.R. 422; O'Dell v. Gregory, 24 Can. S.C.R. 661, and Talbot v. Guilmartin, 30 Can. S.C.R. 482, that the only amount in controversy was the amount of the first monthly instalment of $62.50 demanded, and, consequently, that the Supreme Court of Canada had no jurisdiction to hear the appeal.

Lapointe v. Montreal Police Benevolent and Pension Society, 35 Can. S.C.R. 5.

—Amount in controversy on appeal—Retraxit.]—The judgment appealed from condemned the defendants to pay $775.40, balance of the amount demanded less $1,524.60 which had been realized on a conservatory sale of a cargo of lumber made by consent of the parties pending the suit and for which credit was given to the defendants:—Held, that as the amount recovered was different from that demanded, and the amount of the original demand exceeded $2,000, there was jurisdiction in the Supreme Court of Canada to entertain an appeal. Joyce v. Hart, 1 Can. S.C.R. 321; Levi v. Reed, 6 Can. S.C.R. 482; Laberge v. The Equitable Life Assurance Society, 24 Can. S.C.R. 59, and Kunkel v. Brown, 99 Fed. Rep. 593, referred to. Cowen v. Evans, 22 Can. S.C.R. 328; Cowen v. Evans; Mit-

chell v. Trenholme; Mills v. Limoges; Montreal Street Railway Co v. Carrière, 22 Can. S.C.R. 331, 333, 334 and 335, note; Lachance v. Société de Prêt et des Placements, 26 Can. S.C.R. 200, and Beauchemin v. Armstrong, 34 Can. S.C.R. 285, distinguished.

Dufresne v. Fee, 35 Can. S.C.R. 8.

—Interlocutory proceeding—Final judgment.]—There is no appeal to the Supreme Court of Canada from a judgment on a petition for leave to intervene in a cause, the proceeding being merely interlocutory in its nature. Hamel v. Hamel, 26 Can. S.C.R. 17 followed.

Connolly v. Armstrong, 35 Can. S.C.R. 12.

—Final judgment—Selected item tried and remainder referred.]—In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items and adjudicated on the evidence taken that the action in respect thereof be dismissed:—Held, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred and the costs reserved. No appeal therefrom to the Supreme Court of British Columbia lay after the expiration of twenty days.

McDonald v. Belcher, [1904] A.C. 429, reversing 33 Can. S.C.R. 321.

—From "Division Courts" in Ontario.]
See DIVISION COURT.

Partial renunciation of judgment—Amount in controversy—Supreme Court Act, s. 29.]—Where a conditional renunciation reducing the amount of the judgment to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original demande and, if such demande exceeds the amount limited by section 29 of the Supreme Court Act, an appeal will lie. In an action for $15,000 for damages occasioned by a nuisance to neighbouring property, the plaintiff recovered $3,000, assessed en bloc by the trial Court without distinguishing between special damages suffered up to the date of action and damages claimed for permanent depreciation of the property. Before any appeal was instituted, the plaintiff filed a written offer to accept a reduction of $2,590, persisting merely in $410 for special damages to date of action, with costs, and reserving the right to claim all subsequent damages, including damages for permanent depreciation, but without admitting that the damages suffered up to the time of the action did not exceed the whole amount actually recovered. This offer was refused by the defendants as it did not affect the costs and contained reservations, and an appeal was taken by them, on which the Court of King's Bench, in allowing the appeal, reduced the amount of the judgment to $410, reserved to plaintiff the right of action for subsequent special damages and damages for permanent depreciation and gave full costs against the appellants on the ground that they should have accepted the renunciation filed:—Held, Davies, J., dissenting, that the Court of King's Bench erred in holding that the defendants had no right to reject the conditional renunciation and in giving costs against the appellants; that the action should be dismissed as to the $2,590 with costs, and the reservation as to further action for depreciation disallowed, but that the judgment for $410 with costs as in an action of that class, with the reservation as to temporary damages accruing since the action, should be affirmed. As the costs at the enquête were considerably increased on account of the large amount of damages claimed, it was deemed advisable, under the circumstances, to order that each party should pay their own costs thus incurred.

Montreal Water and Power Company v. Davie, 35 Can. S.C.R. 255.

—Possessory action—Title to land.]—Petitory actions always invoke title to land in a secondary manner and, consequently, are appealable to the Supreme Court of Canada.

Delisle v. Arcand, 36 Can. S.C.R. 23.

—Future rights—Toll bridge—Infringement of privilege.]—The plaintiff's action was for $1,000 for damages for infringement of his toll bridge privileges, in virtue of the Act, 58 Geo. III. c. 20 (L.C.), by the construction of another bridge within the limit reserved, and for the demolition of the bridge, etc. The judgment appealed from dismissed the action. On a motion to quash the appeal:—Held, that the matter in controversy affected future rights and, consequently, an appeal would lie to the Supreme Court of Canada. Galarneau v. Guibault, 16 Can. S.C.R. 579, and Chamberland v. Fortier, 23 Can. S.C.R. 371, followed.

Rouleau v. Pouliot, 36 Can. S.C.R. 26.

—Criminal proceedings—Extradition.]—A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature upon which an application for extradition has been made is a proceeding arising out of a criminal charge within the meaning of s. 24 (g) of the Supreme Court Act, as amended by 54 & 55 Vict. c. 25, s. 2, and, in such a case, no appeal lies to the Supreme Court of Canada. In re Woodhall, 20 Q.B.D. 832,

and Hunt v. The United States, 16 U.S.R. 424, referred to.

Gaynor and Greene v. United States of America, 36 Can. S.C.R. 247.

—Future rights — Hypothec for rent charges.]—In an action for the price of real estate sold for warranty, a plea alleging troubles and fear of eviction under a prior hypothec to secure rent charges on the land does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal.

Carrier v. Sirois, 36 Can. S.C.R. 221.

—Judgment dismissing plea — Art. 512 C.P.Q.]—No appeal lies to the Court of Review from a judgment dismissing, on a joint factum under Art. 512 C.P.Q., one or two pleas filed by the defendant.

Grenier v. Connolly, 7 Que. P.R. 212 (Ct. Rev.).

—Ont. Court of Appeal—Loan Corporations Act.]—There is no right to appeal to the Court of Appeal from a judgment or order of a Divisional Court made upon an appeal to that Court under s. 117 (4) of the Loan Corporations Act, R.S.O. 1897, c. 205, from a magistrate's conviction.

Rex v. Pierce, 10 O.L.R. 297.

—To Privy Council from Ontario Court.] —Under R.S.O. 1897, c. 48, s. 1, it is essential that an appeal to the King in Council should be admitted by the Court of Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not, and where it appears by its order that it has left that question open, the appeal is incompetent.

Gillett v. Lumsden, [1905] A.C. 601.

—Appeal to the Supreme Court—Judgment where no money value involved—Question of the validity of Act of Parliament.]—A case in which no money value is in controversy, but in which a judicial declaration is prayed for that under the British North America Act, the Government of the Dominion have no power to appoint a commissioner for extradition, is one in which an appeal will lie from a judgment of the Court of King's Bench to the Supreme Court of Canada. Such a judgment is not one in criminal matters governed by article 750 of the Cr. Code, but is rendered by the Court in the exercise of its civil jurisdiction.

Gaynor v. Lafontaine, 14 Que. K.B. 335 (Hall, J.).

—Successions — Security by beneficiary — Controversy involved—Future rights—Interlocutory order.]—An application for the approval of security on an appeal to the Supreme Court of Canada from an order directing that a beneficiary should furnish the security required by Art. 663 of the Civil Code of Lower Canada was refused on the ground that it was interlocutory and could not affect the rights of the parties interested.

Kirkpatrick v. Birks, 37 Can. S.C.R. 512.

—Privy Council—Matter in controversy exceeding $4,000.]—On a motion by the plaintiffs for the allowance of the security on an appeal from the Court of Appeal to the Privy Council, in an action brought by the corporation of a city against two electric light companies, to have it declared that they had forfeited their rights under certain agreements with the city, under which they held their franchises, on the ground that they had amalgamated contrary to the terms of such agreements, which action had been dismissed:—Held (Meredith, J.A., dissenting), that the whole matter in controversy at the trial (being the destruction, not the acquisition of the defendants' franchise) was whether the companies had forfeited their right by amalgamation, and this clearly did not come within the last branch of s. 1 of R.S.O. 1897, c. 48, and that there was nothing before the Court to show that such matter was of value to the plaintiffs of more than $4,000, or of any sum or value capable of being ascertained or defined. Per Meredith, J.A.:—The matter in controversy much exceeded $4,000, and if controverted leave should be given to the appellants to prove their value.

Toronto v. Toronto Electric Light Company, 11 O.L.R. 310 (C.A.).

—In B.C. from Gold Commissioner.]—The right of appeal given by the Water Clauses Consol. Act, B.C., is in effect a right to a re-trial; and the appropriate method of dealing with questions of fact on that appeal is by examination and cross-examination of witnesses viva voce. Ross v. Thompson (1903), 10 B.C.R. 117, followed.

Wallace v. Flewin, 11 B.C.R. 328.

—Discretionary order—Stay of foreclosure proceedings—Final judgment.]—Leave to appeal to the Supreme Court of Canada under the 76th section of the Winding-up Act can be granted only where the judgment from which the appeal is sought is a final judgment, and the amount involved exceeds two thousand dollars. A judgment setting aside an order, made under the Winding-up Act, for the postponement of foreclosure proceedings and directing that such proceedings should be continued is not a final judgment within the meaning of the Supreme Court Act, and does not involve any controversy as to a pecuniary amount.

Re Cushing Sulphite Fibre Company, 37 Can. S.C.R. 173.

—Striking out pleadings—Final order—Interlocutory order.]—An order of a County Court Judge purporting to be made under Con. Rule 261, striking out certain paragraphs of a statement of defence as disclosing no reasonable answer, is in its nature final, though in form intermediate, and an appeal will lie under sec. 52 of the County Courts Act, R.S.O. 1897, c. 55. The jurisdiction conferred by Con. Rule 261 may not be invoked for the excision of portions of a pleading only.

Smith v. Traders Bank, 11 O.L.R. 24 (D. C.).

—Third parties—Leave to defend—Right to appeal—Motion to quash.]—An order under Con. Rule 213 giving a third party the right to appear at the trial of an action, even though he be declared to be bound by the judgment, is not equivalent to an order giving him leave to defend. In an action where the third parties had no right to defend the action, but had obtained leave to appeal in the name of the defendants, of which they had availed themselves:—Held, that an appeal in their own names was not competent. Gaby v. City of Toronto (1902), 1 O.W.R. 635, considered and distinguished.

Deseronto Iron Co. v. Rathbun Co., 11 O. L.R. 433 (C.A.).

—Jurisdiction—Declinatory exception — Interlocutory judgment—Review of judgment on exception.]—The action was dismissed in the Superior Court upon declinatory exception. The Court of King's Bench reversed this decision and remitted the cause for trial on the merits. On motion to quash a further appeal to the Supreme Court of Canada:—Held, that such motion should be granted on the ground that the objection as to the jurisdiction of the Superior Court might be raised on a subsequent appeal from a judgment on the merits. Per Girouard, J.:—The judgment of the Court of King's Bench was not a final judgment and, consequently, no appeal could lie to the Supreme Court of Canada.

Willson v. Shawinigan Carbide Company, 37 Can. S.C.R. 535.

—Jurisdiction — New trial — Discretion — Ontario appeals to Supreme Court.]—Per Fitzpatrick, C.J., and Duff, J.:—Sec. 27 of R.S.C. c. 135 prohibits an appeal from a judgment of the Court of Appeal for Ontario granting, in the exercise of judicial discretion, a new trial in the action. Per Davies, J.:—Under the rule in Town of Aurora v. Village of Markham, 32 Can. S.C.R. 457, no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial unless it comes within the cases mentioned in 60 and 61 Vict. c. 34, or special leave to appeal has been obtained. Appeal from judgment of the Court of Appeal, 11 O.L.R. 171, quashed.

Canada Carriage Company v. Lea, 37 Can. S.C.R. 672.

—Judgment—Interlocutory or final.]—An action was dismissed in the Circuit Court on declinatory exception, and also dismissed on the merits by the Superior Court. On an inscription in review, the Court of Review declared that the action was within the jurisdiction of the Circuit Court On an appeal de plano to the Court of King's Bench:—Held, that the judgment of the Court of Review remitting the cause to the Circuit Court was a final judgment from which an appeal de plano would lie.

Village of St. Denis v. Benoit, 7 Que. P.R. 318 (Ct. of K.B.).

—Injunction—Interlocutory judgment.] — A judgment refusing an application for an interim injunction before the issue of a writ of summons is an interlocutory judgment, in respect of which there can be no appeal without special leave granted by a Judge of the Court of King's Bench.

Wampole v. Lyons, 7 Que. P.R. 339 (Ct. of K.B.).

—Workmen's Compensation Act, B.C.—Arbitrator.]—No appeal lies from the decision of an arbitrator appointed by a Supreme Court Judge under clause 2 of the second schedule to the Workmen's Compensation Act, 1902.

Lee v. The Crow's Nest Pass Coal Company, 11 B.C.R. 323.

—Annulment of proces-verbal — Injunction —Matter in controversy—Art. 560 C.C.] — In a proceeding to set aside resolutions by a municipal corporation giving effect to a procès-verbal, the Court followed Toussignant v. County of Nicolet, 32 Can. S.C.R. 353, and quashed the appeal with costs.

Leroux v. Parish of Ste. Justine de Newton, 37 Can. S.C.R. 321.

—Expropriation proceedings — Report of commissioners—Inscription for review.]— No appeal lies from a decision of a Judge of the Superior Court rejecting a petition of the City of Montreal for homologation of a report of expropriation commissioners, under section 439 of 62 Vict. c. 58, and, as a consequence, an inscription for review of such a decision will be rejected on motion.

City of Montreal v. Donovan, Q.R. 27 S. C. 259 (C.R.).

Admiralty cases.]—Notwithstanding the provisions of the Canadian Supreme and Exchequer Court Act, 1875, s. 47, with respect to the finality of the judgments of the Supreme Court, an appeal to the Privy Council lies as of right under s. 6 of the Colonial Courts of Admiralty Act, 1890, from a judgment of the said Court when pronounced in an appeal thereto from a

decree of the Colonial Court of Admiralty constituted in pursuance of and exercising jurisdiction under the said Act.

Richelieu & Ontario Nav. Co. v. The "Cape Breton," [1907] A.C. 112.

—Appeal to Privy Council—Consolidation.] —The Court of King's Bench (appeal side) has no jurisdiction to grant a motion for consolidation of two causes in view of an appeal to the Privy Council after it has rendered independent judgments in said cases; such application can be granted by the Judicial Committee only.

Quebec Bridge & Ry. Co. v. Quebec Improvement Co., 8 Que. P.R. 135 (K.B.).

—Injunction—Final judgment.—Review.] —The judgment on an injunction issued in an action to annul a resolution of a municipal council is not a final judgment within the meaning of paragraph 1 of article 52, C.C.P., and not being one of the judgments mentioned in paragraphs 2, 3 and 4, it is not susceptible of review.

Perreault v. The Corporation of Lévis, Q.R. 30 S.C. 123 (Ct. Rev.).

—Locus standi—Petition to vacate judgment—Appeal—Matter in controversy.]—A creditor of an insolvent with a claim for $600 filed a tierce opposition to vacate a judgment declaring the respondent to be the owner of the business of a restaurant and the liquor license accessory thereto, alleged to be worth over $5,000. The opposition was dismissed on the ground that, under the circumstances of the case, the company had no locus standi to contest the judgment. On motion to quash an appeal to the Supreme Court of Canada:—Held, that as there was no pecuniary amount in controversy an appeal would not lie.

Canadian Breweries Company v. Gariépy, 38 Can. S.C.R. 236.

—Damages—Abandonment of portion of—Claim held to be limited to balance—Appeal to Privy Council.]—The plaintiff, in a Superior Court, may at any time abandon a part of his claim and upon such abandonment the remainder only is deemed to be in controversy. On the trial of an action in which the damages were laid at $5,000, a nonsuit was entered, but it was agreed that in case the plaintiff should, on appeal, be held entitled to maintain the action, the damages should be fixed at $1,000. On appeal to a Divisional Court, the plaintiff was held so entitled, and a new trial was directed unless the defendants consented to judgment for the $1,000. This the defendants refused to do, and appealed to the Court of Appeal, when the judgment of the Divisional Court was affirmed. An application was then made for leave to appeal to the Privy Council, on the ground that the matter in controversy exceeded $4,000. In answer thereto the plaintiff, by affidavit, stated that he was only claiming $1,000, which he regarded as agreed upon for all purposes, and offered to amend his statement of claim:—Held, that the application must be refused, as the damages must be deemed to be limited to the $1,000.

Preston v. Toronto R.W. Co., 13 O.L.R. 78 (Garrow, J.A.).

—Intervention—Matter in controversy.]—An intervention filed under the provisions of the Code of Civil Procedure of the Province of Quebec is a "judicial proceeding" within the meaning of s. 29 of the Supreme and Exchequer Courts Act, and a final judgment thereon is appealable to the Supreme Court of Canada, where the matter in controversy upon the intervention amounts to the sum or value of $2,000 without reference to the amount demanded by the action in which such intervention has been filed.

Coté v. James Richardson Company, 38 Can. S.C.R. 41.

—Amount in controversy — Creditor's action—Transfer of cheque—Preference.] —An action was brought by creditors, on behalf of themselve and all other creditors, of an insolvent to set aside the transfer of a cheque for $1,172.27 made by the insolvent to S. & Son as being a preference and therefore void. At the trial the action was dismissed and this judgment was affirmed by the Divisional Court (12 Ont. L.R. 91) and by the Court of Appeal (13 Ont. L.R. 232, sub nom. Robinson v. McGillivray). On a motion to quash an appeal to the Supreme Court of Canada:—Held, that the only matter in controversy was the property in the sum represented by the cheque and such sum being more than $1,000 the appeal would lie.

Robinson v. Scott, 38 Can. S.C.R. 490.

—Appeal—Contestation of a municipal by-law—Costs.]—1. A judgment rendered by the Circuit Court for the County of Shefford, under the charter of the town of Waterloo and the Town Corporations Act, by a Judge of the Superior Court, in municipal matters, is not appealable to the Court of King's Bench. 2. The respondent in appeal, who does not move a limine for the dismissal of the appeal, for want of jurisdiction, is not entitled to more costs than those which would have been incurred on a motion to dismiss said appeal.

Nichol v. Town of Waterloo, 8 Que. P.R. 361 (K.B.).

—Ontario County Courts—Right of appeal from—Jury—Order of County Court in term.]—Under s. 51 of the County Courts Act, R.S.O. 1897, c. 55, where there has been a trial by a jury of an action in a County Court, and a motion has been

made to the County Court in term for a new trial, and dismissed, no appeal lies from the dismissing order to a Divisional Court of the High Court; but, semble, where the findings of the jury are reversed in term, an appeal lies.

Booth v. Canadian Pacific R.W. Co., 13 O.L.R. 91 (D.C.).

To Privy Council—Judgment dismissing a quo warranto.]—An appeal does not lie to the Privy Council from a judgment dismissing a quo warranto taken against a director of a company to restrain him from acting as president.

Vipond v. Robert, 9 Que. P.R. 273.

—Appellate jurisdiction of Supreme Court of Canada—Manitoba Act (R.S.M. c. 110, s. 36), limiting right of appeal ultra vires.]—By s. 101 of the British North America Act, 1867, the Parliament of Canada was authorized to establish the Supreme Court of Canada, the existing statute being R.S.C. 1906, c. 139, ss. 35 and 36 of which define its appellate jurisdiction in respect of any final judgment of the highest Court of final resort now or hereafter established in any Province of Canada. The Manitoba Mechanics' and Wage Earners' Lien Act (R.S.M. c. 110, s. 36), applies to the suit under appeal and enacts that in suits relating to liens the judgment of the Manitoba Court of King's Bench shall be final and that no appeal shall lie therefrom:—Held, that the provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act.

Crown Grain Company v. Day, [1908] A.C. 504.

—Demurrer — Final judgment—Jurisdiction.]—The declaration in an action by a municipality claiming forfeiture of a franchise for non-fulfilment of the obligations imposed in respect thereof alleged in five counts as many different grounds for such forfeiture. The defendant demurred generally to the declaration and specifically to each count. The demurrer was sustained as to three counts and dismissed as to the other two. On appeal from the decision of the registrar refusing an order to affirm the jurisdiction of the Supreme Court of Canada to entertain an appeal from the judgment maintaining the demurrer:—Held, that each count contained a distinct ground on which forfeiture could be granted and a judgment depriving the municipality of its right to rely on any such ground was a final judgment in respect thereof which could be appealed to the Supreme Court of Canada.

Ville de St. Jean v. Molleur, 40 Can. S.C.R. 139.

—Final judgment—Time for appealing.]—Notwithstanding that no appeal has been taken from the report of a referee within the fourteen days mentioned in s. 19 and 20 of the General Rules and Orders of the Exchequer Court of Canada (12th December, 1899), an appeal will lie to the Supreme Court of Canada from an order by the Judge confirming the report, as required by the said sections, within the thirty days limited by s. 82 of the Exchequer Court Act, R.S.C. 1906, c. 140.

Re Atlantic and Lake Superior Railway Co.; North Eastern Banking Co. v. Royal Trust Co., 41 Can. S.C.R. 1.

—Jurisdiction—Final judgment—Origin in Superior Court.]—An information was laid before the police magistrate of St. John, N.B., charging the License Commissioners with a violation of the Liquor License Act by the issue of more licenses in Prince Ward than the Act authorized. The informant and the Commissioners agreed to a special case being stated for the opinion of the Supreme Court of New Brunswick on the construction of the Act and that Court, after hearing counsel for both parties, ordered that "the Board of License Commissioners for the City of Saint John be, and they hereby, advised that the said Board of License Commissioners can issue eleven tavern licenses for Prince Ward in the said City of Saint John and no more, 38 N.B. Rep. 508." On appeal by the Commissioners to the Supreme Court of Canada:—Held, that the proceedings did not originate in a Superior Court, and are not within the exceptions mentioned in s. 37 of the Supreme Court Act; that they were extra cursum curiæ; and that the order of the Court below was not a final judgment within the meaning of s. 36; the appeal, therefore, did not lie and should be quashed.

Blaine v. Jamieson, 41 Can. S.C.R. 25.

—Jurisdiction—Final judgment.]—In 1903 the United Lumber Co. executed a contract for sale to D. of all its lumber lands and interests therein the price to be payable in three instalments at fixed dates. By a contemporaneous agreement the company undertook to get out logs for D. who was to make advances for the purpose. The agreement for sale was carried out, and two instalments of the purchase money paid. At the time these contracts were executed the Union Bank had advanced money to the company and shortly after the contract for sale was assigned to the bank as security for such and for future advances. The company having assigned in insolvency the bank brought action against D. for the last instalment of the purchase money to which he pleaded that he had paid in advance to the company and the bank more than the sum claimed. The trial Judge held that the bank had no notice of the second agreement under which D. claimed to have advanced the money and gave judgment for the bank

with a reference to ascertain the amount due. The full Court set aside this judgment and ordered a reference to ascertain the amount due the bank and, if anything was found to be due, to ascertain the amount due to D. from the company. The bank sought to appeal from the latter decision:—Held, that the judgment of the full Court was not a final judgment from which an appeal would lie under the Supreme Court Act to the Supreme Court of Canada.

Union Bank of Halifax v. Dickie, 41 Can. S.C.R. 13.

—Appeal to the Supreme Court of Canada —Matter in controversy exceeding $1,000.] —Where the amount of a judgment to be appealed from was $1,000, and $43.05 interest had accrued on such judgment:—Held, that the matter in controversy exceeded the sum or value of $1,000 exclusive of costs, within the meaning of s. 48 of the Supreme Court Act, R.S.C. 1906, c. 139, allowing an appeal to the Supreme Court.

Milligan v. Toronto R.W. Co., 17 O.L.R. 370.

—To Supreme Court of Canada—Amount in controversy.]—The plaintiff's original demand was for $10,000 damages. Before the trial, the claim was reduced to less than $2,000, and the verdict was for less than that sum. It was held that under the limitation provided by s. 46(c) of the Supreme Court Act, R.S.C. (1906), c. 139, the Supreme Court of Canada was not competent to entertain an appeal, and an order was made quashing same.

Montreal Park & Island Ry. v. Labrosse, 40 Can. S.C.R. 96.

—Alternative relief—Judgment granting one—Final judgment.]—Where the party failing at the trial moves the Court of last resort for the province for judgment or, in the alternative, a new trial he cannot appeal to the Supreme Court of Canada from the judgment granting the latter relief. Mutual Ins. Co. v. Dillon, 34 Can. S.C.R. 141, followed.

Ainslie Mining and Railway Co. v. McDougall, 40 Can. S.C.R. 270.

—Dismissal for want of jurisdiction.]— There is no appeal to the Court of King's Bench from a judgment of the Superior Court rendered under the provisions of c. 1 of Title XI. R.S.Q., s. 4178-4615, "Town Corporations." The same rule is applied to judgments in pari materia of the Circuit Court when it is substituted for the Superior Court by the special charter of a town which is thereby subjected to the said provisions. When an appeal is dismissed for want of jurisdiction the only costs granted will be those of a motion.

Nichol v. Town of Waterloo, Q.R. 16 K.B. 509.

Amount in controversy—Reference to assess damages—Final judgment.]—In 1905 L. and others purchased from W. his creameries on the faith of a statement purporting to be made up from the books and showing an output for the years 1904-5 equal to or greater than that of 1903. Having discovered that this statement was untrue they brought action for rescission of the contract to purchase and damages for the loss in operating during 1906. The judgment at the trial dismissing the action was affirmed by the Divisional Court. The Court of Appeal reversed the latter judgment, held that rescission could not be ordered but the only remedy was damages and ordered a reference to assess the amount. On appeal to the Supreme Court of Canada:—Held, that as it can not be ascertained from the record what the amount in controversy on the appeal was, or whether or not it is within the appealable limit, the appeal does not lie. Held, per Idington, J.:—The judgment appealed against is not a final judgment.

Wenger v. Lamont, 41 Can. S.C.R. 603.

—Motion to quash—Judgment in review.] —If a judgment of the Court of Review merely reduces the amount which a defendant has been condemned to pay by the lower Court the defendant cannot appeal therefrom to the Court of King's Bench.

Hull Electric Company v. Clément, 10 Que. P.R. 172.

—Supreme Court Act—Interest in land—Future rights.]—Under a by-law of the defendant company every person desiring to enter the park was required to pay a fee for admission. An action was brought for a declaration as to the right of the company to exact payment of such fee from the lessee of land in the park:—Held, that the matter did not relate to the taking of a "customary or other duty or fee" nor to "a like demand of a general or public nature affecting future rights" under sub-s. (d) of s. 48 R.S.C. [1906] nor was "the title to real estate or some interest therein" in question under sub-s. (a). There was, therefore, no appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in such action (16 Ont. L.R. 386).

The Grimsby Park Company v. Irving, 41 Can. S.C.R. 35.

—Amount in dispute—Interest.]—An action having been brought against the maker and indorser of a note for $2,000

the makers sued the indorser in warranty claiming that no consideration was given for the note and asking that the indorser guarantee them against any judgment obtained in the main action. They also asked that an agreement under which the makers were to become liable for $3,000 be declared null. The two actions were tried together and judgment given for the plaintiff in the action on the note while the action in warranty was dismissed. On appeal from the latter judgment:—Held, that the amount in dispute was $2,000, the value of the note sued on; that the costs of the action in warranty could not be added and without them the sum of £500 was not in controversy even if interest and costs in the main action were added; the appeal, therefore, did not lie. Held, also, that the agreement which the plaintiffs in warranty sought to void was only a collateral matter to the issues raised on the appeal and could not be considered in determining the amount in dispute. Interest after the commencement of the action, unless specially claimed as damages, cannot be added to the amount claimed in the declaration in determining the amount in controversy for the purposes of giving jurisdiction upon an appeal to the Supreme Court.

Labrosse v. Langlois, 41 Can. S.C.R. 43.

—Actio Pauliana—Controversy involved—Title to land.]—In the Province of Quebec, the actio Pauliana, though brought to set aside a contract for sale of an immovable, is a personal action and does not relate to a title to lands so as to give a right of appeal to the Supreme Court of Canada.

Lamothe v. Daveluy, 41 Can. S.C.R. 80.

—Division Court appeal—Motion for new trial—Necessity for.]—An action to recover a sum in excess of $200 for a balance of a teacher's salary was brought against public school trustees in a Division Court, as permitted by s. 81 (7) of the Public Schools Act, 1 Edw. VII. c. 39 (O.). The action was dismissed, and the plaintiff, in appealing to a Divisional Court of the High Court, failed to follow the procedure prescribed by the Division Courts Act:—Held, that "the ordinary right of appeal," mentioned in s. 98 (2) of the Public Schools Act, is the right of appeal given by the Division Courts Act; and the plaintiff, not having moved for a new trial in the Division Court, as required by s. 154 of the Division Courts Act, R.S.O. 1897, c. 60, could not maintain her appeal.

Norton v. Bertie Public School, 17 O.L.R. 413.

—Right of appeal—Summary order for judgment if money not paid into Court—Order "in its nature final."]—An order made by the Judge of a County Court, upon an application by the plaintiffs for summary judgment under Rule 603, allowing the defendants to defend upon condition of their paying money into Court, and directing that, in default of payment into Court, the plaintiffs be at liberty to sign final judgment, is "in its nature final and not merely interlocutory," within the meaning of s. 52 of the County Courts Act; and an appeal therefore lies from such an order to a Divisional Court of the High Court. Bank of Minnesota v. Page (1887), 14 A.R. 347, followed. Rural Municipality of Morris v. London and Canadian L. and A. Co. (1891), 19 S.C.R. 434, following the English decisions, distinguished. Where valid defences are sworn to by the defendants in answer to a motion for summary judgment, unconditional leave to defend should be granted. Jacob v Booth's Distillery Co. (1901), 50 W.R. 49, 85 L.T.R. 262, followed. Order of the Judge of the County Court of Carleton reversed.

F J. Castle Co. v. Kouri, 18 O.L.R. 462

—Interlocutory order.]—In an action for salary by a land surveyor, a judgment ordering plaintiff to file some plans before adjudicating on the merits, is an interlocutory order and a matter of judicial discretion; an inscription in review from said order will be discharged, as an appeal from the final judgment would give a complete remedy.

Hebert v. Canada Resort Co., 11 Que. P.R. 38.

—Special tribunal—Court of last resort.]—Under the provisions of the Montreal City Charter, 62 Vict. c. 58, s. 484 (Que.), an action was brought by the city, in the Recorder's Court, to recover taxes on an assessment of the company's property in the city. Judgment was recovered for $39,691.80, and an appeal to the Superior Court, sitting in review, under the provisions of the Quebec statute, 57 Vict. c. 49, as amended by 2 Edw. VII. c. 42, was dismissed. On an application by the company to affirm the jurisdiction of the Supreme Court of Canada to hear an appeal from the judgment of the Court of Review.—Held, that the Superior Court, when exercising its special appellate jurisdiction in reviewing this case, was not a Court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes within the meaning of s. 41 of the Supreme Court Act, R.S. [1906] c. 139, and, consequently, there could be no jurisdiction to entertain the appeal.

Montreal Street Railway Co. v. City of Montreal, 41 Can. S.C.R. 427.

—Appeal to Privy Council—Appealable amount—Amendment to statute.]—An appeal lies to the Supreme Court of Canada from a judgment of the Court of Review which is not appealable to the Court of

King's Bench, but is susceptible of appeal to His Majesty in Council. By 8 Edw. VII. c. 75 (Que.) the amount required to permit of an appeal to His Majesty in Council was fixed at $5,000 instead of £500 as theretofore:—Held, that said Act did not govern a case in which the judgment of the Court of Review was pronounced before it came into force.—By s. 70 of the Supreme Court Act notice must be given of an appeal from the judgment, inter alia, "upon a motion for a new trial:"—Held, that such provision only applies when the motion is made for a new trial and nothing else and notice is not necessary where the proposed appeal is from the judgment on a motion for judgment non obstante or, in the alternative, for a new trial.

Sedgwick v. Montreal Light, Heat and Power Co., 41 Can. S.C.R. 639.

—Cancellation of license—Persona designata.]—On an application for the cancellation of a liquor license issued under the Liquor License Act of the Province of Alberta, a Judge of the Supreme Court of Alberta, in Chambers, granted an originating summons ordering all parties concerned to attend before him, in Chambers, and, after hearing the parties who appeared in answer to the summons, refused the application. The full Court reversed this order and cancelled the license. On an appeal by the licensee to the Supreme Court of Canada:—Held, that the case came within the principle decided in Canadian Pacific Railway Co. v. Little Seminary of Ste. Thérèse, 16 Can. S.C.R. 606, and, consequently, the Supreme Court of Canada had no jurisdiction to entertain the appeal.

St. Hilaire v. Lambert, 42 Can. S.C.R. 264.

—Appeal to Privy Council—Application to allow security.]—Where the sole question in two actions was as to the validity of an order of the railway committee of the Privy Council of Canada requiring the plaintiffs to build a bridge:—Held, refusing an application to allow the security upon a proposed appeal to His Majesty in His Privy Council from the decision of the Court of Appeal, that an appeal did not lie as of right under R.S.O. 1897, c. 48, s. 1.

Canadian Pacific R.W. Co. v. City of Toronto, 19 O.L.R. 663.

—Right of floating logs—Servitude—Matter in controversy.]—In the Province of Quebec the privilege of floating timber down watercourses, in common with others, is not a predial servitude nor does it confer an exclusive right of property in respect of which a possessory action would lie, and, in a case where the only controversy relates to the exercise of such a privilege, the Supreme Court of Canada has no jurisdiction to entertain an appeal. The appeal was quashed without costs as the objection to the jurisdiction was not taken by the respondents in the manner provided by the Rules of Practice.

Price v. Tanguay, 42 Can. S.C.R. 133.

—Jurisdiction—Commitment of judgment debtor—Final judgment.]—An order of committal against a judgment debtor, under the Manitoba King's Bench Rule 755, for contempt in refusing to make satisfactory answers on examination for discovery is not a "matter" or "judicial proceeding" within the meaning of sub-s. (e) of s. 2 of the Supreme Court Act, but merely an ancillary proceeding by which the judgment creditor is authorized to obtain execution of his judgment and no appeal lies in respect thereof to the Supreme Court of Canada. Danjou v. Marquis, 3 Can. S.C.R. 258, referred to.

Svensson v. Bateman, 42 Can. S.C.R. 146.

—Matter in controversy—Municipal franchise—Demolition of waterworks.]—The action, instituted in the Province of Quebec, was for a declaration of the plaintiff's exclusive right under a municipal franchise to construct and operate waterworks within an area defined in a municipal by-law, for an injunction against the defendants constructing or operating a rival system of waterworks within that area, an order for the removal of waterpipes laid by them within that area, and for $86 damages. On an appeal from a judgment maintaining the plaintiff's action:—Held, that, as it did not appear from the record that the sum or value demanded by the action was of the amount limited by the Supreme Court Act in respect to appeals from the Province of Quebec nor that any title to lands or future rights were affected, an appeal would not lie to the Supreme Court of Canada.

Jeune-Lorette Co. v. Verrett, 42 Can. S.C.R. 156.

—Dismissal of declinatory exception.]—A judgment which dismisses a declinatory exception does not fall within any of the cases mentioned in Art. 52 C.P.Q. and is not susceptible of review.

Pagé v. Génois, Q.R. 36 S.C. 207.

—Interlocutory judgment.]—An appeal will not lie from an interlocutory judgment rejecting a plea of compensation (set-off) for work done in an action on a promissory note. Such claim should be brought by separate action.

Laplante v. Laplante, 11 Que. P.R. 46.

—Interlocutory judgment.]—A judgment maintaining a declinatory exception in an action claiming damages for libel and transferring the action to the district in which the newspaper containing the libel is published is an interlocutory judgment

which can be carried to appeal only by special leave of the Court or a Judge.

Dubuc v. Delisle, 10 Que. P.R. 372 (K.B.).

—Interlocutory judgment.]—A judgment maintaining a partial inscription en droit is an interlocutory judgment from which no appeal lies to the Court of Review.

St. Jacques v. St. Jacques, 10 Que. P.R. 411 (Ct. Rev.).

II. LEAVE TO APPEAL.

—Special leave—Public interest—Important questions of law—Exemption from taxation —School rates.]—By a municipal by-law an industrial company was given exemption from taxation for a term of years. P., a ratepayer of the municipality, applied for a writ of mandamus to compel the council to assess the company for school rates, which, he claimed, were not included in the exemption. The decision to grant the writ was affirmed by the Court of Appeal (20 Ont. L.R. 246, sub nom. Pringle v. City of Stratford). On motion for special leave to appeal from the latter judgment:—Held, that the case was not one of public interest, and did not raise important questions of law. It did not, therefore, fall within the principles laid down in Lake Erie & Detroit River Railway Co. v. Marsh, 35 Can. S.C.R. 197, for granting such leave.

Whyte Packing Co. v. Pringle, 42 Can. S.C.R. 691.

Special leave — "Judicial proceeding" — Discretionary order — Matter of public interest — Alberta Liquor License Ordinance.] —Proceedings on an originating summons issued by a Judge of the Supreme Court of Alberta on an application for cancellation of a license under s. 57 of the Liquor License Ordinance, are judicial proceedings within the meaning of s. 37 of the Supreme Court Act, R.S.C. 1906, c. 139, and, consequently, the Supreme Court of Canada has jurisdiction to entertain an application for leave to appeal from the judgment of the Supreme Court of Alberta thereon. Where the decisions of the provincial Court show that the Judges of that Court are equally divided in opinion as to the proper construction of a statute in force in the province and it appears to be desirable in the public interest that the question should be finally settled it is proper for the Supreme Court of Canada to exercise the discretion vested in it for the granting of special leave to appeal under the provisions of s. 37 of the Supreme Court Act. Girouard, J., dissented on the ground that the proceedings in question were intended to be summary and that, in these circumstances, the case was not one in which special leave to appeal should be granted.

Finseth v. Ryley Hotel Co., 43 Can. S.C.R. 646.

—To Privy Council — Motion for leave to appeal — Amount in dispute — Winding-up Act.]—1. No appeal lies to His Majesty in His Privy Council from a judgment rendered by the Court of King's Bench in which the amount in controversy does not exceed $5,000. 2. The amount of the costs cannot be taken into account to decide if the case is appealable to the Privy Council. 3. Under the Winding-up Act (1906), no appeal to the Privy Council is authorized.

Lapierre v. Banque de St. Jean, 12 Que. P.R. 152.

—Application for leave to appeal.]—The Court of Appeal refused an application by the defendants for leave to appeal to that Court from the judgment of a Divisional Court, 19 O.L.R. 540, the case not presenting any good ground for treating it as exceptional, and allowing a further appeal; the amount actually involved being under $500; and the question of law not appearing to be a matter of sufficient doubt to justify prolonging the litigation.

Webb v. Box, 20 O.L.R. 220.

—Privy Council.]—The Court of Appeal for British Columbia has no power to grant leave to appeal to the Privy Council.

McKenzie v. Chilliwhack, 15 B.C.R. 256.

—To Supreme Court of Canada — Appeal per saltum.]—Leave to appeal direct to the Supreme Court from a judgment of a Divisional Court of the High Court of Justice under s. 26, sub-s. 3 of the Supreme and Exchequer Courts Act, cannot be granted unless it is clear that there is a right of appeal from such judgment to the Court of Appeal for Ontario.

Ottawa Electric Company v. Brennan, 31 Can. S.C.R. 311.

—Appeal per saltum—Divisional Court judgment—Constitutional question.]—Under the provisions of s. 26, sub-s. 3 of the Supreme and Exchequer Courts Act, leave to appeal direct from the final judgment of a Divisional Court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario, and the fact that an important question of constitutional law is involved and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave.

The Ontario Mining Company v. Seybold, 31 Can. S.C.R. 125.

—Appeal for costs—Leave to appeal—Time to inscribe appeal.]—Rule 500 of the Judicature Ordinance (C. O. 1898, c. 21), provides that "no judgment given, or order made by the Court or Judge . . . as to costs only, which by law are left to

the discretion of the Court or Judge, shall be subject to any appeal, except by leave of the Court or Judge giving the judgment, or making the order." Rule 501 provides that "no appeal shall lie from the judgmen or order of the Court presided over by a single Judge, or a Judge of the Court to the Court in banc, without the special leave of the Judge or Court whose judgment or order is in question, unless," etc., but none of the exceptions embrace an appeal, from a judgment or order, as to costs only:—Held, that these two rules are independent of each other; that Rule 501 does not apply to an appeal as to costs; that by virtue of Rule 500, an appeal as to costs lies irrespective of any of the limitations contained in Rule 501, (1) without leave, where, by law, the costs are not—and (2) with leave, where, by law, the costs are—left to the discretion of the Court or Judge. Where, therefore, the grounds of appeal were that the Judge had ordered costs to be paid out of a fund, out of which he had no power to order them to be paid. Held, that leave to appeal was not necessary.

Re Demaurez Estate, 4 Terr. L.R. 281.

—Appeal to Privy Council—Opinion of Court rendered under R.S.M., c. 28, not a judgment—Amount in controversy.]—Held, following Union Colliery Co. v. Attorney-General of British Columbia (1897), 27 S.C.R. 637, that the opinion of the Court (reported 13 Man. R. p. 239), rendered under R.S.M., c. 28, upon a constitutional question submitted by an Order of the Lieutenant-Governor in Council, was not a judgment, decree, order or sentence within the meaning of the Imperial Order in Council of 26th November, 1892, relating to appeals from the Court of Queen's Bench for Manitoba, and that such Court has no jurisdiction to grant an application for leave to appeal to His Majesty in Council under said Order from such an opinion. Held, also, that, although it was shown that the enforcement of "The Liquor Act" would deprive the Province of a revenue far exceeding £300 per annum, and would prejudicially affect the very large investments of persons engaged in the liquor traffic, it could not be said that any questions respecting property or civil rights to the value of £300 were involved in the decision sought to be appealed from.

In re the Liquor Act, 13 Man. R. 323. (Leave to appeal was subsequently granted by the Privy Council and the judgment appealed from, 13 Man. R. 239, reversed.)

Attorney-General v. Manitoba License Holders, [1902] A.C. 73.

—Leave to appeal—Promissory note signed by married woman, separate as to property.]—1. A judgment dismissing an exception to the form, in which the defendant, a married woman, separate as to property, complained of being sued alone, can be corrected by the final judgment. 2. Semble that a married woman, separate as to property from her husband, can be sued alone on a promissory note signed by her. 3. When a pleading has been dismissed upon demurrer or exception to the form and there appears to be a reasonable doubt as to the correctness of the judgment, leave to appeal will generally be accorded, almost as a matter of course; but the contrary rule prevails when it is the demurrer or the exception itself which has been dismissed.

O'Gilvie v. Fraser, 3 Que. P.R. 546.

—Acquittal by magistrate—Application by prosecutor—Criminal Code s. 744.]—A motion by the prosecutor, under s. 744 of the Criminal Code (as amended by 63 and 64 Vict. c. 46), for leave to appeal from the decision of a police magistrate acquitting the defendant of perjury, and refusing to reserve for the opinion of the Court of Appeal the questions whether there was corroborative evidence of the prosecutor in any material particular, and whether the magistrate exercised a legal discretion under s. 791 of the Code in deciding to adjudicate summarily upon the case, and had jurisdiction to try the defendant, who was a client of the county crown attorney, in the absence of counsel for the Crown, was refused, under the circumstances and for the reasons stated in the judgments.

Rex v. Burns, 1 O.L.R. 336, 4 Can. Crim. Cas. 323 (C.A.).

—Leave to appeal—Grounds.]—Where a motion to quash a municipal by-law was refused by the Judge who heard it, and his order affirmed by a Divisional Court, an application for leave for a further appeal was dismissed:—Held, that under s. 77 (4) (e) of the Judicature Act, upon such an application for leave, it must appear that there is some reasonable ground for doubting the soundness of the judgment, and in addition thereto that special reasons exist for taking a case out of the general rule which forbids more than one appeal to the same party.

Re Reddock and City of Toronto, 19 Ont. Pr. 247.

—To Supreme Court of Canada—Special leave—60 and 61 Vict. c. 34, s. 1 (e).]—Special leave to appeal from a judgment of the Court of Appeal for Ontario under 60 and 61 Vict. c. 34, s. 1 (e) will not be granted where the questions involved are not of public importance and the judgment of the Court of Appeal appears to be well founded.

Royal Templars of Temperance v. Hargrove, 31 Can. S.C.R. 385.

—To Supreme Court of Canada—60 and 61 Vict. c. 34—Criminal case.]—The Act of

the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court (60 and 61 Vict. c. 34) applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code.

Rice v. The King, 32 Can. S.C.R. 480; 5 Can. Cr. Cas. 529.

—Leave—Status of judicial officer.]—Leave granted to appeal from the judgment of a Divisional Court, differing from that of a Judge in Chambers, and involving the status, jurisdiction, and authority of the drainage referee.

McClure v. Township of Brooke, 4 O.L.R. 102 (Osler, J.A.).

—Leave to appeal—Order striking out jury notice—Powers of Judge in Chambers.]—In an action of covenant upon two mortgages, the defence was that the defendant had been induced to execute them by false and fraudulent representations. The defendant filed and served a jury notice, which was struck out by a Judge in Chambers, whose order was affirmed by a Divisional Court. A motion by the defendant for leave to appeal to the Court of Appeal was refused:—Held, that the order sought to be appealed against involved no question of law or practice on which there had been conflicting decisions or opinions by the High Court, or by Judges thereof. R.S.O. 1897, c. 51, s. 77, sub-s. (4), cl. (c). The power of a Judge in Chambers to strike out a jury notice has never been doubted.

People's Building and Loan Association v. Stanley, 4 O.L.R. 90.

—Motion for leave to appeal to Court of Appeal—Costs of—High Court—Authority to issue execution.]—An application to a Judge of the Court of Appeal for leave to appeal from an order of a Divisional Court having been dismissed with costs, the same were taxed and a certificate issued, which, with the order of dismissal, was filed in the High Court, and a fi. fa. issued to levy the amount of such costs placed in the sheriff's hands:—Held, that the order directing payment of costs was properly made under ss. 77 and 119 of the O.J. Act; and that execution was properly issued out of the High Court under Rule 3, by analogy to the procedure under Rule 818.

The People's Building and Loan Association v. Stanley, 4 O.L.R. 247 (Meredith, J.). Affirmed by D.C. 4 O.L.R. 377.

—From County Courts—Appeal to Divisional Court—When authorized—R.S.O. 1897, c. 55, s. 51, sub-ss. 1, 2, 3 and 5.]—Where from a judgment pronounced by a junior Judge in a County Court case, tried before him without a jury, an appeal to set aside such judgment and to enter judgment for the defendants, or, in the alternative, a new trial, was made to the senior Judge, and on such appeal the judgment was set aside and judgment entered for the defendants dismissing the action, an appeal lies to the Divisional Court by the unsuccessful party to such appeal, and the fact that a new trial in the alternative was asked for is immaterial. The sub-ss. of s. 51 of the County Courts Act, R.S.O. 1897, c. 55, applicable are sub-ss. 1, 2 and 5, and not sub-s. 3.

Leishman v. Garland, 3 O.L.R. 241.

—Leave to appeal—Public Schools Act.]—Where an order for a mandamus to a township council to pass a by-law for the issue of debentures for the purchase of a schoo' site was refused by a Judge in Chambers and an appeal by the school board was allowed by a Divisional Court, and it appearing that an important question was raised as to the true meaning of a somewhat obscurely phrased section of the Public Schools Act, leave was granted to appeal to the Court of Appeal.

Re Cartwright, 4 O.L.R. 278.

—Leave to appeal—Art. 46 C.P.]—Even if a judgment granting to a foreign plaintiff an additional delay to file a proper power of attorney comes under any of the conditions stipulated in Art. 46 C.P., leave to appeal shall not be granted when it appears that the plaintiff has complied with part of the order of the Court below, by furnishing security for costs, and has also, one day only after the expiry of the delay, filed a power of attorney, which, however, was considered insufficient.

The Canadian Asbestos Co., Ltd., v. The Glasgow & Montreal Asbestos Co., Ltd., 5 Que. P.R. 65.

—Leave to appeal—Appeal to Court in banc from refusal of leave by trial Judge—Neglect to give necessary evidence.]—The Judicature Ordinance, R.O. 1888, c. 58. s. 435, provides that "no appeal shall lie from the judgment or order of the Court presided over by a single Judge or of a Judge of the Court to the Court in banc, without the special leave of the Judge or Court, whose judgment or order is in question, unless the title to real estate, or some interest therein is affected, or unless the matter in controversy on the appeal, (in matters of contract exceeds the sum of $500, and, in matters of torts,) exceeds the sum of $200, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary, or other duty or fee, or a like demand of a general or public nature affecting future rights:—Held, that, where a trial Judge had not granted leave to appeal in a case in which by virtue of this section, leave to appeal was necessary, the Court in banc has no more jurisdiction to entertain an appeal, or to give leave to

appeal, even, semble, had it appeared that the Judge had said that the applicant might apply to the Court in banc for leave. Semble, where a party fails in his case by reason of his neglecting to give necessary evidence, of which at the time of the trial he had knowledge, he should be allowed a new trial to permit him to supply the evidence, only under special circumstances.

Chalmers v. Fysh, 1 Terr. L.R. 434.

—Leave to appeal—Special circumstances.] —In an action which at the trial resolved itself into two branches, (1) The status of some of the parties, and (2) the testamentary capacity of the testator and the validity of the will propounded; the trial Judge dealt with the validity of the will only, and on an appeal, a Divisional Court dealt with the question of status only:—Held, upon an application for leave to appeal to the Court of Appeal that although the applicants had the judgments of two tribunals against them they had the opinion of but one Court in respect of either branch of the case, and in view of the value of the estate and the important consequences to them, sufficient special circumstances were shown to entitle them to leave to appeal.

Kidd v. Harris, 3 O.L.R. 277 (Moss, J.A.).

—Amount in controversy—Special leave.] —The plaintiff sued for $617.85, and defendants with their defence, while denying liability, brought into Court $367 as being sufficient to satisfy the plaintiff's claim; the trial Judge found the plaintiff entitled to $543.22, and applied the $367 in Court, leaving with an adjustment of interest, a balance due to the plaintiff of $182.43:—Held, that the amount in controversy exceeded $200, and the defendant was entitled to appeal without special leave.

McDougall v. McLean, 1 Terr. L.R. 436.

—To Supreme Court of Canada—60 & 61 Vict. c. 34—Quashing by-law—Appeal de plano—Special leave.]—The appeals to the Supreme Court from judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 Vict. c. 34, and no appeal lies as of right unless given by that Act. The Supreme Court will not entertain an application for special leave to appeal under the above Act after a similar application has been made to the Court of Appeal and leave has been refused.

Town of Aurora v. Village of Markham, 32 Can. S.C.R. 457.

—In forma pauperis.]—While no precise or definite rule can be laid down as to the proof to be adduced in support of applications for leave to proceed before the Court of King's Bench on an appeal in forma pauperis, the Court will be more exacting in a case, like the present, where the appellant, claiming a share of an estate, is appealing from a unanimous adverse judgment of the Court of Review and is, moreover, still capable of earning a livelihood, than it would be in an action for an alimentary allowance, or for damages by a person incapacitated for work by an accident, or where the judgment appealed from has been in favour of the party making the application.

Boucher v. Morrison, 11 Que. K.B. 129.

—Practice of Judicial Committee—Special leave—Revised Statutes of Canada, 1886, c. 135, s. 71.]—According to s. 71 of Revised Statutes of Canada, 1886, c. 135, there is no appeal from any judgment or order of the Supreme Court of Canada except by special leave of His Majesty in Council. Where a suitor, having his choice whether to appeal to the Supreme Court or to His Majesty in Council, elects the former remedy, it is not the practice to give him special leave except in a very strong case. (Prince v. Gagnon (1882), 2 App. Cas. 103, followed.)

Clergue v. Murray, [1903] A.C. 521.

—Appeal per saltum—Extension of time for appealing—Jurisdiction]—A Judge of the Court appealed from has no jurisdiction to extend the time for appealing per saltum to the Supreme Court of Canada.—After the expiration of sixty days from the signing, entry or pronouncing of judgment, leave to appeal per saltum to the Supreme Court of Canada cannot be granted.—Quaere, whether under the provisions of s. 6 of the Yukon Territory Act 62 & 63 Vict. c. 11, and of the Northwest Territory Act, R.S.C., c. 50, s. 42, thereby made applicable to the Territorial Court of Yukon Territory, three Judges of that Court are necessary to constitute a quorum for the hearing of appeals from judgments upon the trial of cases therein?

Barrett v. Syndicate Lyonnais du Klondyke, 33 Can. S.C.R. 677.

—Supreme Court of Canada—Leave to appeal—Interlocutory judgment.]—A judgment granting a motion ordering an opposant a fin de charge to give security that the real estate advertised for sale will be sold for a sufficient price to enable the hypothecary creditors to be paid in full, is an interlocutory judgment, and a Judge of the Court of King's Bench of Quebec cannot grant leave to appeal therefrom to the Supreme Court of Canada.

Desaulniers v. Payette, 5 Que. P.R. 364 (Hall, J.).

—Action for separation from bed and board—Inventory of common property—Leave to appeal—C.P. 46.]—In an action for separation from bed and board, a judg-

ment holding that the provision of the will of the defendant's father, which provides that the movable and immovable properties bequeathed may not in any manner be liable for the support and maintenance of his wife, does not provide for the exclusion of said properties from the community then on the death of the testator existing between the parties, and ordering the report to be referred back to the practitioner appointed by the Court to take an inventory of the property and assets of the community of property existing between the plaintiff and defendant, and ordering the said practitioner to include therein the properties and immovable effects belonging to the said estate, and revenues thereof derived from the movable property from the time of the testator's death to the time of the dissolution of the community of property, is an interlocutory judgment not falling under the condition imposed by paragraph 2 of article 46 C.P., and may be remedied by a final judgment.

Stewart v. Cairns, 5 Que. P.R. 235 (Hall, J.).

—Leave to appeal—Contempt of Court—Discretionary powers of Judges.]—Where the trial Judge in the Court below has exercised his discretionary powers in a matter of procedure, by ordering that a party who was in contempt of Court for refusing to produce effects unlawfully removed by her, be imprisoned until the effects should be produced, the Court of King's Bench, or a Judge thereof, will not be disposed to allow an appeal from such exercise of discretion, and particularly where the course adopted by the Court below was apparently the only practical remedy available to enforce obedience to its orders.

St. Pierre v. Belisle, 12 Que. K.B. 279 (Hall, J.).

—Special leave—60 & 61 Vict. (Can.) c. 34 (e)—Error in judgment—Concurrent jurisdiction.]—Special leave to appeal from a judgment of the Court of Appeal for Ontario, under sub-s. (e) of 60 & 61 Vict. c. 34, will not be granted on the ground merely that there is error in such judgment. Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused. The Ontario Courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney-General. S. having been refused such fiat applied for a writ of mandamus which the Division Court granted and its judgment was affirmed by the Court of Appeal:—Held, that the mandamus having been granted the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal though it might have had the writ been refused. The question raised by the proposed appeal is, if not one of practice, a question of the control of Provincial Courts over their own records and officers with which the Supreme Court should not interfere.

Attorney-General v. Scully, 33 Can. S.C. R., 16, 6 Can. Cr. Cas. 381.

—Special leave—Judge of Court appealed from.]—A Judge of the Supreme Court of British Columbia may grant special leave for an appeal from that Court to the Supreme Court of Canada although he did not sit with the full Court on the rendering of judgment appealed from.

Oppenheimer v. Brackman & Ker Milling Co., 32 Can. S.C.R. 699.

—Leave to Appeal—Appeal to Supreme Court of Canada — Jurisdiction.] — The Court of King's Bench, or a Judge thereof, has no jurisdiction to grant a leave to appeal to the Supreme Court of Canada, from a judgment of the Court of King's Bench, confirming the interlocutory judgment of the Superior Court.

Desaulniers v. Payette, 13 Que. K.B. 182 (Hall, J.).

—Appeal to the Supreme Court of Canada from the Court of Review (Que.)—Action taken in a rural district.]—When judgment is rendered by the Court of Review confirming a judgment of the Superior Court, sitting in a rural district, the party who wishes to appeal from said judgment to the Supreme Court of Canada and furnish security for costs, must apply for leave to do so to the Judge of the district where the action was taken.

Daigle v. Quebec Southern Railway, 6 Que. P.R. 403 (Fortin, J.).

—Contempt of Court—Judgment condemning to imprisonment—Leave to appeal.]—Leave to appeal will not be granted from a judgment condemning a party to imprisonment until he produces certain effects.

St. Pierre v. Bélisle, 6 Que. P.R. 418 (Hall, J.).

—Action for separation—Judgment declaring reconciliation proved—Reservation.]—See HUSBAND AND WIFE.

Christin v. Lafontaine, 6 Que. P.R. 297.

—To Privy Council—General public importance—Repeal statute.]—Special leave having been granted by the Judicial Committee to appeal from a judgment of the Supreme Court of Canada on a petition stating that the construction of the statute in question was a matter of general public importance, without stating that it had been repealed:—Held, that as the omission was immaterial and bona fide, the successful appellant should not be deprived of his costs.

McDonald v. Belcher, [1904] A.C. 429.

—Privy Council—Special leave to appeal—Decree of Supreme Court of Canada.]—Special leave to appeal from a decree of the Supreme Court of Canada will not be granted to a petitioner who has elected to appeal to that Court and not to His Majesty direct, unless a question of law is raised of sufficient importance to justify it. Ex parte Clergue (1903), A.C. 521, followed.

C.P.R. v. Blain [1904] A.C. 453.

—To Privy Council—Leave.]—Petition for special leave to appeal from the Supreme Court of Canada dismissed where the petitioners were appellants to that Court and no important question of law was raised.

Ewing v. Dominion Bank, [1904] A.C. 806.

—Infringement of patent of invention—Order postponing hearing of demurrer—Judgment—Leave to appeal.]—Unless an order upon a demurrer be a decision upon the issues raised therein, leave to appeal to the Supreme Court of Canada cannot be granted under the provisions of the fifty-first and fifty-second sections of the Exchequer Court Act, as amended by 2 Edw. VII. c. 8.

The Toronto Type Foundry Company v. Mergenthaler Linotype Company, 36 Can. S.C.R. 593.

—Appeal per saltum—Winding-up Act.]—Leave to appeal per saltum, under sec. 26 of the Supreme Court Act, cannot be granted in a case under the Dominion Winding-up Act. An application under sec. 76 of the Winding-up Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick was refused where the Judge had made no formal order on the petition for a winding-up order and the proceedings before the full Court were in the nature of a reference rather than of an appeal from his decision.

Re Cushing Sulphite Fibre Co., 36 Can. S.C.R. 494.

—Motion for leave to appeal to Privy Council.]—A petition for leave to appeal to the Privy Council can not be granted by a Judge in Chambers unless sufficient security is offered at the same time.

Palliser v. Consumers Cordage Company, 7 Que. P.R. 299 (Hall, J.).

—Special leave—Judge in Chambers—Appeal to full Court—Jurisdiction.]—No appeal lies to the Supreme Court of Canada from an order of a Judge of that Court in Chambers granting or refusing leave to appeal from a decision of the Board of Railway Commissioners under sec. 44 (3) of the Railway Act, 1903.

Williams v. Grand Trunk Railway, 36 Can. S.C.R. 321. [The Privy Council refused leave to appeal 2 August, 1905.]

—Interlocutory judgment—Delay.]—The party who has obtained leave to appeal from an interlocutory judgment of the Superior Court is not entitled to the delay of six months given by Art. 1209 C.P.Q., for an appeal to the Court of King's Bench, and if he does not proceed with his appeal within a reasonable delay from the time such leave was granted he will be held to have forfeited his right thereto. Hoffnung v. Porter, 7 L.C. Jur. 301, followed.

Hasburger v. Gutman, Q.R. 13 K.B. 360.

—Cases tried with a jury—Leave to appeal direct to the Court of Appeal.]—Section 76a of the Judicature Act, as amended by 4 Edw. VII. c. 11 (O.), which relates to appeals to the Court of Appeal in cases which may be appealed to the Supreme Court of Canada, from a judgment order or decision of a Judge in Court, at the trial or otherwise, applies to a judgment at or following upon the trial where the issues in fact are tried by a jury.

Randall v. Ottawa Electric Co., 8 O.L.R. (Garrow, J.A.).

—Interlocutory judgment — Art. 48 C.P.Q.]—Leave to appeal from an interlocutory judgment, ordering a party to furnish, in support of his declaration, certain particulars and documents, will not be granted.

Village of Dehorimier v. Sisters of Jesus and Mary, 7 Que. P.R. 64 (K.B.).

—Appeal from Divisional Court—Trivial amount at stake.]—Held, on application by the plaintiff for leave to appeal to the Court of Appeal from the judgment of a Divisional Court under s. 76 (1) (g) of 4 Edw. VII. c. 11—whereby such leave may be given (in cases other than those in which under that section the appeal lies as of right) where there are special reasons for treating the case as exceptional and allowing a further appeal—that the amount at stake being very small ($75), the fact that the decision on the facts or the law might be thought controvertible was not by itself special reason for treating the case as exceptional and allowing a further appeal.

Clipshaw v. Town of Orillia, 9 O.R.L. 713 (Osler, J.A.).

—Court of Appeal—Leave to appeal from judgment at trial.]—It is to the interest of all parties that the series of possible appeals should be reduced by one in case of substantial importance. Leave to appeal direct from the judgment at the trial to the Court of Appeal granted, in the circumstances of this case.

Molsons Bank v. Stearns, 10 O.L.R. 91 (Osler, J.A.).

—Public interest.]—Special leave to appeal from the judgment of the Court of Appeal for Ontario (60 & 61 Vict. c. 34 (sec. 1 (D)), may be granted in cases involving matters of public interest, important questions of law, construction of imperial or Dominion statutes, a conflict between Dominion and Provincial authority, or questions of law applicable to the whole Dominion. If a case is of great public interest and raises important questions of law leave will not be granted if the judgment complained of is plainly right.

Lake Erie and Detroit River Railway Company v. Marsh, 35 Can. S.C.R. 197.

—Order of Board of Railway Commissioners—Use of public streets—Removal of tracks.]—Where the Judge entertained doubt as to the jurisdiction of the Board of Railway Commissioners for Canada to make the order complained of and the questions raised were of public importance, special leave for an appeal was granted, on terms, under the provisions of s. 44 (3) of "The Railway Act, 1903."

Montreal Street Railway Company v. Montreal Terminal Railway Company, 35 Can. S.C.R. 478 (Sedgewick, J.).

—Order of Railway Commissioners.]—Montreal Street Railway v. Montreal Terminal Railway (1905), C.A. Dig. 8, also reported 4 Can. Ry. Cas. 369.

—Leave to appeal from order of Divisional Court—Special grounds.]—Leave to appeal from the order of a Divisional Court was refused by the Court of Appeal, the amount in question being about $425 only, and the matter in dispute, viz., whether the plaintiff was liable to assessment and taxation in respect of income derived from dividends upon the stock of the Ottawa Electric Railway Company, not being one affecting the rights of the whole body of shareholders.

Goodwin v. City of Ottawa, 12 O.L.R. 603 (C.A.).

—Judge in Chambers—Jurisdiction—Leave to appeal to Privy Council.]—A Judge of the Court of King's Bench in Chambers has no jurisdiction to entertain an application for leave to appeal to the Privy Council from a judgment rendered by the Court

Palliser v. Consumers' Cordage Company, 14 Que. K.B. 338.

—Appeal to Privy Council—Leave—Amount in controversy—Privy Council Rules.]—In determining the question of the value of the amount involved, upon which the right to appeal to the Privy Council depends, the Supreme Court of British Columbia, on a motion for leave to appeal, will look at the judgment as it affects the parties, and where it appeared from affidavits in support of the motion that defendants in obeying an injunction would be put to an expense of over £300, they were granted leave to appeal.

Centre Star Mining Company v. Rossland-Kootenay Mining Company (No. 2), 11 B.C.R. 509.

—Interlocutory judgment—Inscription in law.]—When an interlocutory judgment, maintaining an inscription in law, has not the effect of excluding evidence upon any matter pertinently pleaded, leave to appeal will not be granted, as this judgment can, in any event, be revised by the Superior Court even before the final judgment in the cause.

Girouard v. Girouard, 8 Que. P.R. 419.

—Appeal to Supreme Court—Action for declaration and injunction.]—The Act 60 & 61 Vict. c. 34 (D.), relating to appeals from the Court of Appeal for Ontario does not authorize an appeal without leave to the Supreme Court of Canada in an action claiming only a declaration that a municipal by-law is illegal and an injunction to restrain its enforcement. A by-law providing for special water rate from certain industries does not bring in question "the taking of an annual or other rent, customary or other duty or fee" under s. 1 (d) of the Act (R.S. 1906, c. 149, s. 48 (d)).

City of Hamilton v. Hamilton Distillery Company, 38 Can. S.C.R. 239.

—Special grounds—Dissenting judgments.]—Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, 13 O.L.R. 569, was refused, the majority of the Court holding that it was not necessary to consider upon an application for leave, the question whether an appeal would lie without leave, and being of opinion that no special reasons were shown for granting leave, the circumstance that out of the nine Judges of the Provincial Courts who heard the case two dissented from the opinion of the majority, not being a special ground.

Lovell v. Lovell, 13 O.L.R. 587 (C.A.).

—Leave to appeal to Court of Appeal—Conflicting decisions.]—Leave to appeal to the Court of Appeal from the judgment of a Divisional Court granted in a case in which the scale of costs taxable was in question, the point being one of considerable practical importance, and there being differences of opinion in the cases already decided.

Stephens v. Toronto Railway Co., 13 O.L.R. 107.

—Leave to appeal direct from judgment at trial.]—At the time of the commencement of an action to declare void two mortgages

given to secure the same debt, the amount of the debt exceeded $1,000. Upon an application by the plaintiff for leave to appeal direct to the Court of Appeal from the judgment pronounced at the trial, it was contended by the defendant that pending the litigation moneys had been realized by him which reduced the claim below $1,000, but this was disputed by the plaintiff:—Held, that the proper conclusion was that the matter in controversy in the appeal exceeded the sum or value of $1,000 exclusive of costs, and therefore there was jurisdiction under 4 Edw. VII. c. 11, s. 76a(O.), to make the order asked for.

Wade v. Elliott, 14 O.L.R. 637.

—Application for—Judgment interlocutory or final.]—When there is serious question whether a judgment is final or interlocutory, an application asking that leave be granted to appeal to the Court of Review will be allowed, because said application is a fair measure of precaution.

Teolo v. Cordasco, 9 Que. P.R. 416.

—Privy Council—Leave to appeal in criminal matter.]—Quære, whether the Judicial Committee may not grant special leave to appeal from a Canadian Court in a criminal matter notwithstanding s. 1025 of the Revised Cr. Code 1906 (s. 751 of the Code of 1892), but such leave will not be granted unless the judgment below is attended with sufficient doubt to justify the granting of special leave.

The King v. Townsend (No. 4); Townsend v. Cox, 12 Can. Cr. Cas. 509.

—Leave to appeal from Divisional Court.]—Leave to appeal to the Court of Appeal from the order of a Divisional Court of the High Court affirming an order of a Judge directing judgment to be entered for the plaintiff on his claim with costs of the action and for the defendant on his counterclaim with costs thereof, was granted, under s. 76 (l) (e) and (g) of the Ontario Judicature Act, where the Divisional Court had given leave to appeal from the order, so far as it was open to that Court to do so, under s. 72 of the same Act, and the leave was sought in order to settle the question as to the proper form of judgment and as to costs where a defendant proves a set-off to an amount exceeding the plaintiff's claim, having pleaded it in form as a counterclaim.

Gates v. Seagram, 17 O.L.R. 493.

—Supreme Court of Canada—Leave to appeal—Extension of time.]—The Court of Appeal has jurisdiction, under s. 48 (e) of the Supreme Court Act, R.S.C. (1906) c. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under s. 71, to extend the time for appealing, even after the sixty days allowed by s. 69 have expired. The Court refused leave to appeal from the judgment in 16 O.L.R. 386, after the time for appeal ing had long expired, notwithstanding that an appeal to the Supreme Court of Canada, launched without leave, had been argued in that Court upon the merits before being quashed for want or jurisdiction.

See Grimsby Park Co. v. Irving (1908), 41 S.C.R. 35.

Irving v. Grimsby Park Co., 18 O.L.R. 114.

—Supreme Court of Canada—Leave to appeal—Extension of time.]—The Court of Appeal has jurisdiction, under s. 48 (e) of the Supreme Court Act, R.S.C., 1906, c. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under s. 71, to extend the time for appealing, even after the sixty days allowed by s. 69 have expired. The Court refused leave to appeal from the judgment in 17 O.L.R. 530, deeming that there were no special circumstances which would take this case out of the general rule that litigation involving no more than the sum of $1,000 should cease with the rendering of judgment by the Court of Appeal. The mere fact of a difference of opinion among the members of the Court is not, in itself, a sufficient reason for treating a case as exceptional.

Milligan v. Toronto R.W. Co., 18 O.L.R. 109.

—Delay—Leave to appeal.]—An application for leave to appeal will be granted if made on the 31st day after delivery of judgment if the 30th day was a Sunday or holiday. Leave may be granted for appeal from a judgment dismissing a declinatory exception which judgment partially brings the litigation to an end and orders something to be done, namely the hearing of the cause, which the final judgment cannot remedy.

Porter v. Canadian Rubber Co. of Mont real, 10 Que. P.R. 197.

III. EXTENSION OF TIME.

—Refusal to extend time for appeal—No leave to appeal therefrom—Final order.]—Defendant, having given notice of an appeal from the judgment pronounced upon the trial of this action, made default in filing the appeal books within the time limited. An application was, therefore, made to a Judge for an order extending the time for filing the appeal books, which was refused. From this order the defendant appealed. On the appeal it was objected that the appeal did not lie, the order appealed from being an interlocutory order, from which no appeal lay without leave, which had not been obtained. The action involved an interest in real estate:—Held,

that the fact that an interest in real estate was involved in the action did not give a right of appeal from an order in such action without leave, unless such title or interest was in question in the order appealed from. 2. That the order in question, while it might, in effect, finally dispose of the action as far as the defendants were concerned, was not thereby a final order, but was interlocutory, a final order being one made in an application which, if decided in favour of either party, finally disposes of the action, while this application, if the appellant had succeeded, would have allowed them to proceed with the action.

Newkirk v. Stees, 3 Sask. R. 208.

—Special leave—Time limit—Extension.]—After the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the time will not enable it to do so.

Goodison Thresher Co. v. Township of McNab, 42 Can. S.C.R. 694.

—Death of respondent—Time for appeal—Solicitor's mistake.]—Upon the death of one of several defendants to a suit in the Supreme Court in Equity the plaintiff may continue the suit by applying for administration ad litem or by application to the Equity Court under s. 116 or s. 119 of the Supreme Court in Equity Act, C.S. 1903, c. 112, and therefore where one of several defendants died after judgment of the Supreme Court en banc confirming a decree of the Equity Court dismissing the plaintiff's bill with costs, and the plaintiff delayed his appeal to the Supreme Court of Canada for eight months thereafter on the ground that no administration had been taken out:—Held, this was no excuse for the delay and the judgment of McLeod, J., refusing to allow the appeal under s. 71 of the Supreme Court Act, R.S.C. 1906, c. 139, was confirmed. Held also, that the mistake of the solicitor as to the procedure on defendant's death, even though supported by opinion of counsel, was not a sufficient excuse. Per McLeod, J.:—The plaintiff (appellant) could have filed a suggestion and proceeded under s. 85 of the Supreme Court Act, R.S.C. 1906, c. 139.

Harris v. Sumner, 39 N.B.R. 456.

—Appeal to Privy Council—Application for security—Record returned to the Superior Court.]—When leave to appeal to the Privy Council has been granted, but security has not been furnished within the legal delay, and no application has been made within the delay to have the same extended, a Judge of the Court of King's Bench can no longer extend the delay for putting in such security, the record having been returned to the Superior Court.

Asbestos & Abestic Company v. William Selater Company, 3 Que. P.R. 491.

—Extension of time—Application to opposite solicitor — Unreasonable refusal — Costs.]—Rules 799 and 801, prescribing the times for filing and serving notice of appeal and serving the appeal case, enable the appellant, whenever necessary, to obtain further time from the Court or a Judge; and that being so, the solicitor requiring further time should, in general, before applying to the Court, apply to the solicitor for the respondent, explaining the occasion for it, and the latter ought, in every proper case, to grant the request; any other course of conduct only occasions unnecessary and useless costs. And where application for an extension was made to the solicitor, and, in the opinion of the Judge who heard a motion to extend the time, unreasonably refused, an order was made extending the time and staying execution, without costs to the respondent.

Bodine v. Howe, 1 O.L.R. 208.

—Extension of time—Application to opposite solicitor—Unreasonable terms—Costs.]—Where the respondent's solicitor refused, except upon more stringent terms than the Court would impose, to extend the time for delivery by the appellant of the draft appeal case and reasons of appeal, and the appellant, declining to accept the terms, moved before a Judge of the Court of Appeal and obtained an order extending the time, the costs of such motion were made costs to the appellant in the appeal.

McGuire v. Corry, 1 O.L.R. 590.

—Yukon cases—Extension of time for—Security for costs—Appeal books.]—The Supreme Court of British Columbia may extend on terms the time for appealing to the Full Court from the Territorial Court of the Yukon. The respondent is entitled to a copy of the appeal book.

Banks v. Woodworth, 7 B.C.R. 385.

—Division Court appeal—Certified copy of proceedings—Filing—Notice of appeal—Extension of time—Excuse for delay.]—An order refusing a new trial of a Division Court plaint was made on the 25th August; the clerk certified a copy of the proceedings on the 29th August, and it was filed in the High Court on the 4th September; notice of appeal was not given for the October sittings of the High Court (Divisional Court); but on the 12th October, 1900, the appellant obtained an order in the Division Court extending the time for filing the certified copy of the proceedings, and on the 17th October obtained and filed another copy, and gave notice to the opposite party of having done so and of the appeal for the November sittings:—Held, that the order

extending the time was inoperative because the certified copy had already been filed; and, the delay in giving notice of appeal not having been accounted for, the appeal must be quashed.

Heise v. Shanks, 1 O.L.R. 48.

—Extending time for perfecting appeal—How application should be made.]—An appeal was not entered in time for the sittings of the Full Court for which the notice of appeal had been given, and on an application to the Full Court to extend the time for leave to appeal for next sitting, it was:—Held, that when the Full Court is sitting such an application is properly made to it.

Mecredy v. Quann, 9 B.C.R. 117.

—Extension of time—Jurisdiction—Security for costs—Application for—No waiver of right to object that appeal not brought in time.]—The Court has no jurisdiction to extend the time limited by s. 76 of the Supreme Court Act, as amended by B.C. Stat. 1899, c. 20, for giving notice of appeal. A respondent by applying for security for the costs of appeal does not waive his right to object that the appeal was not brought in time.

Sung v. Lung, 8 B.C.R. 423.

—Appeal to Supreme Court after lapse of sixty days—Special circumstances.]—The appellant allowed the delay of 60 days, from the date of judgment rendered by the Court of King's Bench, to elapse without applying for leave to appeal to the Supreme Court. Subsequently, it obtained leave to appeal to the Privy Council. It now moved for leave to appeal to the Supreme Court, and offered to desist from its appeal to the Privy Council, if the present motion was granted:—Held, that the "special circumstances" referred to in s. 42 of the Supreme and Exchequer Courts Act, are circumstances which would make it unreasonable to impute the failure to act within the prescribed time to the negligence of the party seeking the appeal, e.g., illness, absence, ignorance of the rendering of the judgment, inability owing to poverty to find sureties within the prescribed delay, but not circumstances which did not prevent the application from being made within the proper delay.

City of Montreal v. Montreal Street Railway Co., 11 Que. K.B. 325, 5 Que. P.R. 446..

—Extension of time—Intention to appeal—Suspension of proceedings.]—Upon an application to extend the time for appealing from the Court of Appeal to the Supreme Court of Canada the applicant must show a bona fide intention to appeal, held while the right to appeal existed and a suspension of further proceedings by reason of some special circumstances. No such case having been made out here, and the Court not being impressed with the merits of the defence, leave to extend the time was refused.

In re Manchester Economic Building Society (1883), 24 Ch. D. 489, followed.

Smith v. Hunt, 5 O.L.R. 97 (Moss, (C.J.O.).

—Extension of time—Failure to give security in time.]—After judgment was given declaring the plaintiff entitled to the value of certain bonds, which the defendant had failed to deliver over, such value to be determined by a reference to the local Master, and after a long interval without anything having been done under the reference, it was transferred to the Master in Ordinary, and after the finding of the Master, and appeals and cross appeals therefrom, the plaintiff for the first time claimed interest on such value from the date of the breach, and moved to have the judgment amended so as to include such interest, which was disallowed, whereupon the plaintiff gave notice of appeal to the Court of Appeal, but did not furnish the necessary security until after the time for appealing had elapsed, the Court, under the circumstances, refused to extend the time for the allowance of the security, and the setting down of the appeal.

Ray v. Port Arthur, 7 O.L.R. 737 (Osler, J.A.).

—Appeal to the Supreme Court—Security Bond—Insufficiency—Extending time.]—If a security bond given to guarantee the costs of an appeal to the Supreme Court is found insufficient by the Registrar of that Court and a delay is granted by him to furnish another bond, a Judge of the Court of King's Bench can enlarge the delays for perfecting the appeal.

Armstrong v. Beauchemin, 6 Que. P.R. 128 (Hall, J.).

—Notice of appeal—Extending time.]—Under the present practice relief will be granted against a slip in practice, such as in this instance the failure to give notice of appeal in time, whenever the justice of the case requires it, and no injury to the opposite party which cannot be compensated for by costs or otherwise has resulted. In considering what justice requires in such a case, regard is to be had to the bona fides of the applicant; the delay, whether great or trifling, as affecting the question of prejudice to the opposite party; and, especially where the application is made after default, whether the appeal appears to be groundless or frivolous. Where, therefore, a bona fide intention to appeal had been made out, the points raised were open to argument, and the delay was very short, no sittings of the Court having been lost, leave to serve notice of appeal was given.

Ross v. Robertson, 7 O.L.R. 464 (Osler, J.A.).

Extension of time for appeal — Creditor applying to file claim long after date of order of confirmation.]—A scheme of arrangement between a railway company and its creditors had been confirmed by order of Court after the company had complied with all the requirements of the statute and the rules of Court made thereunder, and after notice given to all parties interested. Furthermore, as the confirmation had been opposed, enrolment of the scheme and the order of confirmation was not made until the expiry of thirty days after the date of the order confirming the scheme, and after notice of the said order had been published in compliance with Rule 60 of the Rules and Orders regulating the practice of the Court. Following upon that new proceedings were taken, and an order obtained, on behalf of the company, for the sale of the railway, and it was sold thereunder. More than fifteen months after the scheme was confirmed, by a judgment of the Court, although the fact of such confirmation had become known to him some four months before he applied, a creditor of the railway applied for an extension of time for appealing from the judgment confirming the scheme. The Registrar in Chambers, in view of the facts above stated, refused the creditor's application:—Held, on appeal from the decision of the Registrar, that the application was properly refused.

Re Atlantic and Lake Superior Railway and North Eastern Banking Co., 13 Can. Exch. R. 127.

— Decision of Gold Commissioner — Appeal from, to territorial Court—Deposit of appeal books—Extension of time.]—

Grant v. Treadgold, 2 W.L.R. 484 (Y.T.).

—Extension of time for—Explanation of delay—Special circumstances.]—

Moore v. Shackleford, 8 W.L.R. 1 (Y.T.).

—Extension of time—Special circumstances —Absence of solicitor for appellant—Member of Parliament.]—

Stone v. Goldstein, 11 W.L.R. 386, 539 (Y.T.).

—Notice of appeal—Extending time for—Discretion.]—

Alaska Mercantile Co. v. Ballantine, 1 W.L.R. 504 (Y.T.).

—Extension of time—Mistake of solicitor—Special circumstances.]—

Munroe v. Morrison, 4 W.L.R. 31 (Y.T.).

—Time for appealing—Notice of appeal—Vacation.]—

Thompson v. Sparling, 6 W.L.R. 143 (Y.T.).

—Motion to extend time for allowance of security—Jurisdiction of single Judge.]— A judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security on a pending appeal to the Supreme Court in a case where no such appeal can be brought without leave. But the full Court of Appeal or the Supreme Court can grant leave or allow the appeal under s. 42 of the Supreme Court Act, R.S.C. 1886, c. 135, notwithstanding the expiration of the time limited by s. 40 of that Act, as amended by 50-51 Vict. c. 16, s. 57 (D.), and Schedule A.

Tabb v. Grand Trunk Railway Company, 8 O.L.R. 281 (Osler, J.A.).

—Extension of time—Ex parte order unreversed.]—An order extending the time for appeal, made ex parte, is not a nullity; and, if not set aside, the Court will hear an appeal taken under it.

Re Welch, 36 N.B.R. 628.

—Motion against verdict—Notice of—Enlargement of time.]—An application for enlargement of the time for giving notice and made returnable within ten days of motion against a verdict, etc., under Con. Stat. 1903, c. 111, s. 372, on the ground that the transcript of the stenographic report of the trial had not been filed, should be supported by an affidavit showing that the transcript is necessary to enable counsel to prepare the notice.

McCutcheon v. Darrah, 37 N.B.R. 1.

—From ruling of taxing officer—Costs of interlocutory examinations—Time—Extension.]—Semble, that no appeal lies from the decision of the senior taxing officer at Toronto, under Con. Rule 1136, as amended by Con. Rule 1267, as to the allowance of the costs of interlocutory examinations:—Held, that if an appeal lies, it must be either under Con. Rule 774 or 767—probably the latter—and, under either, notice of appeal must be given within four days and made returnable within ten days after the decision complained of; and notice in this case not having been given in time, an extension should not be granted, having regard to the character of the decision complained of—a ruling against allowing the costs of examining more than one of the plaintiffs for discovery.

Mann v. Crittenden, 11 O.L.R 46 (Anglin, J.).

—N.S. Collection Act—Appeal from examiner to County Court—Limitation of time—Prohibition.]—Under the provisions of the Collection Act, R.S. 1900, c. 182, s. 32, "notice of appeal must be served upon the solicitor of the respondent or upon the respondent personally within ten days of the date of the decision appealed from." No notice was given within the ten days and the Judge of the County Court subsequently made an order ex parte extending the time. The appellant failed to prosecute his ap-

peal within the period of thirty days prescribed by s. 33 as amended by Acts of 1901, c. 15, and a writ of prohibition was applied for:—Held, that the Judge had power on proper application to extend the time for giving notice of appeal, but that such application should be made within the period of ten days prescribed by s. 31. Also, that it was not within the power of the Judge to adjourn the matter to a date beyond the thirty days and then make an adjudication, and that the writ of prohibition should go.

McLure v. Parker, 39 N.S.R. 413.

—Order extending time—Jurisdiction.]—The Court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a Judge of the Court appealed from after the expiration of that time was ultra vires and could not be permitted under s. 42 of the Supreme and Exchequer Courts Act, R.S.C. c. 135.

Temiscouata R.W. Co. v. Clair, 38 S.C.R. 230, 6 Can. Ry. Cas. 367.

—To Supreme Court of Canada—Extending time for appealing—Leave to appeal.]—Time for allowing appeal extended, and the security approved of and allowed, under s. 71 of the Supreme Court Act, R.S.C. 1906, c. 139, although this might have been done by a single Judge of the Court of Appeal, since the failure to come within the proper time, under sec. 69, arose from the impression that leave to appeal was necessary, and no Court was sitting during that time to which the application for leave could have been made. Also leave to appeal granted, if necessary, valeat quantum, under s. 48 (e) of the Supreme Court Act.

Hamilton Steamboat Co. v. MacKay, 15 O.L.R. 184.

—Appeal to Divisional Court—Division Court appeal—Filing certified copy of proceedings—Extension of time.]—A Divisional Court of the High Court, which is the Court for hearing Division Court appeals, has no power to extend the time limited, by s. 158 of the Division Courts Act for filing the certified copy of the proceedings in the Division Court, and has no power, under sub-s. 2 of s. 158 (as added by 4 Edw. VII. c. 12, s. 2), or otherwise, to extend the time for setting down the appeal until it is seized of the appeal by the filing of the certified copy, the time for filing which may be extended by the Judge in the Division Court.

Whalen v. Wattie, 16 O.L.R. 249 (D.C.).

—Extending time for giving notice—Delay in moving.]—Where the intending appellant had allowed three months to elapse from the expiry of the time for giving notice of appeal before moving for an extension of time, and no important principle of law was involved, and the amount of the judgment was small:—Held, that the trial Judge had properly exercised his discretion in refusing to extend the time for giving notice of appeal.

Hill v. Barwis, 1 Alta. 514.

—Power to extend time.]—S. 151 (3) of the Mining Act of Ontario, 1908, provides that unless an appeal (to a Divisional Court of the High Court) is set down and a certificate of such setting down lodged within a specified time, "the appeal shall be deemed to be abandoned:—Held, that "deemed" means nothing less than "adjudged" or "conclusively considered" for the purposes of the legislation. And where the time for lodging a certificate had expired and no certificate had been lodged when a motion to quash an appeal which had been set down came on for hearing, the appeal was quashed, the Court having no power to extend the time. Reekie v. McNeil (1899), 31 O.R. 444, followed.

Re Rogers and McFarland, 19 O.L.R. 622.

—Appeal to Privy Council—Stay of execution—Security.]—Where after judgment on appeal to the Supreme Court of Canada the losing party proposes to appeal to the Judicial Committee of the Privy Council the Court will order proceedings on such judgment in the Court of original jurisdiction to be stayed on satisfactory security being given for the debt interest and costs.

Union Investment Co. v. Wells, 41 Can. S.C.R. 244.

IV. INSCRIPTION AND NOTICE.

—Service.]—The inscription on appeal cannot be served on the adverse party before it has been filed in the Superior Court; if it is the inscription will be set aside on motion therefor.

Gagnon v. Bourgouin, 11 Que. P.R. 123 (K.B.).

—Service.]—The costs of a motion to set aside the inscription not previously filed will be allowed when the appellant has since properly filed it; all proceedings on the appeal taken before it was filed are illegal and void.

Gross v. Racicot, 11 Que. P.R. 124 (K.B.).

—Appeal bond—Judgment reversed by King's Bench, but restored by Supreme Court.]—The security in appeal is not discharged until the matter becomes finally settled by the Court of last resort. Lowrey v. Routh, M.L.R. 3 Q.B. 364, followed.

Bruneau v. Généreux, 11 Que. P.R. 277.

Application to review judgment—Time—Delay in obtaining copy of proceedings.]

Rex v. Wilson; Ex parte Burns, 2 E.L.R. 442 (N.B.).

—From summary conviction — Provincial law.]

See SUMMARY CONVICTION.

—Inscription in review—Joinder of proceedings—Deposit.]—When the parties have, by consent, proceeded to try the principal action, the action on warranty and the intervention as if there had been only one cause, and there has been a common enquête and one judgment rendered, one inscription in review and a single deposit are sufficient.

Anderson v. Smith, 11 Que. P.R. 416.

—Not perfected—Motion to dismiss.]—Plaintiffs having given notice of appeal to the Court en banc, neglected to perfect the appeal within the time limited, and the defendant moved to dismiss. It was objected on the authority of Griffin v. Allen, 11 Ch.D. 913, that no costs of the motion should be allowed, as no demand had been made for costs of the appeal:—Held, that Griffin v. Allen, supra, did not lay down the established practice in these matters, but merely indicated the course the Court would pursue in such cases, and no such practice having been established in this Court, the application should be allowed with costs, but the rule in Griffin v. Allen was a very proper one, and in the future the Court would not, in the absence of good cause, allow costs of an application to dismiss for want of prosecution of an appeal, unless the applicant has made a previous demand for costs of the appeal, which has not been complied with.

Wessell v. Tudge, 2 Sask. R. 231.

—Surrogate Court—Amendment of notice of appeal.]—Appellants, being dissatisfied with an order of the Surrogate Judge, gave notice of appeal therefrom "to a Judge of the Supreme Court of Saskatchewan," and of intention "to move to the presiding Judge in Chambers on." This notice was given on the last day for appealing. On the hearing of appeal it was objected that the appeal was not taken to the proper tribunal, under the Surrogate Courts Act, and on this objection being made an application was made to amend the notice:—Held, that the appeal given by the Surrogate Courts Act is to a Judge of the Supreme Court sitting in Court, and as rules have been promulgated fixing the sittings of Court for each judicial district, the appeal is to a Judge sitting in Court at such appointed times, and as the notice here evidently contemplated the Judge in Chambers as the tribunal to which the appeal was to be taken it was irregular, and no action could be taken upon it. 2. That inasmuch as the time for appeal had expired and the right of appeal was gone, no amendment could be made in the notice of appeal. 3. That in any event the subject matter in question did not exceed $200, and there was therefore no right of appeal in any case.

Independent Order of Foresters v. Mackenzie, 3 Sask. R 13, 13 W.L.R. 409.

—Information by agent of a society—Notice of appeal in name of the society—Service of notice on justices for respondent.]—1. Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no locus standi to appeal from the justice's order dismissing the charge. 2. The notice of appeal must in such cases be taken in the name of the agent personally, otherwise it may be quashed. 3. Where a notice of appeal under the summary convictions clauses is served on the justice who tried the case, instead of on the respondent, it must show on its face that it is so served on the justice for the respondent.

Canadian Society v. Lauzon, 4 Can. Crim. Cas. 354 (Bélanger, J.).

—Appeal from summary conviction—Notice—Sufficiency thereof.]—A notice of appeal from a summary conviction neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient though it appears that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor.

Hostetter v. Thomas, 4 Terr. L.R. 224.

—Inscription in review—Return of notice of inscription.]—The fact that notice of inscription in review was served on the opposite party within the eight days allowed for making the deposit, but not returned into Court within such delay, is not a ground for rejecting the inscription, and a motion to reject such inscription will be dismissed, where it is shown that the notice, after service, has been filed on the nearest following judicial day after the expiration of the eight days.

McDonald v. Vineberg, 3 Que. P.R. 548.

—Settlement of book — Appointment — Onus.]—Having regard to Rules 798 et seq., relating to appeals to the Court of Appeal, the burden of procuring from "the Court appealed from, or a Judge thereof" (Rule 798), an appointment to settle the appeal case or book, the parties being unable to agree, is upon the appellant. Rule 701 (3) enables the respondent to move in the matter, if so disposed; but it is the appellant's duty to enter the case with the registrar and set down the appeal for argument; this he cannot regularly do without depositing the appeal books (Rule 812); and before they are deposited the case must be settled.

Oatman v. Michigan Central R.R. Co., 1 O.L.R. 636.

—From Division Court—Notice of setting down and grounds—Failure to give—Amendment—New notice—Time.]—Where the defendants, appealing from the judgment of a Division Court, procured and filed a certified copy of the proceedings within the two weeks prescribed by s. 158 of the Division Courts Act, R.S.O. (1897), c. 60, and set down the appeal to be heard at an unnecessarily early sittings of a Divisional Court of the High Court, but neglected to give the plaintiff notice of the setting down of the appeal and of the grounds of it, the Court, upon objection taken by the plaintiff when the appeal came on for hearing, postponed the hearing until the next sittings, for which the defendants were still in time, in order that they might give a proper notice:—Semble, that so soon as the certified copy of the proceedings is filed, if filed within the proper time, and the case is set down, if set down within the proper time and for the proper Court, the appeal is properly lodged, and the other matters are matters done in the Appellate Court as to which the Court may have the power of amendment or enlargement of the time.

Smith v. Port Colborne Baptist Church Trustees, 1 O.L.R. 195.

—Parliamentary elections — Recount of votes—Notice of appeal.]—The notice of appeal from the decision of a County Court Judge upon a recount of votes under s. 129 (1) of the Election Act, need not be signed by the appellant candidate personally, but may be signed by his solicitor or agent on his behalf. Where both candidates appeal from the decision of the County Court Judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority. Neither appeal having been limited to particular ballots, it was open to the candidate whose appeal was first determined to object, when his opponent's appeal was being heard, to certain ballots not previously objected to.

Re North Grey Provincial Election, 4 O.L.R. 286 (C.A.).

—From Surrogate Court—Court of Appeal—Form of notice and bond—Motion to quash.]—On a motion to quash an appeal from a Surrogate Court to a Divisional Court subsequent to the passing of 58 Viet. c. 13, s. 45 (O.), which transfers such appeals from the Court of Appeal to a Divisional Court, on the ground that the notice of appeal did not specify the Court, to which the appeal was taken and that the bond filed followed the surrogate form "to the Court of Appeal":—Held, that the intention to appeal expressed in the notice was sufficient, and that the words "the Court of Appeal" in the bond might be read as an equivalent of "the proper appellate tribunal."

Taylor v. Delaney, 3 O.R.L. 380.

—Sufficiency of notice—Non-prosecution of appeal, excuse for.]—Rule 460 of the Judicature Ordinance, C.O. (1898), c. 21, providing for two clear days' notice of motion, except by special leave, applies to motions to the Court en banc. An appellant is excused for not having proceeded with the appeal by the fact that the original documents from which the appeal book is to be prepared have remained in the respondent's possession, he having neglected to file them in the Land Titles Office, as directed by the order appeal from.

Re Donnelly Tax Sale, 5 Terr. L.R. 270.

—Late entry—Refusal of consent—Confirmation.]—The defendants on the 19th May gave notice of an appeal to the Court of Appeal from a judgment delivered on the 22nd April, and gave security on the 22nd May. Reasons of appeal were not served till the 10th September, and reasons against appeal not till the 13th October. The next sitting of the Court of Appeal was set for the 10th November. The appeal case was not prepared in time to enter the case on the 6th November, and the plaintiff's solicitor refused to consent to its being entered without consent on the 17th November, and a motion was made to confirm the entry:—Held, that the plaintiff's solicitor should have consented to the proposed entry on the 10th November, and the subsequent entry should be confirmed; and as both parties were nearly equally blameable for delay, there should be no costs.

McLaughlin v. Mayhew, 5 O.L.R. 114 (Maclennan, J.).

—Release of seizure—Inscription in review—Disclaimer of judgments.]—1. If release of an attachment has been granted and the plaintiff appeals and the parties in whose favour the release has been granted disclaim the judgment, the Superior Court is, notwithstanding such disclaimer, no longer seized of the cause and can take no notice of subsequent incidental proceedings so long as the appeal is pending. 2. A motion dismissed for a reason not urged by the parties, will be dismissed without costs.

Lamothe v. Piche & Brown, 5 Que. P.R. 172.

—Notice of intention to appeal—Time—Pronouncing or entry of judgment.]—A judgment in a mechanic's lien action, tried by a local Master, was signed on the 12th March, but dated the 24th February, being the day on which the Master had signed a memorandum of his findings, a copy of which he the same day sent by mail to the solicitors for each of the parties. The memorandum contained no reference to costs of the action, but they were disposed

of by the judgment as signed. There was no arrangement between the solicitors and the Master that his findings were to be sent by mail:—Held, that the month within which notice of intention to appeal from the judgment must, by Rule 799, be given, ran from the signing of the judgment on the 12th March.

Wallace v. Bath, 7 O.L.R. 542 (Osler, J.A.).

—Notice of—Sittings for which given.]—A final judgment was pronounced and entered on 27th July; notice of appeal to the January sitting of the Full Court was given on 24th October. A sitting of the Full Court commenced according to statute on 3rd November:—Held, per Irving and Martin, JJ. (Hunter, C.J., dissenting), overruling a preliminary objection with costs, that the appeal was brought in time.

Traders National Bank of Spokane v. Ingram, 10 B.C.R. 442.

—From County Court—Motion against verdict—Grounds—Order to enter nonsuit.]—On a motion against a verdict in the County Court, it is not necessary to serve the grounds of the motion and the authorities relied upon. The Court may order a nonsuit to be entered on an appeal from the County Court, though no leave had been reserved at the trial.

Miller v. Gunter, 36 N.B.R. 330.

—Motion against verdict—Notice of—Printing.]—The Court will not hear a motion where the notice of motion exceeds five folios and is type-written and not printed as required by 60 Vict. c. 24, s. 366.

Wilmot v. Macpherson, 36 N.B.R. 327.

—To Supreme Court of Canada—Inscription—Security for costs.]—The case on appeal cannot be filed unless security for the costs of the appeal is furnished as required by s. 46 of the Supreme Court Act. The giving of such security cannot be waived by the respondent, nor the amount reduced by consent of the parties.

Holsten v. Cockburn, 35 Can. S.C.R. 187.

—Appeal per saltum—Time limit—Pronouncing or entry of judgment.]—To determine whether the sixty days within which an appeal to the Supreme Court must be taken, runs from the pronouncing or entry of the judgment from which the appeal is taken no distinction should be made between common law and equity cases. The time runs from the pronouncing of judgment in all cases except those in which there is an appeal from the registrar's settlement of the minutes or such settlement is delayed because a substantial question affecting the rights of the parties has not been clearly disposed of by such judgment.

County of Elgin v. Robert, 36 Can. S.C.R. 27.

—Place of hearing in B. C.]—Under the B.C. Supreme Court Act an appeal may be taken to the Full Court sitting either at Victoria or Vancouver at the option of the appellant.

Raser v. McQuade (No. 2), 11 B.C.R. 169.

—Inscription for appeal—Service of notice—Designation of judgment appealed from.]—The only formality necessary for bringing appeals is by the filing of an inscription in the office of the Court appealed from and giving notice thereof within the time limited by Art. 1213 C.P.Q. (2) The inscription and notice are part of the proceedings in the Court appealed from, and may be served by a bailiff of that Court. (3) The omission of the date of the judgment appealed from in the inscription is not fatal to the proceeding, provided the judgment is otherwise sufficiently designated.

McAvoy v. Willig, Q.R. 14 K.B. 59.

—Transmission of record.]—A motion for an order to transmit the record in a cause to the Court of King's Bench (appeal side) should be made to the Superior Court, not to the Court of Appeal.

Wilson v. Carpenter, 8 Que. P.R. 157 (K.B.).

—Inscription in review—Judgment of Circuit Court—Assessment roll.]—A judgment rendered by the Circuit Court at the chef lieu of a district on a petition asking that an assessment roll be quashed cannot be taken for review before three Judges of the Superior Court.

Noyes v. Village of Cowansville, 8 Que. P.R. 426.

—Remitting record—Adding parties.]—A judgment of the Court of Review remitting the record to the Superior Court to enable the plaintiff to bring certain parties into the cause (in this case the heirs in an action on pétition d'hérédité) is a final judgment from which an appeal lies de plano to the Court of King's Bench.

Stevens v. Coleman, 8 Que. P.R. 414 (K.B.).

—Consolidation.]—When two causes between the same parties have been consolidated for enquête and hearing and one judgment is given for the two, one inscription in review and a single deposit are sufficient.

Levinson v. Heirs of Mark Axelrad, 8 Que. P.R. 242 (Ct. Rev.).

—Filing inscription—Delays.]—When the last day for filing an inscription in review falls on a Saturday service and filing on the Monday following is valid.

Asselin v. Fréchette, 8 Que. P.R. 134 (Ct. Rev.).

—Inscription for review—Amount in controversy—Amount of deposit.]—(1) When a judgment is rendered for less than $400 in an action brought for a sum exceeding that amount, a deposit of $50 with an inscription for review, by the defendant is sufficient. (2) The additional $3 in cases of judgments rendered elsewhere than at Montreal or Quebec, is a matter between the party and the prothonotary who makes up and transmits the record. A charge made by the prothonotary against the advocate of the party, in an amount current between them, is a sufficient compliance with the law.

Michaud v. Michaud, 34 Que. S.C. 88.

—From County Court—Divisional Court—Time.]—If a judicial opinion or decision, oral or written, is not pronounced or delivered in open Court, it cannot, until the parties are notified of it, be said to be pronounced or delivered within the meaning of s. 57 of the County Courts Act, R.S.O. (1897), c. 55, requiring appeals from the County Court to be set down for the first sitting of a Divisional Court commencing on or after the expiration of one month from the judgment, order, or decision complained of.

Allan v. Place, 15 O.L.R. 148.

—Inscription in review—Delays.]—When the last of the eight days on which the deposit for purposes of a review of a judgment must be made is a non-juridical day, and the day following is a Saturday, the deposit can be made on the first juridical day of the following week. In a real action when the defendant has formally summoned his auteur en garantie and the latter has taken his fait et cause and contested the demand but the principal defendant has not been made a party the judgment maintaining the action can be inscribed in review by the grant alone. An inscription in review by a party acting in the capacity of tutor ratified by an order of the Court on advice of a family council is as valid as if made with a previous authorization.

Brown v. McIntosh, Q.R. 31, S.C. 465 (Ct. Rev.).

—"Decision," meaning of—Time for taking appeal.]—In a proceeding under the Water Clauses Consolidation Act (1897), before the County Judge, on appeal from the decision inter alia to the jurisdiction of the learned County Court Judge, who overruled the objection and proceeded with the hearing, reserving his decision on the petition generally. Respondents appealed within the 21 days given in s. 39 as the time within which an appeal must be taken from the decision of any Supreme or County Court Judge on any proceeding under the Act:—Held, by the full Court, that the term "decision" as used in s. 39 means final disposition of the whole case before the Judge on appeal from the Water Commissioner.

Bole v. Roe, 13 B.C.R. 215.

—County Court—Delivery of judgment and taking out formal order.]—The time for taking an appeal from an ordinary judgment of the County Court to the full Court commences from the date of the delivery of judgment, and not from the date of taking out the formal order. A judgment in replevin is not a special judgment under Order XXIII., Rule 1.

Kirkland v. Brown, 13 B.C.R. 350.

—Exhibits—Motion to dismiss from record—Case inscribed in appeal.]—The filing of the inscription in appeal and the giving of security remove the record from the jurisdiction of the Superior Court, a motion to dismiss some exhibits from the record, which has been fyled after the enquete and merits of the case and which has not been referred to in any of the depositions, cannot be then entertained.

Page v. Connolly, 10 Que. P.R. 101.

—Not perfected—Motion to dismiss.]—Plaintiffs having given notice of appeal to the Court in banc, neglected to perfect the appeal within the time limited, and the defendant moved to dismiss. It was objected on the authority of Griffin v. Allen, 11 Ch.D. 913, that no costs of the motion should be allowed, as no demand had been made for costs of the appeal:—Held, that Griffin v. Allen, supra, did not lay down the established practice in these matters, but merely indicated the course the Court would pursue in such cases, and no such practice having been established in this Court, the application should be allowed with costs, but the rule in Griffin v. Allen was a very proper one, and in the future the Court would not, in the absence of good cause, allow costs of an application to dismiss for want of prosecution of an appeal, unless the applicant has made a previous demand for costs of the appeal, which has not been complied with.

Wessell v. Tudge, 2 Sask. R. 231.

—Judgment for distribution—Proceeds of sale of immovables by sheriff under warrant of curator.]—(1) A judgment of distribution by the prothonotary of the proceeds of a sale of immovable property abandoned for the benefit of creditors, made by the sheriff under the warrant of a curator, is subject to appeal under Art. 830 C.P., and is not a judgment in virtue of Art. 879, nor of any of the articles referred to in Art. 890 of the same Code. (2) A party who appears, by a notarial deed of assignment, to have acquired the rights of a creditor named in the registrar's certificate of hypothecs in the case, may institute such an appeal. (3) An ap-

pellant who has given security within five days after filing the inscription to appeal, may supplement it by further security, given after the delay, and both the bonds together, if sufficient, will avail as the security required under Art. 1213 C.P. (4) Notice of an inscription to appeal from a judgment of distribution, under Art. 830 C.P., should be served upon all the parties interested in the distribution. When the sum distributed is the proceeds of the sale of abandoned property, the curator of the insolvent debtor has a sufficient interest to move for the rejection of the appeal, on the ground that notice thereof has not been served on all the parties entitled to it, and the Court may, in such a case, order the appellant to serve the notice accordingly within a prescribed delay

Bousquet v. Henderson, 17 Que. K.B. 550.

—Consolidation of appeals.]—Two appeals to the Supreme Court of Canada from the judgment of a Provincial Court of Appeal upon separate appeals made in the same case from separate orders.

Emperor of Russia v. Proskouriakoff, 18 Man. R. 143.

—Cross-appeal—Relief against party not an appellant.]—Rule 652 (a) of the King's Bench Act, R.S.M. (1902), c. 40, does not apply when the party against whom the respondent in an appeal seeks relief is not an appellant. It is not sufficient in such a case for the respondent to serve upon such non-appealing party a notice under said rule, but he must set down a substantive cross-appeal.

Bent v. Arrowhead Lumber Co., 18 Man. R. 277.

—Appeal to Supreme Court of Canada—Failure to give security.]—Pending an action a sum of money was paid into Court by defendant, which money represented land, the subject matter of the action. The defendant having been successful on the trial, and on appeal, applied for payment out of the money. The plaintiffs had given notice of an appeal to the Supreme Court of Canada but had not furnished security as required within the time limited. An application for payment out before time for giving security had expired had previously been refused on account of the appeal. On a renewed application for payment out:—Held, that an appeal to the Supreme Court of Canada cannot be considered as brought or entered until security has been furnished and as no security had been given the defendants were entitled to an order for payment out.

Huggard v. Ontario & Saskatchewan Land Corporation, 1 Sask. R 495.

—Waiver—New action.]—A party who has inscribed his case before the Court of Review does not acquiesce in the judgment of the Superior Court rejecting his claim by fyling in the Exchequer Court of Canada the same claim against the owners of a tug which is advertised to be sold, said tug being the cause of the damages sued for.

Webster v. International Paper Co., 10 Que. P.R. 375.

—Stay of proceedings pending appeal.]—An application for a stay of proceedings is generally an application for an indulgence, and the applicant should pay the costs.

Alexander v. Walters, 14 B.C.R. 250.

—Appeal to Privy Council—Security—Payment of money into Court.]—Where the security required upon an appeal to the Privy Council is given by payment of money into Court, instead of by a bond in the penal sum of $2,000, as provided by Con. Rule 831, the sum paid in must not be less than $2,000, having regard to the provisions of s. 2 of R.S.O. (1897), c. 48; the explicit language of the section cannot be held to be varied by the general words of Con. Rule 833.

Florence Mining Co. v. Cobalt Lake Mining Co., 19 O.L.R. 342.

—Inscription in review—Delay—Transmission by mail.]—The inscription (accompanied by a cheque for the deposit) in review from a judgment rendered in the District of Ottawa, filed three days after the expiration of the delay prescribed by Art. 1196 C.P.Q., is valid if it appears that it was posted, addressed to Montreal, within the five days from the date on which the judgment was pronounced, that is to say, in time to be received, in the ordinary course of transmission, by the prothonotary of the Court of first instance and the delay is to be imputed to the postal officials.

Fournier v. Providence Fire Assur. Co., Q.R. 35 S.C. 310.

—Dismissal for default.]—A Judge sitting in Chambers has no power to grant an application to have set aside a judgment of the Court dismissing an appeal for failure by the appellant to file his factum within the time prescribed.

Ouimet v. Fleury, 10 Que. P.R. 325.

V. PRELIMINARY OBJECTIONS.

—Petition for review—Service—Indulgence.]—The party who neglects to serve, with the petition for review of a judgment, the prothonotary's certificate of its having been filed, may obtain leave to serve and file such certificate. If the prothonotary's cerifitate does not show the date of deposit of the petition the certificate is sufficient if the record proves such date, and the plaintiff is not prejudiced, the Judge, having under the provisions of the new

Code of Procedure very large powers of amendment in matters of procedure.

Breton v. Chabot, 18 Que. S.C. 154 (S.C.).

—From summary conviction—Entry of—Time of giving recognizance—Quashing appeal—R.S.B.C. 1897, c. 176.]—The recognizance required by s. 71 (c) of the B.C. Summary Convictions Act, on an appeal to a County Court from a summary conviction, must be entered into before the appeal is entered for trial; and the giving of the recognizance thereafter, but before the sitting of the Court, is insufficient.

The Queen v. King, 4 Can. Cr. Cas. 128; 7 B.C.R. 401.

—Objection to irregularity.]—An objection on the ground of irregularity in the proceedings leading up to an appeal, cannot be taken on the argument of the appeal.

Steele v. Ramsay, 1 Terr. L.R. 1.

—Security for costs—Default.]—When, owing to the failure of the appellant to furnish security for costs on the date fixed, the appeal has been declared abandoned, the appellant cannot bring a fresh appeal from the safe judgment before paying the costs of the former appeal.

Cain v. Bartels, 10 Que. K.B. 323.

—Surrogate Court appeal—Security for costs—Affidavit.]—An appeal to a Divisional Court for an order of a Surrgote Court is not duly lodged and will be quashed if security has not been given and an affidavit of the value of the property affected filed, as required by Rule 57 of the Surrogate Court Rules of 1902, which are made applicable by s. 36 of the Surrogate Courts Act, R.S.O. 1897, c. 59, notwithstanding the provisions of Con. Rule 825 that no security for costs shall be required on a motion or appeal to a Divisional Court.

In re Wilson, Trusts Corporation of Ontario v. Irvine, 17 P.R. 407 (1897) C.A.D. 15, applied and followed.

Re Nichol, 1 O.L.R. 213.

—Preliminary objection.]—Notice of a preliminary objection to an appeal to the Full Court (B.C.) must be served at least one clear day before the time set for the beginning of the sittings.

McGuire v. Miller, 9 B.C.R. 1.

—Appeal books.]—The pages of appeal books should be numbered at the top of the pages.

Haggerty v. Lenora Co., 9 B.C.R. 6.

—Appeal bond—Motion to enlarge time for filing.]—The time for filing an appeal bond as fixed by the law and by a Judge cannot be enlarged, after the expiration of such time limit on motion to that effect. See Baron v. Vallee, 2 Que. P.R. 157.)

Larocque v. Rosenthal, 5 Que. P.R. 386.

—Waiver—Statement of claim—Irregularity — Validating order — Compliance with terms.]—After the delivery of the statement of claim an order for particulars was made, and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff without leave and without the defendant's consent, delivered an amended statement of claim:—Held, that the delivery of the amended statement of claim was irregular under Rule 300. An order was made, upon the defendant's application to set aside the amended statemen of claim for irregularity, validating the delivery of it, but directing that the plaintiff should pay the costs of the motion and other costs occasioned by the irregularity, and that until payment of such costs further proceedings on the charges introduced by the amendment should be stayed, or if such costs should not be paid within one month after taxation that the amendments should be struck out. Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms, does not preclude him from moving against the order.

Anthony v. Blain, 5 O.L.R. 48 (Meredith, C.J.).

—Party not affected—Sale of substituted lands.]—Where a person who might have an eventual interest in substituted lands has not been called to the family council nor made a party in the Superior Court on proceedings for authority to sell the lands, the order authorizing the sale is, as to him, res inter alios acta does not prejudice his rights and, therefore, he cannot maintain an appeal therefrom.

Prevost v. Prevost, 35 Can. S.C.R. 193.

—From Probate Court (N.B.)—Party aggrieved.]—A party aggrieved by a decree of a Judge of probate in New Brunswick may appeal therefrom although he did not appear in the Court below.

Re Welch, 36 N.B.R. 628.

—Acceptance and adoption of judgment—Payment of money as directed.]—In an action for an injunction against a municipal corporation to restrain a sale of lands to one C. and to compel it to sell and convey the lands to the plaintiff, on the ground that his was the highest tender therefor, both plaintiff and C. having paid deposits; the trial Judge held that the plaintiff was entitled to an injunction restraining the sale to C., but that the corporation could not be compelled to sell to him and both the deposits were directed to be returned. The corporation, having returned the deposits, appealed to a Divisional Court and the plaintiff moved to

quash the appeal on the ground that the corporation had accepted and acted on the judgment and that C. would not now carry out the purchase:—Held, that the mere payment of money, as directed by a judgment, is not a bar to an appeal from that judgment by the party making such payment: and mere obedience to a judgment, not such as to signify conclusive acceptance of its terms, does not destroy the right of appeal: and that here the repayments of the deposits involved nothing inconsistent with the relief, which the corporation sought upon its pending appeal and in no wise signified a conclusive submission to the judgment appealed from. Held, also, that no change in attitude upon C.'s part at this stage of the case could debar his co-defendants from taking steps by appeal to relieve themselves from an onerous judgment which they alleged had been pronounced in error.

Philips v. City of Belleville, 10 O.L.R. 178, D.C.

—County Court, N.B.—Summons for new trial.]—The Court will not refuse to hear an appeal because the appellant neglected to take out a summons for a new trial in the County Court until the time had expired for which the signing of judgment had been stayed, and did not ask for a further stay or offer any excuse for the delay, no term having elapsed. S. 158 of 60 Vict. c. 24 (N.B. Supreme Court Act), providing that the Judge, instead of directing the jury to give either a general or special verdict may submit questions of fact and enter a verdict on the questions answered, applies to the County Courts.

Read v. McGivney, 36 N.B.R. 513.

—Appeal from interlocutory judgment—Time running in long vacation.]—The thirty days limited by Art. 1211, C.P.Q., for taking appeals to the Court of King's Bench from interlocutory judgments falls under the exception provided by the eleventh clause of Art. 15, C.P.Q., and runs during long vacation, between 30th June and 1st September. (Lacoste, C.J.)

Poirier v. City of Montreal, Q.R. 14 K.B. 481.

—Record—Matter omitted.]—When two causes were joined for the purposes of trial under Article 292, C.C.P., and an appeal is taken from the judgment in one if the record transmitted for the appeal does not contain all the depositions and documents filed according to their order in the joint trial it should not, on that account, be declared incomplete, and a motion to that effect will be rejected if the depositions and documents do not relate to the appeal and are of no importance in deciding it.

Bernard v. Carbonneau, Q.R. 15 K.B. 287.

VI. NEW GROUNDS AND EVIDENCE.

—New evidence—Amendment of notice.]—As a general rule on the argument of an appeal leave to amend the notice of appeal will be given only for the purpose of correcting errors of dates and other trifling matters and on special terms.

Sexsmith v. Murphy, 1 Terr. L.R. 311.

—Practice on appeal—Supplementary evidence—Objections not taken at trial—Amendment of pleadings.]—On the hearing of the appeal, objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question:—Held, following The Exchange Bank of Canada v. Gilman, 17 Can. S.C.R. 108, that the Court must refuse to receive the document as fresh evidence can not be admitted upon appeal. Held, also, that the defendant could not raise the question as to the sufficiency of the plaintiff's title, for the first time on appeal. In this case it appeared that the allegations and conclusions of the plaintiff's declaration were deficient and the Court, under s. 63 of the Supreme and Exchequer Courts Act, ordered all necessary amendments to be made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence.

Piché v. City of Quebec, Cass. Dig (2 ed.) 497; Gorman v. Dixon, 26 Can. S.C.R. 87, followed. City of Montreal v. Hogan, Can. S.C.R. 1.

—From County Court—New evidence on appeal.]—Under Ontario Rule 498 the Court may entertain an application to admit new evidence in a proper case on a County Court appeal, notwithstanding R.S.O. c. 55, s. 51, sub-s. 3, under which such an application must be made before the County Court, and this although the time for applying for a new trial had expired.

Butler v. McMicken, 32 Ont. R. 422.

—Notice of appeal—Amendment asking new trial.]—An amendment was allowed to a notice of appeal so as to ask expressly for a new trial, but only on the grounds stated in the notice of appeal. An amendment so as to set up the ground, not stated in the notice, of the improper admission of evidence taken on commission, was refused as it did not appear from the Judge's notes that objection was made at the trial though the commissioner had noted the objection.

Edmonton v. Thomson, 1 Terr. L.R. 342.

—Non-direction—Point not submitted by counsel at trial.]—Where counsel at the trial abstains from asking the Judge to submit a point to the jury, a new trial

will not be granted on the ground of non-direction as to that point.

Waterland v. City of Greenwood, 8 B.C.R. 396. (Full Court).

—Introducing fresh evidence on appeal—Practice.]—An application to admit further evidence which might have been adduced at the trial, should be supported by the affidavit of the applicant indicating the evidence desired to be used and setting forth when and how the applicant came to be aware of its existence, what efforts, if any, he made to have it adduced at the trial, and that he is advised and believes, that if it had been so adduced, the result would probably have been different.

Marino v. Sproat, 9 B.C.R 335.

—Requete civile—Documents discovered since suit.]—The setting aside of a judgment on the ground that the petitioner has discovered, since action, letters of a nature to change the judgment, cannot be demanded by requete civile, if such letters were in his possession at the time of the action.

Warin v. DeWertheimer, 5 Que. P.R. 462.

—New points on appeal—Jurisdiction of court below.]—Questions of law appearing upon the record but not raised in the Courts below may be relied upon for the first time on an appeal to the Supreme Court of Canada where no evidence in rebuttal could have been bought to affect them had they been taken at the trial.

McKelvey v. Le Roi Mining Co., 32 Can. S.C.R. 664.

—Amending Judge's notes of evidence—Practice.]—Where a party desires to introduce on an appeal, evidence alleged to have been omitted from the Judge's notes of evidence, he should first apply to the Judge appealed from to amend his notes.

Rendell v. McLellan, 9 B.C.R. 328.

—Introducing fresh evidence.]—The defendant in a civil action was tried and acquitted on a criminal charge before the hearing of an appeal therein, and on the appeal his counsel moved the Full Court to be allowed to read the verdict of the jury in the criminal case. The Court refused the motion.

Borland v. Coote, 10 B.C.R. 493.

Same case in appeal, 35 Can. S.C.R. 282.

—Objection—Waiver.]—Where a respondent, on an appeal to the Court below, has failed to set up the exception resulting from acquiescence in the trial Court judgment, as provided by Article 1220 of the Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada. On an application to vary the minutes of judgment, as settled by the Registrar, for reasons which had not been mentioned at the hearing of the appeal, the motion was granted, but without costs.

Chambly v. Willet, 34 Can S.C.R. 502.

—New grounds.]—The argument of an appeal to the Supreme Court of Canada must be based on the facts and confined to the grounds relied on in the Courts below.

Confederation Life v. Borden, 34 Can. S.C.R. 338.

—New trial to raise new defence.]—If the defendant on the trial of a cause neglects to avail himself of a defence of which he was apprised, and which he could have then made if he had wished, it is not open to him to move for a new trial in order to make such defence.

Kennedy Island Mill Company v. McInerney, 36 N.B.R. 612.

—Issue—Substantial finding of—Submission of precise point—New trial.]—Where the issue submitted to, and found by, the jury involves, and as a necessary sequence determines the issue raised by the pleading, a new trial will not be granted, though the precise point was not submitted.

Porter v. Tibbits, 37 N.B.R. 25.

—New trial — Surprise.] — Defendant agreed to "feed and winter" 47 young cattle for plaintiff and to be responsible for the loss of any of the cattle in any other way than by death from ordinary disease. Twenty-nine of the cattle died and plaintiff sued for damages. At the trial, plaintiff had a verdict on the strength of evidence proving that the stable in which defendant had kept the cattle was too small for so many cattle. There was nothing in the statement of claim to inform defendant upon what grounds he was held liable, and he filed affidavits to show that he had been unable to ascertain such grounds on the examination of the plaintiff for discovery, also that the stable, which had been taken down and removed before the trial, had been of quite sufficient size to accommodate the cattle:—Held, that there should be a new trial on the ground of surprise in the evidence produced by the plaintiff as to the size of the stable. Costs to abide the result of the new trial.

McLenaghan v. Hood, 15 Man. R. 510 (Dubuc, C.J., and Perdue, J.).

VII. REVIEW AND REHEARING.

—Review—Judgment of Circuit Court—Intervention.]—There is no appeal to the Court of Review from a judgment of the Circuit Court dismissing an intervention which asks for the release of certain goods

from a saisie-gagerie, when the rent claimed as well for the present as for the future does not amount to $100.

Labbah v. Kirnel, 11 Que. L.R. 153—Ct. Rev.).

—Motion to adduce fresh evidence on appeal.]—A party moving the Court of Appeal for leave to adduce fresh evidence, must give notice and serve affidavits in support:—Held, in this instance, that, the party having knowledge of a fraud, and not having been reasonably diligent in exposing it at the time, he should not be assisted in doing so on appeal. A strong and clear case must be made out in order to gain such an indulgence.

Woodford v. Henderson, 15 B.C.R. 495.

—Review—Deposit—Intervention.]—A deposit of $50 with the inscription in review by an intervenant is sufficient when his interest in the subject matter of the intervention does not amount to $400, and its object is to obtain a declaration that the effects seized for rent are not subject to the privilege of the plaintiff as tenant.

Gelinas v. Finkelstein, 11 Que. P.R. 154.

—Loss of record—Inscription in review.]—An inscription in review will not be struck out because the record is missing.

Dupéré v. London & Lancashire Life Assurance Co., 11 Que. P.R. 198.

—Practice—Concurrent findings of fact.]—The Supreme Court of Canada will not interfere with concurrent findings of two Courts below on questions purely of fact unless satisfied that the conclusions appealed from are clearly wrong.

Weller v. McDonald-McMillan Co., 43 Can. S.C.R. 85.

—Admission of fresh evidence on appeal.]—Where the order of a Court upon an appeal has not been issued, the appeal is still pending and within the control of the Court, and the Court is at liberty, of its own motion or on application, to recall the opinion which has been pronounced, and, on a proper case, to admit further evidence for the purpose of the appeal, under Con. Rule 498. The rule which governs the admission of new evidence upon appeal is fenced round with strict limitations. There must be no remissness in adducing all possible evidence at the trial; the new evidence must be practically conclusive; merely corroborative evidence, evidence to admit which would be merely setting oath against oath, evidence obtained under suspicious circumstances, or evidence which might merely enable an opponent's witness to be cross-examined more effectively, will not do; as a rule, the evidence must be of some fact or document essential to the case, of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute. After an order had been pronounced by a Divisional Court reversing the judgment in the plaintiff's favour of an Official Referee in an action to enforce a mechanic's lien, but before the order had issued, the plaintiff applied for leave to adduce fresh evidence to show that, by a mistake of his bookkeeper, certain items in respect of materials furnished had been charged as extras, whereas in fact the materials had been furnished under the contract. The Divisional Court allowed the evidence to be given, and, although it had always been in the possession of the plaintiff, there being no suspicion of bad faith, credited it, recalled the order pronounced, and substituted an order affirming the judgment of the Referee—the evidence being conclusive upon the question involved in the appeal:—Held, that the discretion of the Court was properly exercised. Order of a Divisional Court, 19 O.L.R. 428, affirmed.

Rathbone v. Michael, 20 O.L.R. 503 C.A.

—New trial—Misdirection as to contributory negligence—Practice—Judge's charge not excepted to at the trial or in first appeal.]—In an action for damages for the death of the appellant's son while acting as engineer of the respondents' lumber train the respondents were charged with negligence in respect to the train having been equipped with defective brakes and an incompetent brakesman, while the deceased was charged with contributory negligence in jumping from the train. The jury found for the appellants, but a new trial was ordered by the Supreme Court. One Judge was dissatisfied with the verdict on the ground of misdirection in regard to contributory negligence, and another Judge held, contrary to both his colleagues, that the damages were excessive:—Held, that the order must be reversed. It was too late for the respondents to rely on misdirection which they had not excepted to at the trial or in the notice of appeal or in oral argument before the Supreme Court. There were no sufficient grounds for a new trial on the head of excessive damages.

White v. Victoria Lumber Co. [1910] A.C. 606 on appeal from B.C.

—Conditional allowance of—Reduction of damages — Election — Further appeal.]—After the plaintiff's damages had been assessed by a jury, the trial Judge dismissed the action. The plaintiff appealed, and the Court of Appeal ordered that, if the plaintiff elected to reduce the damages assessed by the jury, her appeal should be allowed with costs, and judgment entered for her for the reduced amount with costs, or otherwise that there should be a new trial:—Held, that the plaintiff was entitled to have a clause inserted in the order of the Court protecting her, in the event of an appeal by the defendant to the Supreme Court of Canada, against her election to reduce the damages.

Fahey v. Jephcott, 2 O.L.R. 353 (Osler, J.A.).

—From Small Debts Courts, B.C.]—An appeal from a Small Debts Court in British Columbia is by way of a rehearing, and witnesses may be called, although not called at the trial.

Malkin v. Tobin, 7 B.C.R. 386.

—Case reserved for Court of Review, Que.] —Per Lemieux, J.:—The Court of Review has absolute and unlimited power to decide on the merits of a cause reserved for its consideration without regard to the verdict of the jury. Art. 496 C.P.C.

Ferguson v. Grand Trunk Railway Co., 20 Que. S.C. 54 (Ct. Rev.).

—Verdict, general or special—Matter of procedure.]—In an action against the Toronto Railway Co. for damages arising from personal injuries caused by a collision between a street car and a waggon in which plaintiff was riding, the grounds of negligence alleged against the company were:—(1) The car was running unlawfully down the eastern track. (2) It was running at too great speed. The Judge at the trial charged the jury, in case they found for plaintiff to state what negligence they pointed to. The jury found the company responsible (1) Because the car was on the wrong track according to the general custom. (2) The motorman and his appliances were on the rear instead of at the front, the car being reversed. A verdict was entered for plaintiff on their findings. Before the Court of Appeal the company claimed that the verdict was special and reasons should not have been given but only facts stated from which the Court could decide. The Court of Appeals sustained the verdict, holding that it was general not special. The company appealed to the Supreme Court of Canada:—Held, that the question whether the verdict was general or special was a matter of procedure only in which the Court would not interfere. Appeal dismissed with costs.

Toronto Railway Co. v. Balfour, 32 Can. S.C.R. 239.

—Procedure—Account—Action pro socio—Art. 1898 C.C.]—The judgment of the Court of King's Bench of Quebec, appealed from, held that in an action pro socio, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify an inquiry into all the affairs of the partnership and for the liquidation of the same without producing full and regular accounts of the partnership affairs:—Held, that the appeal to the Supreme Court of Canada involved merely a question of procedure in a matter where the appellant had suffered no wrong, and, therefore, that the appeal should be dismissed.

Higgins v. Stephens, 32 Can. S.C.R. 132.

—Trial by Judge without a jury—Findings of fact—Commission evidence—Reversal by Appellate Court.]—In an action in the Yukon for damages for breach of contract tried before a Judge without a jury, the evidence for the defence being evidence taken on commission, the Court held that the contract sued on was made with defendant company, and not with one Munn as alleged by the defence, and gave judgment for plaintiffs. On appeal:—Held, reversing the finding and allowing the appeal, that the Court had failed to appreciate said evidence. Per Drake, J.:—The question of ultra vires not having been raised in the Court below, was not open on appeal.

McKay Bros. v. Yukon Trading Co., 9 B.C.R. 37.

—Concurrent findings of fact—Avoidance of gifts made by testator—Civil Code, art. 762.]—Where there are concurrent findings of fact as to a testator's competence and freedom from undue influence:—Held, that they will not be disturbed unless it be made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered.

Archambault v. Archambault [1902], A.C. 575.

—Exchequer appeal—Assessment of damages with findings of Exchequer Court Judge.]—The Exchequer Court Judge heard witnesses, and upon his appreciation of contradictory testimony awarded damages to the respondents. The Crown appealed on the ground that the damages were excessive:—Held, Gwynne and Girouard, JJ., dissenting, that as it did not appear from the evidence that there was error in the judgment appealed from, the Supreme Court would not interfere with the decision of the Exchequer Court Judge.

The Queen v. Armour, 31 Can. S.C.R. 499.

—Appeal from interlocutory order—Action decided pending appeal.]—Where, pending an appeal from an interlocutory order the action itself has been decided, the Full Court will not hear the appeal.

Fawcett v. Canadian Pacific Railway Co., 8 B.C.R. 219. (Same case, 32 Can. S.C.R. 721.

—Church discipline.]—Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference.

Ash v. Methodist Church, 31 Can. S.C.R. 497, affirming 27 Ont. App. 672.

—Controverted election.] See ELECTION LAW.

—Motion for new trial—Admissibility of evidence.]—Evidence of persons who had been witnesses at a trial, that the evidence they then gave was not true, and that certain statements made by them before trial to the plaintiff's solicitor were true, is not receivable on a motion for a new trial.

Rushton v. Grand Trunk R.W. Co., 6 O.L.R. 425 (D.C.).

—Questions of fact.]—There is no rule of law or of procedure which prevents an appellate Court from reversing the decision of the trial Judge on the facts.

Dempster v. Lewis, 33 Can. S.C.R. 292.

—Concurrent findings of Courts below—Reversal on questions of fact—Improper rulings—Reversal.]—Where the findings of the trial Courts were manifestly erroneous and the trial appeared to have been irregularly conducted, the Supreme Court of Canada reversed the concurrent findings of the Courts below and also reversed the concurrent rulings of those Courts refusing leave to amend the statement of claim by alleging an account stated.

Belcher v. McDonald, 33 Can. S.C.R. 321.

—Concurrent finding of fact—Duty of appellate Court.]—A judgment based upon concurrent findings of fact in the Courts below ought not to be disturbed on appeal to the Supreme Court of Canada if the evidence be contradictory.

D'Avignon v. Jones, 32 Can. S.C.R. 650.

—Settlement of case—Controverted election.]—No machinery has been provided by the Ontario Controverted Elections Act or by the rules for the settlement of a case upon an appeal to the Court of Appeals from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court:—Semble, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal.

Re South Oxford Provincial Elections, McKay v. Sutherland, 5 O.L.R. 58, Street and Britton, JJ.

—Review from inferior Court—Power to review on question of fact—Debt under forty dollars.]—In an action in the Small Debts Court of Fredericton to recover a balance on contra accounts between plaintiff and two defendants, who were partners, the defence being that the partnership was discharged by the plaintiff's acceptance from one of the members of the firm after its dissolution of his individual promissory note in satisfaction of the debt, the jury, found for the plaintiff. On review before a Supreme Court Judge the latter ordered a new trial. On the second trial the verdict was for the defendants The plaintiff obtained an order for review from the County Court Judge, and the latter set aside the verdict and ordered a verdict for the plaintiff for the full amount of his claim:—Held, on motion to make absolute a rule nisi to quash on certiorari, that, the amount of the claim being less than forty dollars, the County Court Judge had no power to review the finding of the jury, the issue being entirely one of fact.

Ex parte McGoldrick, 40 C.L.J. 41 (S.C. N.B.).

—From order as to costs.]—A new trial granted on payment of costs on the ground that the verdict is against the weight of evidence by a Judge of the County Court can not be appealed from on the ground that the costs should not have been imposed.

Macrae v. Brown, 36 N.B.R. 353.

—Review—Affidavit by agent—Finding of facts.]—The affidavit that substantial justice has not been done, made on review proceedings from a judgment of the Small Debt Court of Fredericton, may be made by the attorney or agent of the party reviewing under 45 Vict. c. 15, s. 1. There is no authority under Consolidated Statutes, c. 60, or amending Acts, to review the finding of a justice or the jury in a question of fact where the amount involved in the suit does not exceed forty dollars in debt and eight dollars in tort. The Judges of the Supreme and County Courts are of co-ordinate jurisdiction in matters of review under Consolidated Statutes, c. 60, and orders made within their authority are final. (Per Hanington and Gregory, JJ.)

The King v. Wilson; ex parte McGoldrick, 36 N.B.R. 339.

—Misdirection—Judge's comments on evidence.]—It is not misdirection for the Judge to tell the jury his own opinion on the evidence before them. In his charge to the jury the Judge stated that he himself would pay very little attention to certain corroborative evidence adduced by defendants, but he also told them that the matter was entirely for them to decide:—Held, not misdirection.

Harry v. Packers Steamship Company, 10 B.C.R. 258.

—New trial—Alternative relief.]—Where the plaintiff obtains a verdict at the trial and the defendant moves the Court of Appeal to have it set aside and judgment entered for him or in the alternative for a new trial, he cannot appeal to the Supreme Court if a new trial is granted.

Mutual Reserve Fund Life Association v. Dillon, 34 Can. S.C.R. 141.

—Positive and negative evidence.]—Where the trial Judge accepts positive in preference to the negative testimony,

the Full Court will not interfere unless he is clearly wrong.

Milton v. District of Surrey, 10 B.C.R. 296.

—Discretion—Amendment—Formal judgment.]—The Supreme Court of Canada should not interfere with the exercise of discretion by a provincial Court in refusing to amend its formal judgment. Such amendment is not necessary in a mining case where the mining regulations operate to give the judgment the same effect as it would have if amended.

Creese v. Fleischman, 34 Can. S.C.R. 279.

—Rejection of evidence.]—Where the appellant asks a new trial on the ground of wrongful rejection of evidence, he must show that the question of admissibility was directly raised in the Court below.

Hopkins v. Gooderham, 10 B.C.R. 250.

—Insufficiency of damages—Compromise verdict.]—A new trial on the ground of the insufficiency of the damages will not be granted unless it appears clearly to the Court that the smallness of the damages has arisen from mistake upon the part of either the Court or jury, or from some unfair practice on the part of the defendant. A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence.

Currie v. Saint John Railway Company, 36 N.B.R. 194.

Weight of evidence—Discretion—New grounds on appeal.]—Where the Court whose judgment is appealed from ordered a new trial on the ground that the verdict was against the weight of evidence:—Held, that this was not an exercise of discretion with which the Supreme Court of Canada would refuse to interfere, and the verdict at the trial was restored. Decision of the Supreme Court of Nova Scotia, 35 N.S. Rep. 94, sub nom Conf. Life Assoc. v. Brown, reversed.

The Confederation Life Association v. Borden, 34 Can. S.C.R. 338.

—Misdirection—Prejudice—New trial.]—If, in charging a jury the Judge makes a statement calculated to unnecessarily magnify the importance of the matter in dispute, and suggest excessive damages, a new trial will not be granted, even though the Judge was in error in making the statement, if it appears from the verdict found that the jury, in assessing the damages, were not influenced by the charge.

Cormier v. Boudreau, 35 N.B.R. 645.

—Rejection of evidence—Prejudice.]—A judgment will not be reversed on appeal on the ground that evidence was improperly rejected if the record shows that the party offering the evidence could not have been prejudiced by the rejection.

Johnson v. Jack, 35 N.B.R. 492.

—B. C. County Courts—Setting aside judgment and granting new trial.]—A County Court Judge has no power to grant a new trial merely because he is dissatisfied with the verdict; he is to be guided in granting a new trial by the same principles as the Full Court.

Hutchins v. British Columbia Copper Company, 9 B.C.R. 535.

—New trial—Setting aside verdict.]—Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury has either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted.

Metropolitan Life v. Montreal Coal and Towing Co., 35 Can. S.C.R. 266.

—Inferences from admitted facts—Review.]—Although accepting the findings of the trial Judge as to the credibility of the witnesses, the appellate Court may review the evidence and reverse the decision of the trial Judge as to the legal conclusions to be drawn from the admitted facts.

Gilmour v. Simon, 15 Man. R. 205.

—Supreme Court of Canada—Findings of fact.]—It is the duty of the Court if satisfied that the judgment in appeal is erroneous to reverse it even when it represents the concurring view of three or any number of successive Courts before which the case has been heard.

Hood v. Eden, 36 Can. S.C.R. 476.

—Equity appeal—Review.]—In an equity appeal where the Judge in equity has, in the opinion of the appellate Court, disregarded or not given due weight to evidence taken under commission, the appellate Court may review his finding on the facts as well as the law.

Fairweather v. Lloyd, 36 N.B.R. 548.

—Question of fact—Trial Judge's finding reviewed.]—Where a question of fact, as to which the evidence is contradictory, and as to which there is no preponderance in favour of either party, has been determined by the trial Judge in favour of the plaintiff, but with doubt, and only for the reason that, to send the case to a jury, would probably result in a disagreement and in expense to the parties, the Court, if they consider that the interests of justice require it, will review the Judge's finding and will order a new trial, directing the issues to be settled by a jury.

Johnson v. Durant, 37 N.S.R. 471.

—New trial—Condition—Damages—Reduction.]—The Court of Appeal pro-

nounced judgment on the 4th April, 1905, dismissing the defendants' appeal except upon the question of damages. It was held that the damages assessed by the jury were excessive, and a new trial was ordered unless the plaintiff would consent to a reduction. The certificate of this judgment not having issued, the Court on the 2nd June, 1905, reconsidered the matter, and, acting under Rule 786, directed a new trial confined to the question of the amount of damages:—Held, following Watt v. Watt, [1905] A.C. 115, that the Court has no jurisdiction, without the defendants' consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages.

Hockley v. Grand Trunk R.W. Co., 10 O.L.R. 363 (C.A.).

—New trial—Misdirection, or improper non-direction.]—W., a trader, while in financial difficulties, transferred his property to B., one of his creditors, and subsequently made an assignment of his property in trust for the benefit of all his creditors. The trustee for the creditors brought an action to have the conveyances set aside. On the trial, after the evidence on both sides was concluded, plaintiff's counsel asked the Judge to instruct the jury as to what, on the evidence of this case, might constitute fraud under the Statute of Elizabeth, and he also asked that an account should be taken of the dealings between W. and B. The Judge refused. The jury stated that they were unable to deal with the accounts, but found that there was no fraud in the transaction between W. and B.:—Held, that the refusal to charge the jury as requested, amounted to a misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts, and that it could be more properly dealt with as an equity case. Quære, per Patterson, J.:—Whether an assignee for the benefit of creditors was entitled to maintain the action if there was no provision in the statute relating to assignments for the benefit of creditors, entitling him so to do.

Griffiths v. Boscowitz (1891), 1 S.C. Cas. 245.

—Judgment in appeal—Reference to reasons for judgment.]—See RAILWAYS.

Canadian Pacific Railway v. Blain, 36 Can. S.C.R. 159.

—Non-direction—Onus on party complaining—No substantial miscarriage of justice.]—Where a verdict is attacked for non-direction the onus is upon the attacking part to show that the proper instructions were asked for and refused. And where the charge of the trial Judge has placed the case as a whole correctly before the jury, and no injustice has been done by the verdict and no substantial miscarriage of justice has resulted, a new trial will not be allowed for non-direction on the part of the trial Judge which has not materially affected the result.

Burrill v. Sanford, 37 N.S.R. 535.

—New trial—Misdirection—Charge to jury—Bias.]—A new trial may be ordered on the ground that the Judge's charge showed passion and bias and was improper.

Bustin v. Thorne, 37 Can. S.C.R. 532, reversing Thorne v. Bustin, 37 N.B.R. 163.

—New trial—Terms.]—The Court has no jurisdiction without the defendant's consent to make a new trial dependent upon the plaintiff's refusal to reduce the amount of his verdict.

Barter v. Sprague's Falls Mfg. Co., 38 N.B.R. 207.

— Inferior Court — Review of judgment — Time when application must be made.]—An affidavit taken out of the province by a notary public may be read on an application for review under Con. Stat. (1903), c. 122, s. 6. Affidavits on review should not be entitled in any Court, but if entitled in a Court the entitling may be treated as surplusage. The order for hearing of a review need not be made within thirty days from the date of the certificate of the return. It is sufficient if the application for the order is made within thirty days from the receipt by the applicant of the copy of the proceedings. The thirty days allowed by s. 6, c. 122, Con. Stat. (1903), to apply for review of a judgment in the civil cause tried in an inferior Court after obtaining a copy and minute of the proceedings, does not apply only to a copy obtained under an order of a Judge of the Supreme or County Court, but to any copy applied for and furnished by the justice under the section.

Lunt v. Kennedy, 37 N.B.R. 639.

—Motion for new trial—Failure of stenographer to file record—New trial.]—In a case tried at circuit a verdict was entered for the defendant on a declaration amended on the trial, subject to the defendants' objection, substituting for counts therein setting forth causes of action at common law, causes of action under the Workmen's Compensation for Injuries Act, the plaintiff entered the cause on the special paper to move for a new trial, and the defendant to move for a nonsuit pursuant to leave, in case the Court should be of the opinion that the verdict should not stand, and the motions could not be argued owing to the stenographer not filing any record of the trial; the Court ordered a new trial without costs, and that the case be brought down for a second trial on the original record as if no order to amend had been made.

Bourque v. Record Foundry, 38 N.B.R 239.

—Review—Enlargement of judgment.]—On inscription of a cause of review by one of the parties the Court cannot enlarge the judgment against him if the other party has not also inscribed in review. A judgment condemning defendant to repair defects in the construction of a building and to put the building in the condition called for by the contract for construction is too general and vague and not capable of being executed; the cause in review will, therefore, be remitted to the Court of first instance for a proper judgment to be entered.

Les Curé, etc., de St. Charles de Lachenaie v. Archambault, 9 Que. P.R. 369 (Ct. Rev.).

—New trial—Grounds.]—It is not valid ground for ordering a new trial that the Judges differ from the conclusion at which the jury have arrived or consider that the findings shew that the defendants had not had a fair and unprejudiced trial.

Toronto Ry. v. King [1908], A.C. 260.

—Verdict for insufficient damages—Weight of evidence.]—In an action of trespass and trover in the Count Court the jury found for the plaintiff for part of his claim on evidence, that while contradictory as to part of the claim, was strongly in favour of the plaintiff's whole claim. The Judge of the County Court made an order setting aside the verdict and granted a new trial on the ground that the damages were insufficient and the verdict against the weight of evidence:—Held, on appeal, that the Judge had power to make the order, and the appeal was dismissed.

Gallant v. O'Leary, 38 N.B.R. 395.

—Review—Judgment for part of claim—Execution pending review.]—The plaintiff who has obtained judgment for part of his claim and inscribed in review for the portion as to which he has failed does not lose his right to proceed to execution for the part in which he succeeded especially when he expressly reserved such right in his inscription in review.

Brook v. Wolff, Q.R. 31 S.C. 63 (Ct. Rev.).

—Trial without jury—Verdict involving findings of disputed facts.]—Where on a trial without a jury the Judge makes no distinct finding on certain disputed facts, but orders a verdict to be entered for the plaintiff which involves the finding of those facts in the plaintiff's favour, the Court on appeal will assume they have been so found if the evidence justifies a finding to support the verdict.

Hampstead Steamship Co. v. Vaughan Electric Co., 38 N.B.R. 418.

—Review from inferior Court.]—An order on review made by a Judge under Con. Stat. N.B. (1903), c. 122, s. 6, is final.

Hallett v. Allen, 38 N.B.R. 349.

—Review—Judgment against one of several defendants—Several inscriptions in review—Consolidation.]—An inscription in review accompanied by a single deposit from a judgment against one of several defendants, the action being dismissed as to the others, is properly and regularly made by the plaintiff when the defendants appeared separately by the same attorney and filed separate, though identical, pleas and there was, by consent, a single trial and hearing on the merits. When there are several inscriptions in review from the same judgment, one by the plaintiff and the others by different defendants, the Court may order them to be consolidated so that there shall be but one hearing and they may be disposed of by one judgment

Hétu v. Humphrey, Q.R. 32 S.C. 169 (Ct. Rev.).

—Personal action—Warrantor—Inscription in review—Deposit.]—Where a personal action was dismissed after the defendant, having pleaded, called in a warrantor who intervened and also opposed the demand, the plaintiff may inscribe in review without notice to the warrantor and is only obliged to make a single deposit.

Bray v. City of Montreal, Q.R. 32 S.C. 115 (Ct. Rev.).

—Stay of execution.]—The Court will stay execution pending an appeal if it is established or seems probable that the party realizing the money would be unable to pay it back should he fail on the appeal.

Huggard v. Ontario & Saskatchewan Land Co., 1 Sask. R. 52.

—Findings of trial Judge—Appreciation of evidence—Reversal on appeal.]—In a dispute as to the nature and effect of a contract, the trial Judge on his view as to the weight of evidence, found the facts in favour of the plaintiff and gave judgment accordingly. His decision was reversed by a majority of the Court in banco, and the action was dismissed with costs:—Held, reversing the decision of the Alberta Full Court, that the findings of the trial Judge, who had seen and heard the witnesses, should not have been reversed.

Hayes v. Daly, 41 Can. S.C.R. 134.

—Reversal of trial Judge's finding of fact.]—Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its rights and its duty to consider the evidence. And if it appear from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material

part of it, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse the findings. In an action to recover damages for the destruction of property of the plaintiff by fire alleged to have been started by sparks from a locomotive of the defendants, the trial Judge (MacMahon, J.), found in favour of the plaintiffs:—Held, by a Divisional Court, reversing the finding, which was based upon a misapprehension of the evidence, that the plaintiffs had failed to meet the onus cast upon them by the law to prove that the fire which caused the damage came from the defendants' engine. In every case there must be evidence from which it can fairly be inferred not simply guessed, that the damage was caused by the defendant.

Beal v. Michigan Central R.R. Co., 19 O.L.R. 502.

—Motion for new trial—Verdict against weight of evidence.]—A new trial will not be granted on the ground that the verdict was against the weight of evidence if the verdict was one which the jury, acting as reasonable men, could have found.

McLeod v. White, 39 N.B R. 32.

—New trial — Misdirection — Questions for jury.]—An order for a new trial should not be granted merely on account of error in the form of the questions submitted to the jury where no prejudice has been suffered in consequence of the manner in which the issues were presented by the charge of the Judge at the trial and the jury has passed upon the questions of substance. The judgment appealed from (18 Man. R. 134) was affirmed.

Winnipeg Electric Railway Co. v. Wald, 41 Can. S.C.R. 431.

—Court of Review—Reduction of damages.]—There can be no appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, quashing an appeal from the Superior Court, sitting in review, for want of jurisdiction. City of Ste. Cunégonde v. Gougeon, 25 Can. S.C.R. 78, followed. In an action for damages where the plaintiff obtains a verdict at the trial and the Court of Review reduces the amount awarded thereon the judgment of the Superior Court is confirmed and, therefore, no appeal lies to the Court of King's Bench, but there might be an appeal from the judgment of the Court of Review to the Supreme Court of Canada. Simpson v. Palliser, 29 Can. S.C.R. 6, distinguished.

Hull Electric Co. v. Clement, 41 Can. S.C.R. 419.

—New trial—Counsel reading judgments to jury.]—At the trial the plaintiff's counsel was allowed, subject to objection, to read as a part of his closing address a judgment on a former motion for a new trial in this cause delivered in this Court, and also a judgment delivered on appeal in the Supreme Court of Canada. These were both dissenting judgments, they dealt with the same facts and expressed opinions on the facts, but covered a wider range of questions than those on which this jury was asked to find; the trial Judge expressed his opinion that the jury could not have been biased by the reading of these judgments; this was the third trial of the cause and at each trial the plaintiff had a verdict, and the weight of evidence was in favour of the findings of the jury:—Held, that while it was improper to allow the judgments to be read, yet under the special circumstances this was not a ground for a new trial. Held, also, that the objection was cured by section 376 of the Supreme Court Act, C.S. (1903) c. 111, as no substantial wrong or miscarriage of justice had been thereby occasioned.

Harris v. Jamieson, 39 N.B R. 177.

Question of fact—Conflicting evidence.]—Bent v. Morine, 3 E.L.R. 108 (N.S.).

—Appeal on questions of fact—Judge's charge.]—Where disputed questions of fact are left to the jury, and the Judge's charge distinctly leaves the matter to them to find for the plaintiff if they believe his evidence, and for the defendant if they believe the defendant's evidence, and there is evidence to support a finding either way, the verdict will not be disturbed on appeal.

Brenan v. Hopkins, 39 N.B.R. 236.

VIII. EFFECT.

—Certificate of judgment—Stay of proceedings.]—After the decision of the Court of Appeal has been certified by the Registrar, the case is no longer pending in that Court, and, by Rule 818, the subsequent proceedings are to be taken as if the decision had been given in the Court below. A Judge of the Court of Appeal has, therefore, no power, under the Judicature Act, R.S.O. (1897), c. 51, s. 54, or 60 & 61 Vict. c. 34, s. 1 (D.), or otherwise, after certificate, to make an order staying proceedings upon the judgment pending a proposed application for leave to appeal to the Supreme Court of Canada.

Hargrove v. Royal Templars of Temperance, 2 O.L.R. 126.

—Summary conviction—Appeal to County Court—Subsequent habeas corpus proceedings.]—The decision of the County Court in appeal from a summary conviction is final and conclusive, and a Supreme Court Judge has no jurisdiction to interfere by habeas corpus.

Rev v. Beamish, 8 B.C.R. 171 (Walkem, J.).

—Appeal to Privy Council—Stay of execution.]—A Judge in Chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the Court to the Judicial Committee of the Privy Council.

Adams & Burns v. Bank of Montreal, 31 Can. S.C.R. 223.

—Effect of allowing appeal—Non-appealing party—Costs.]—Action to restrain a township corporation and a contractor from constructing a drain authorized by by-law of the township. The judgment of the High Court granted an injunction against and ordered costs to be paid by both defendants, and ordered the corporation to indemnify the contractor if he paid them. The corporation appealed to the Court of Appeal, making the contractor a respondent; the latter appeared at the hearing of that appeal, but did not himself appeal. The appeal was allowed with costs:—Held, that the result of allowing the corporation's appeal was that, as the plaintiff's right to recover against the contractor depended upon his right to recover against the corporation, the action must be dismissed as against both defendants, but the contractor could have no costs of the appeal:—Semble, that he should have his costs below against the plaintiff.

Challoner v. Township of Lobo et al. (No. 2), 1 O.L.R. 292 (C.A.).

—Removing stay of execution—Rule 827—Discretion—Grounds for removal.]—An appeal lies to the Court of Appeal from an order of a Judge thereof, in Chambers under Rule 827, directing that the execution of the judgment appealed from shall not be stayed pending the appeal. Such an order is not a purely discretionary one; a proper case must be out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause. A Judge in Chambers having ordered the removal of the stay upon the ground that the appellants' financial position was weak, his order was reversed by the Court, where the appeal appeared to be prosecuted in good faith, and on substantial grounds, and the effect of the execution would practically be to close up the business of one of the appellants.

Centaur Cycle Co. v. Hill, 4 O.L.R. 92 (C.A.).

—To Privy Council—Execution pending.]—See EXECUTION.

(Consolidated Car Heating Co. v. Came, 5 Que. P.R. 48.)

—Stay of reference pending appeal—Ruling of Master in Ordinary—Appeal from.]—A judgment directed the Master in Ordinary to make partition of lands; ordered that the parties should execute and deliver all necessary conveyances, to be settled by the Master, and should give possession to each other in accordance therewith; and directed the Master to ascertain the plaintiff's damages for ouster, mesne profits, and waste. The defendants appealed from the judgment of the Court of Appeal, and gave the security provided for by Rule 826:—Held, that the reference was stayed pending the appeal. Construction and application of Rules 827 and 829. The ruling of the Master that the reference was not stayed was a ruling upon a question of practice, and therefore came within the exception in s. 75 (2) of the Judicature Act R.S.O. (1897), c. 51; and an appeal from his ruling lay to a Judge in Court.

Monro v. Toronto Ry., 5 O.L.R. 15.

—Stay of proceedings—Appeal to Privy Council.]—The Superior Court cannot, on the mere affirmation of a party that he intends to apply to His Majesty's Privy Council for leave to appeal from a final judgment of the Supreme Court of Canada, suspend the execution of said judgment.

McDougall v. Montreal Street Railway Co., Q.R. 24 S.C. 509 (Sup. Ct.).

—Small Debts Court—Appeal from—Finality of.] — An appeal from the Small Debts Court, B.C., either to a Judge of the Supreme Court or to the County Court is final.

Larsen v. Coryell, 11 B.C.R 22.

—To Supreme Court (Can.)—Stay of proceedings.]—Upon giving the security prescribed by s. 46 and sub-clause (e) of s. 47, defendants are entitled to a stay of proceedings in respect of the plaintiffs' whole judgment, including the costs of the action.

Eggleston v. C.P.R. (N.W.T.), 1 W.L.R. 570 (Scott, J.).

—Appeal from order for new trial—Security on appeal—Stay of trial.]—A new trial having been ordered by a Divisional Court, the plaintiff gave notice of trial, but the defendants appealed to the Court of Appeal from the order directing the new trial, and gave the security required by Con. Rule 826, which was duly allowed:—Held, that the order for a new trial was "a judgment or order appealed from," within the meaning of Con. Rule 827 (1), and the security for the appeal having been allowed, the execution thereof, by proceeding to a new trial or otherwise, was stayed pending the appeal, by the force of that rule, such judgment or order not being one of the excepted cases mentioned in the Rule. The Rule is not confined to a case of a judgment or order directing the payment of money, but extends generally to all appealable judg-

ments or orders which are to be "executed" by proceedings to be taken thereunder or in consequence thereof. In a proper case the stay may be removed and permission given to proceed to trial notwithstanding the appeal; but as a general rule such permission ought not to be granted; and in this case it was refused.

Uylaki v. Dawson, 10 O.L.R. 683.

—Judgment for part of claim—Execution—Inscription in review by plaintiff—Acquiescence.]—The issue of a writ of execution or a saisie-arret by the plaintiff whose action has been maintained in part only does not annul the inscription in review by the plaintiff, especially when, in the fiat and execution, he states that it is issued "without prejudice and under reserve of plaintiff's inscription in review fyled herein." Quaere. Can a plaintiff who has inscribed in review from a judgment for part of his claim only, execute said judgment, from which defendant has not appealed, for the part in his favour?

Brook v. Wolf, 8 Que. P.R. 187 (Ct. Rev.).

—Appeal to Privy Council—Stay of proceedings.]—The judgment of the Court of Review dismissing an action to set aside the will of plaintiff's husband having been reversed by the Supreme Court of Canada the plaintiff brought an action for partition of the property of a partnership of which her husband was a member:—Held, that the defendant was not entitled to an order staying the proceedings in said action for partition until an application for leave to appeal from the judgment of the Supreme Court to the Privy Council had been heard and decided.

Mayrand v. Dussault, 8 Que. P.R. 285 (Davidson, J.).

IX. Security for Costs

See Security for Costs.

X. Criminal Appeal.

See Criminal Law; Summary Conviction.

APPEARANCE.

Leave after judgment.]—After judgment in default of appearance an appearance cannot be entered without leave.

Chong Man Chock v. Kai Fung, 8 B.C.R. 67.

Necessity for notice of—Rules of Court—English practice.]—

Bell Engine & Thresher Co. v. Bruce, 6 W.L.R. 357 (N.W.T.).

—Service—Art. 115 C.C.P.—Rule 29 practice Sup. Ct.]—A defendant is not obliged to cause the appearance to be served on the opposite party.

Morin v. Jette, 5 Que. P.R. 69 (Sup. Ct.).

—Service on plaintiff unnecessary.]—A defendant is not obliged to serve the plaintiff's attorney with a duplicate or certified copy of his appearance; it suffices that the same is filed with the prothonotary within the delays prescribed by law.

Cardinal v. Picher, Q.R. 26 S.C. 523 (Sup. Ct.).

—Appearance — Withdrawal of — Conditional appearance.]—An application by a defendant resident in Montreal, in an action brought in Ontario on two promissory notes payable, if at all, in Montreal, to withdraw his appearance and enter a conditional appearance, was refused, it having been shown that the defendant had not only appeared, but had also successfully resisted a motion for immediate judgment on material alleging his intention to counterclaim to have a partnership between the plaintiff and himself in Ontario wound up.

Croil v. McCullough, 11 O.L.R. 282 (M. C.).

ARBITRATION AND AWARD.

Liability for tort—Agreement to refer—Refusal of arbitrator to act.]—An agreement between a contractor about to build and the occupant of neighbouring premises, for the payment of damages, to be ascertained by arbitration, likely to be caused by the works, does not relieve the contractor from liability as for tort, and if no arbitration is had in consequence of his arbitrator's refusal to act, an action to recover the damages lies de plano.

Rosenveesen v. Thackeray, 38 Que. S.C. 453.

—Oral submission and award—Irregularity—Absence of prejudice.]—The plaintiff sued in the District Court for $12, the amount of an award, the action being brought under the small debt procedure. The plaintiff found cattle upon his land, doing damage, and impounded them. The cattle in fact belonged to the defendant's mother, but it was not shown that the defendant had not some interest in them; and he, in order to have them released from the pound, signed a written undertaking to pay for the damage done by the cattle on the plaintiff's land. He also agreed orally to an arbitration, and the damages were assessed, by an award (not in writing) of 3 men, at $12. The defendant was not present when the 3 men inspected the land and made their award, nor was he notified:—Held, that the undertaking was signed by the defendant for good consideration; and he was personally responsible to the plaintiff for unascertained damages; that there was an

oral submission to arbitration; that the procedure under it by the plaintiff and the arbitrators was irregular, but the defendant was not prejudiced by it, the award being a fair one; that the submission, not being in writing, was not governed by the Arbitration Ordinance; that the oral submission was valid, and so was the award; that the award made the damages a debt, and so within the small debt procedure; and the plaintiff was entitled to judgment.

Erbach v. Bender, 14 W.L.R. 720.

—Award made by Judge—Enforced statutory arbitration.]—H. attempted to appeal to the Court en banc from an award made by Harvey, J., under the provisions of the Edmonton charter, fixing compensation for lands expropriated. The charter gives no appeal and makes no reference to the Arbitration Act:—Held, that the award was not an order of a Judge within the meaning of c. 7 of the statutes of 1908, "An Act respecting the Enforcement of Judges' Orders in Matters not in Court;" that the Arbitration Act does not apply to an enforced statutory arbitration, the charter not declaring that the proceedings under it shall be deemed a submission; and that no appeal lay by virtue of these statutes or otherwise to the Court en banc. Semble, that the only method by which H. could impeach the award was by action based upon the equitable grounds of fraud, misconduct, or mistake.

Re Humberstone and City of Edmonton, 14 W.L.R. 492 (Alta.).

—Agreement—Set-off for deficiency—Arbitration condition precedent to right of action.]—In an agreement between the parties for the purchase and sale of a logging plant, one of the provisions was: "The said parties of the first part further guarantee that the balance of the assets of the said Company . . . are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered, the value of said deficiency shall be estimated by three arbitrators . . . and the amount of the award of the said arbitrators shall, in the manner hereinbefore mentioned, be deducted from the said purchase-money still owing and unpaid under this agreement":—Held, on appeal (affirming the judgment of Clement, J.), that the holding of an arbitration to determine any deficiency was a condition precedent to the claiming of any set-off against the purchase-price.

Cuddy v. Cameron, 15 B.C.R. 452.

—Order for enforcement of award—Appeal from—Objections to award.]—Upon appeal from an order granting one of the parties to an arbitration leave to enforce an award:—Held, that the Court could not entertain objections to the award based upon alleged misconduct of the arbitrators; the appellant's course in regard to such objections was to move to set aside the award. Held, however, that the award was uncertain and indefinite in its terms and incapable of enforcement by the Court; and upon this ground the appeal should be allowed and the order for enforcement set aside.

Re Mitchell and Mitchell, 14 W.L.R. 701.

—Failure to attend after notice.]—On motion to set aside an award it appeared from the affidavits before the Court that one of the parties to the arbitration, anticipating an award against him, purposely absented himself from the final meeting of arbitrators, at which a conclusion was to be arrived at, and connived with one of the arbitrators to do the same, with the view of preventing the holding of the meeting, of which both had notice, and thereby preventing the making of an award:—Held, that it was not open to such party to complain of the award made by the two remaining arbitrators in the absence of himself and the arbitrator who abstained from attending at his instance.

Lesser v. Cohen, 44 N.S.R. 132.

Case stated by arbitrators — Time — Remission to arbitrators.]—An application to the Court by one of the parties to an arbitration, under s. 41 of the Arbitration Act R.S.O. (1897), c. 62, for an order directing the arbitrators to state a case for the opinion of the Court as to the admissibility and relevancy of evidence before them must be made before the execution of the award, and it is too late for them to state a case under that section after the award is made. The Court will not remit the matter to the arbitrators for reconsideration on the ground of mistake unless the mistake appears on the face of the award, or unless the mistake is admitted by the arbitrators. Where after an award was made two of the arbitrators certified that they had admitted and considered certain evidence, the admissibility of which they considered doubtful, the Court refused to remit under s. 11 of the above Act the matters in question in the arbitration.

Re An Arbitration between Montgomery, Jones & Co., and Liebenthal & Co. (1898), 78 L.T.N.S. 406, specially considered. Re The Grand Trunk Railway and Petrie, 2 O.L.R. 284.

—Time for making award—Power to extend—N.S. Acts of 1895, c. 7, s. 2, sub-sec. (e).—By the terms of an agreement for submission to arbitration the matters in difference between the parties were referred to the award, etc., of M. and B., and in case they disagreed, or failed to make their award before the 1st day of August, then next, then to the award, etc., of such umpire as said arbitrators should nominate and appoint, "so as the said arbitrators or umpire do make and publish his

and their award ready to be delivered on or before the 10th day of August next, or on or before any other day to which said arbitrators or umpire shall, by writing indorsed by these presents, enlarge the time for making such award or umpirage." On the 29th July the arbitrators appointed J. as umpire, and on the same day, by indorsement on the award, extended the time for making the award by the arbitrators from the 1st to the 25th August, and for the umpire from the 10th to the 30th August. On the 25th August the arbitrators further extended the time for making the award by the arbitrators to the 10th September, and for the umpire to the 20th September. On the 20th September the umpire extended the time for making his award to the 30th September, and on that date he again extended the time to the 10th October. On the 7th October he made and published the award on which plaintiff's action was brought:—Held, per Ritchie, J., Graham, E.J. concurring, that, under the terms of the agreement, the power of the arbitrators to consider and deal with the questions submitted absolutely terminated on the 1st of August, after which date the umpire was the only person who had authority to make an award. Held, also, that the arbitrators had no authority to extend the time within which the umpire could make his award, and that as such time, if not legally extended, expired on the 10th August, and the umpire did not attempt to extend it until the 20th September, the award made by him was irregular and void, and plaintiffs could not recover. Held, also, that the provisions of the Arbitration Act, Acts of 1895, c. 7. s. 2, sub-sec. (e) were not applicable, a contrary intention being expressed in the submission, which fixed the date before which the arbitrator was to make his award or extend the time. Held, also, that the section, if applicable, would not assist plaintiff, as the umpire did not begin to extend the time until September 20th, and the authority of the arbitrators had terminated more than a month previously. Per Meagher, J., McDonald, C.J., concurring. Held, that the power of the arbitrators to make their award, and consequently their authority to extend the time for doing so, did not terminate until they disagreed upon the terms of the award, and, in the absence of evidence to show when this disagreement occurred, the enlargement of time made by them was valid. Held, also, that it must appear from some clear term or expression that it was intended to exclude the provisions of the Arbitration Act from the submission. Held, also, that, under the terms of the Arbitration Act, the umpire had one month after the original or extended time for making the award of the arbitrators, in which to make his award, and that, as he had made it within that time, it could not be said that he had no authority to do so.

Holmes v. Taylor, 33 N.S.R. 415.

—Appointment of third arbitrator by first two named—Injunction—Grounds of objection—Onus.]—Certain rights and easements of plaintiffs were expropriated by the L. Gas Co. under an Act of the legislature enabling the company to make such expropriation, and providing for the determination of the amount of remuneration to be paid by arbitration. Plaintiffs appointed C. to be one of the arbitrators, and the company appointed D. Plaintiffs claimed a declaration that D., who was alleged to have been agreed upon by C. and B., as the third arbitrator, was not duly appointed, and an injunction to prevent him from acting (1) because the appointment of D. was not agreed to by C.; (2) because the appointment was not made in writing; and (3) because the appointment, if agreed to by C. in the first instance, was revoked by C. withdrawing his consent thereto before action brought:—Held, 1. The onus of establishing the grounds relied upon was upon plaintiffs. 2. The question as to whether C. did or did not assent to the appointment of D. was one of fact, and the finding on the point being adverse to plaintiffs, and the weight of evidence being in favour of the finding there was no reason for setting it aside. 3. In the absence of anything to require the appointment of the third arbitrator to be made in writing the same law would govern as in the case of the appointment of an umpire under a submission, which may be made by parol if no particular mode of appointment be prescribed. 4. D. having been appointed and having consented to act his appointment could not be revoked by subsequent dissent of the parties.

Kedy v. Davison, 37 C.L.J. 360 (S.C., N.S.).

—Remuneration of arbitrator—Contract.]—Where there is evidence of an express promise to pay an arbitrator for his services as such founded on good consideration, it is misdirection to withdraw the same from the consideration of the jury.

Pinder v. Cronkhite, 34 N.B.R. 498.

—Special case — Arbitration Act — "Opinion."]—A single Judge has no jurisdiction to pronounce the opinion of the Court upon a special case stated by arbitrators pursuant to s. 41 of the Arbitration Act, R.S.O. (1897), c. 62. The effect of cl (a) of sub-sec. 1. of s. 67 of the Judicature Act, R.S.O. (1897), c. 51, and of Rule 117, is to require that such a case be heard before a Divisional Court, as being a proceeding directed by statute to be taken before the Court, and in which the decision of the Court is final. "The opinion

of the Court'' is a ''decision,'' though not a binding adjudication as to the rights of parties or a decision amounting to a judgment or order; it is a ''final decision'' because it is the end of the proceeding and cannot be reviewed by an Appellate Court.

Re Geddes and Cochrane, 2 O.L.R. 145 (D.C.).

—Arbitrator — Disqualification — Bias—Alderman—Expropriation of property by city.]—An alderman of the City of St. John is disqualified from acting as an arbitrator appointed by the city to determine with other arbitrators the value of property expropriated by the city under Act 61 Vict. c. 52.

In re Abell, 2 N.B. Eq. 271.

—Purchase of electric light plant — Appointment of sole arbitrator—Notice—Arbitration Act.]—By an agreement between the town corporation and the assignor of the company for the establishment and operation for ten years of an electric light plant in the town, it was provided that the town might at any time during the ten years purchase the plant at a valuation fixed by three arbitrators, appointed by each party choosing an arbitrator and they two a third in case of dispute, or by a majority of them. Where a submission provides that the reference shall be two arbitrators, the Arbitration Act, R.S.O. (1897), c. 62, s. 8 (b), gives power to the party who has appointed an arbitrator (if the other makes default as specified) to appoint that arbitrator as sole arbitrator; and it is provided that the Court or Judge may set aside any such appointment:—Held, that notice of the appointment of the sole arbitrator should be given to the party in default, who, if not notified, is not called upon to move against the appointment. Held, also, that the agreement was not to be read as suspending the choice of a third arbitrator till there should be a dispute, but it imported that the three arbitrators should act from the outset; and therefore, s. 8 (b) did not apply.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation (1901), 2 O.L.R. 301, and Gumm v. Hallett (1872), L.R. 14 Eq. 555, considered:—Semble, that the arbitration was under the Municipal Act, and s. 8 of the Arbitration Act was not applicable at all; R.S.O. (1897), c. 223, s 467.

Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls, 2 O.L.R. 585.

—Service of award—Arts. 94, 1438, 1442, 1443 C.C.]—The Superior Court at Montreal has no jurisdiction in an action to enforce an award of arbitrators, although the agreement for arbitration, submission and announcement of the award had taken place in the District of Montreal, if the award has been served on defendants in the District of St. Hyacinthe, the whole cause of action in such case not having arisen in the District of Montreal.

Roman Catholic Episcopal Corporation of Nicolet v. Paquet, 17 Que. S.C. 447 (S.C.).

—Taxation of costs—Art. 5164 R.S.Q.]—There is no review of a judgment by a Judge of the Superior Court taxing and settling the costs of an arbitration in virtue of par. 26 of Art. 5164 R.S.Q.

Richelieu East Valley Railway Co. v. Jetté, 17 Que. S.C. 493 (C.R.).

—Benefit society—By-law for arbitration—Expulsion of member.]—A by-law of a benefit society, ordering the expulsion of a member who had sued the society instead of submitting his claim to a board of arbitration established by its charter, is neither against public order, oppressive nor unreasonable, and the expulsion of the member is lawful.

Union St. Joseph v. Cabana, 10 Que. K.B. 325.

—Condition precedent—Waiver.]—An objection as to arbitration and award being a condition precedent to an action for damages cannot be invoked on appeal after having been waived or abandoned in the Court below.

Hamelin v. Bannerman, 31 Can. S.C.R. 534.

—Appointment of third arbitrator by first two named—Question as to consent of—Injunction to prevent party appointed from acting.]—Certain rights and easements of plaintiffs were expropriated by the L. Gas Co. under an Act of the Legislature enabling the company to make such expropriation, and providing for the determination, by arbitration, of the amount of remuneration to be paid. Plaintiffs appointed C. to be one of the arbitrators, and the company appointed B. Plaintiffs claimed a declaration that D., who was alleged to have been agreed upon by C. and B. as the third arbitrator, was not duly appointed, and an injunction to prevent him from acting. (1) because the appointment of D. was not agreed to by C., (2) because the appointment was not made in writing, and (3) because the appointment, if agreed to by C. in the first instance, was revoked by C. withdrawing his consent thereto before action brought:—Held, that the onus of establishing the grounds relied upon was upon plaintiffs. Held, that the question as to whether C. did or did not assent to the appointment of D. was one of fact, and, the finding of the trial Judge on the point being adverse to the plaintiffs, and the weight of evidence being in favour of the finding, there was no reason for setting it aside. Held, that, in the absence of anything to require the appointment of the

third arbitrator to be made in writing, the same law would govern as in the appointment of an umpire under a submission, which may be made by parol if no particular mode of appointment be prescribed. Held, that D., having been appointed, and having consented to act, his appointment could not be revoked by subsequent dissent of the parties.

Kedy v. Davison, 34 N.S.R. 233.

—Clerical error in award—Motion to refer back—Railway Act of Canada.]—Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act:—Held, that if the Provincial legislation (R.S.O. 1897, c. 62) applied, the motion was needless, the arbitrators having power (s. 9 (c)) to correct the mistake. If that legislation were not applicable, there was no power, under the Dominion Railway Act or otherwise, to remit the award, nor to correct the error upon this motion. Application dismissed.

Re McAlpine and Lake Erie and Detroit River Railway Co., 3 O.L.R. 230.

—Compensation under s. 133 of the Vancouver Incorporation Act, 1900—Award of —Procedure—Arbitrators.]—The right to compensation cannot be determined by arbitrators appointed under s. 133 of the Vancouver Incorporation Act, 1900, as their jurisdiction is limited to the finding of the amount of compensation. An award of such arbitrators cannot be enforced summarily under s. 13 of the Arbitration Act.

In Re Northern Counties Investment Trust, Ltd., and the City of Vancouver, 8 B.C.R. 338 (Irving, J.).

—Extension of delay for making report—Arts. 407, 1438 C.C.P.] — Arbitrators amiables compositeurs and experts, become functi officio by the lapse of the delay fixed for the performance of their duties. If the period fixed has expired without any report having been made, the submission becomes inoperative, and the Court cannot thereafter grant an extension of the delay.

Beaudoin v. Dubrule, 200 Que. S.C. 575 (Davidson, J.).

—Jurisdiction of arbitrators—Deed of Submission—Construction.]—By agreement of submission dated April 10th, 1893, the provinces of Ontario and Quebec referred to a statutory tribunal the "ascertainment and determination of the amount of the principal of the Common School Fund and the method of computing" interest thereon and of the amount for which Ontario was liable. That fund was established by Canadian Act (12 Vict. c. 200), and consisted (inter alia) of the proceeds of public lands received by Ontario and paid to the Dominion:—Held, that a claim by Quebec that Ontario should be debited with uncollected prices of land sold by it, being a claim for wilful neglect and default and in the nature of damages, not suggested in but heterogeneous to the matters actually specified in the submission was not on its true construction included therein.

Attorney-General for Ontario v. Attorney-General for Quebec (1903), A.C. 39.

—Stating case—Matter "arising in the course of the reference"—Revoking submission—Arbitration Act.] — Arbitrators were appointed under the arbitration clause in an agreement between two companies, whereby, inter alia, one agreed to provide the other daily with a certain quantity of cordwood, which the latter agreed to carbonize into charcoal, and to deliver to the former to the maximum quantity of 85,000 bushels per month. The arbitration clause provided that "in case of any dispute . . . . arising between the parties in regard to the meaning or construction of this agreement . . . . or of the mutual obligations of the parties . . . . or of any other act, matter or thing relating to, or concerning the carrying out of the true spirit, intention, or meaning of these presents, the same shall be determined by arbitration." Disputes arising between the parties, one of the claims referred to the arbitrators was for damages for alleged short delivery of charcoal, such shortage being claimed whatever the proper construction of the agreement in that regard. On application by one of the parties, under s. 41 of the Arbitration Act, R.S.O. (1897), c. 62, for a direction to the arbitrators to state a special case as to what was the true construction of the contract as to the amount of charcoal called for per month under it—a matter upon which they had reached and announced a conclusion:—Held, this was a question of law "arising in the course of the reference" within the meaning of the said section, and a special case might properly be directed as to it. Held, also, that a special case having been directed as to this, the principal question, it might properly be made to include two other questions in dispute, though had they been the only questions which the applicants desired to have stated, it would not have been proper to direct the case as to them. A party to a reference is not entitled ex debito justitia to have a special case directed whenever a question of law arises in the course of a reference. This is a matter resting in the discretion of the Court. There is no general rule that where the arbitrators are specially qualified to decide the question of law, this direction should not be given, at all events where the arbitrators have ruled upon the question. Semble, that different considerations apply to the exercise of the discretion to give leave to revoke a submission (R.S.O. 1897, c. 62, s. 3), a discre-

tion which is to be exercised only under exceptional circumstances.

The Rathbun Company v. Standard Chemical Company, 5 O.L.R. 286, 2 C.L.R. 110 (Meredith, C.J.).

—Landlord and tenant—Valuation of buildings—Extension of time for making award—Interest.]—By a lease made on the 1st November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuators or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid by the lessors, with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the valuators or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the lands and buildings were given up by the lessees to the lessors on the 31st October, 1900:—Held, Osler, J.A., dubitante, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent., and for the remainder of the time at the legal rate of five per cent. Judgment of a Divisional Court, 3 O.L.R. 519, varied.

Toronto General Trusts Corporation v. White, 5 O.L.R. 21 (C.A.).

—Submission—Appointment of sole arbitrator—Arbitration Act, R.S.O. 1897, c. 62, s. 8—Appeal.]—A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient":—Held, reversing the decisions of a Divisional Court, 3 O.L.R. 93, and of Street, J., 2 O.L.R. 301, that the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R.S.O. 1897, c. 62, s. 8, and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator. Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls (1901), 2 O.L.R. 585, approved. Held, also, that the order of Street, J., dismissing an application to set aside the appointment of a sole arbitrator, was not made by him as persona designata, but was a judicial order from which an appeal lay.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation; Re Faulkner, 5 O.L.R. 609 (C.A.).

—Order for leave to enforce award—Time—Arbitration Act, s. 45.]—An application under s. 13 of the Arbitration Act, R.S.O. 1897, c. 62, for an order giving leave to enforce an award need not be made within six weeks after the publication of the award. S. 45 of the Act does not apply to such an application, but only to applications to set aside awards. An order under s. 13 is necessary when the reference has been made out of Court. Objections properly the subject of a motion to set aside the award were not given effect to upon appeal from an order under s. 13.

Re Lloyd and Pegg, 5 O.L.R. 389 (Meredith, J.).

—Making award a judgment—King's Bench Act, Rules 754-764—Arbitrators delegating their duty to third person.]—Plaintiff's action was to recover a balance on a building contract, alleging completion. Defendant denied completion and counterclaimed against plaintiff on several grounds. After the record had been entered for trial the parties entered into an agreement to refer to two named arbitrators and a third one to be appointed by the latter "all matters whatsoever in dispute" between them. The arbitrators thus appointed having made their award in plaintiff's favour, he moved, under Rules 754-764 of the King's Bench (Act Man.) to have the award made a judgment of the Court:—Held, dismissing the motion with costs, that the award was bad on the following grounds:—1. It showed on its face that the work under the plaintiff's contract had not been completed, so that the plaintiff was not entitled to recover anything at all in this action. 2. From evidence taken on the hearing of the motion it was clear that the arbitrators had not taken into consideration 'all matters whatsoever in dispute," but had failed to deal with a number of such matters which had been brought to their attention. 3. The arbitrators had attempted to delegate to another person unascertained) their authority to decide whether the sum of $110, part of the amount awarded, should or should not be paid.

Blakeston v. Wilson, 14 Man. R. 271 (Richards, J.).

—Setting aside award—Misconduct of arbitrator—Waiver.]—A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award. Where two out of three arbitrators go on and hold a meeting and make an award at a time when the third arbitrator cannot attend, it amounts to an exclusion of the third arbitrator and the award is invalid. A party by attending at such a meeting and not objecting (although he knew of the third arbitrator's inability to attend) does not waive his right to object afterwards. Per Hunter, C.J.:—It is not necessary that there should be absolute proof of misconduct before an award will be set aside on that ground; it is enough if there is a reasonable doubt raised in the judicial mind that all was fair in the conduct of the arbitrators.

In Re Deborer and Megaw's Arbitration, 10 B.C.R. 48.

—Arbitration Ordinance—Remission for reconsideration refused—No authority to appoint new arbitrator.]—Sec. 11 of "The Arbitration Ordinance" provides that "In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire." Remission was refused because after the submission was entered into one of the arbitrators commenced an action against the party who had nominated him to recover an amount agreed to be paid for procuring settlement of the matters in dispute. Where the instrument of submission names the arbitrators the Court or Judge has no power to appoint a new arbitrator in lieu of one who has become incompetent.

Re Crawford and Allen, 5 Terr. L.R. 398 (Scott, J.).

—Disinterested party — Ratepayer of town.]—By the Acts of 1902, c. 80, the town of Glace Bay was empowered, for the purpose of obtaining a water supply, to enter upon any lands in the county of Cape Breton, and it was provided that the damages, if any, payable to the owner of such land, should be determined by arbitration. Objection was taken to the award of damages on the ground that C. F., one of the arbitrators appointed under the Act, was not a disinterested party, he having been assessed as a ratepayer in the town:—Held, dismissing with costs the appeal from the decision of Townshend, J., refusing a writ of certiorari. (a) That if the arbitrators were acting in a judicial capacity, c 39, R.S. applied and the fact of one of the arbitrators being a ratepayer afforded no valid objection to the award made by him. (b) That if the arbitrators were not acting in a judicial capacity a writ of certiorari would not lie to remove into this Court any award made by them. Rex v. Town of Glace Bay, 36 N.S.R. 456.

—Setting aside award—Misconduct of arbitrator—Partiality—Evidence — Jurisdiction of majority—Decision in absence of third arbitrator.]—A reference under the British Columbia Arbitration Act authorized two out of three arbitrators to make the award. After notice of the final meeting the third arbitrator failed to attend, on account of personal inconvenience and private affairs, but both parties appeared at the time appointed and no objections were raised on account of the absence of the third arbitrator. The award was then made by the other two arbitrators present:—Held, reversing the judgment appealed from (10 B.C.R. 48), that under the circumstances there was cast upon the two arbitrators present the jurisdiction to decide whether or not, in the exercise of judicial discretion, the proceedings should be further delayed or the award made by them alone in the absence of the third arbitrator, and it was not inconsistent with natural justice that they should decide upon making the award themselves. Held, further, that although the third arbitrator had previously suggested some further audit of certain accounts that had already been examined by the arbitrators, there was nothing in this circumstance to impugn the good faith of the other two arbitrators in deciding that further delay was unnecessary. Where it does not appear that an arbitrator is in a position with regard to the parties or the matter in dispute such as might cast suspicion upon his honour and impartiality, there must be proof of actual partiality or unfairness in order to justify the setting aside of the award.

Doberer v. Megaw, 34 Can. S.C.R. 125.

—Non-compliance with direction of the Court—Refusal to state a special case—Bona fide application—Remittal to arbitration—R.S.O. (1897), c. 62, s. 12, subsec. 2, s. 41.]—On a motion to set aside an award:—Held, that an arbitrator to whom an award had been remitted "to find and make his award as to the ownership" of certain property had not complied with that direction by vesting the property in one of the parties as owner. Held, also, that (an application having been made bona fide to him before the award was signed to state certain questions of law in a special case for the opinion of the Court or to adjourn the matter until an application to the Court to direct him to state a special case had been disposed of, his refusal to do so was a ground for remittance to him for further consideration. In re Palmer & Co. and Hosken & Co. (1898), 1 Q.B. 131, followed.

Re Powell and Lake Superior Power Company, 9 O.L.R. 236 (Teetzel, J.).

—Quebec Association—Registration as member.]—Held (affirming the judgment of the Superior Court, Mathieu, J.):—An architect, in order to avail himself of the tariff of the Province of Quebec Association of Architects, in support of a claim for services as architect, must establish that he is registered as a mem ber of the Association under the Act 61 Vict. (Q.) c. 33.

Beaulieu v. Lapierre, 26 Que. S.C. 1 (C.R.).

—Partnership—Nomination of arbitrator to adjust accounts—Staying action.]—A partnership agreement contained a provision by which the parties thereto nominated and appointed a named person "as sole and final arbitrator in case of the death of either of the partners before the expiration of the said contract to finally adjust and settle all matters between the survivor and the personal representatives of the deceased partner within such time and on such conditions as they may see fit:"—Held, upon the application of the surviving partners in an action brought against them by the personal representatives of the deceased partner to have the accounts of the partnership wound up, that this clause applied, and the action was stayed and a reference to the arbitrator directed.

Royal Trust Company v. Milligan, 10 O.L.R. 456 (Britton, J.).

—Lands taken or injuriously affected—Inclusion of other matters in submission—Appeal.]—Certain parties having appointed arbitrators under the Municipal Act in respect to lands taken by the municipality in connection with their water works system —afterwards entered into an agreement under seal defining the scope of the arbitration, and included a claim for damages for breach of contract and other matter not within the Municipal Act. They did not provide in the agreement for an appeal under s. 14 of the Arbitration Act, R.S.O. (1897), c. 62. The arbitrators in their award awarded one sum both for the claim "under the Acts and in respect of the matters referred to in the said submission":—Held, affirming the judgment of Teetzel, J., that as the matters not under the Municipal Act could not be distinguished in the amount awarded from the questions referred under the Act, the award being one and indivisible in its present form, and as the agreement come to by the parties defining the scope of the arbitration did not provide for an appeal under the Arbitration Act, no appeal on the merits lay, or was possible.

In re Field-Marshall, and the Village of Beamsville, 11 O.L.R. 472 (D.C.).

—Arbitrator's fee under Workmen's Compensation Act (1902), B.C. Stat. (1902), c. 74.]—The schedule to the Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act, and the arbitrator's fee must be dealt with by a practice analogous to that prevailing prior to the Arbitration Act on a reference directed by the Court.

Chisholm v. Centre Star Mining Company, 12 B.C.R. 16.

—Arbitration — Injunction — Jurisdiction.]—An injunction will not be granted to restrain a party from proceeding with an arbitration where the result of the arbitration will be merely futile and of no injury to the party seeking the injunction. An injunction to restrain an arbitration to determine the value of land of the plaintiff taken by the defendants on the ground that a condition precedent to the taking of the land had not been complied with, refused.

Duncan v. Town of Campbellton, 3 N.B. Eq. 224.

—Setting aside award—Pleading—Prayer for general relief.]—When the plaintiff, in answer to the defence of an award covering the amount of his claim, amends his statement of claim by setting up facts which, if true, would entitle him to ask specifically to have the award set aside, the statement of claim is good on demurrer, if it contains a prayer for general relief, although it does not ask for that specific relief. 2. This Court has jurisdiction over awards whether or not they are awards to which the provisions of 9 & 10 Wm. III. c. 15 apply. 3. Per Mathers, J., Rule 773 of the King's Bench Act provides a code of procedure only for the enforcement of awards, and Rule 774, which reads, "The former practice with respect to awards shall not be abolished, but the same shall only be followed by special leave of the Court or Judge," should be interpreted as if it read, "The former practice relating to the enforcement of awards," etc.

Johannesson v. Galbraith, 16 Man. R. 138.

—Motion for leave to issue execution.]—Upon an application made under R.S.O. (1897), c. 62, s. 13, to the Court for leave to issue an execution to enforce an award the Court has discretion upon affidavits produced to say that in face of facts disclosed, execution should not issue for the present, as was done in this case, and proceedings were stayed for 30 days to enable the objecting party to apply for leave extending the time for moving against the award. A local Judge has jurisdiction to make an order for leave to issue execution to enforce an award.

Re Baker and Kelly, 14 O.L.R. 623.

—Powers of expropriation — Arbitration clause—Right to sue for damages.]—An arbitration clause in a private Act of Parliament will not oust the jurisdiction of the Court, and an action for damages will lie, unless the necessary steps are taken under the Act, to vest the power to exercise the right, or to do the thing for which compensation would be due under the Act. Held, also, following Watt v. Watt (1905) A.C. 115, that the Court has no jurisdiction without the defendant's consent to make a new trial dependent upon the consent of the plaintiff to reduce the damages.

Barter v. Sprague's Falls Manufacturing Company, 38 N.B.R 207

—Time for award—Failure of arbitrators to extend—Action—Stay of proceedings.]—A submission to arbitration, dated the 4th October, 1904, was under seal, and bound the parties to abide by the award so as it was made on or before the 30th October, 1904, or any subsequent day to which the arbitrators should by writing extend the time. There was no covenant not to take other proceedings. The arbitrators proceeded to consider the matters referred to them and continued the arbitration, with the assent of the parties, for nearly two years, but did not by writing extend the time for the award. The plaintiff brought this action for an account in respect of the matters referred, the arbitration being still uncompleted, and the defendant pleaded the submission and proceedings of the arbitrators as an answer to the action:—Held, that the assent of the parties to the arbitration being proceeded with after the time had expired was equivalent to a parol submission only; section 3 of the Arbitration Act, which makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court applies, by virtue of section 2, to submissions in writing only; the same is the case with section 6, which allows an application to stay proceedings; no order extending the time had been made under section 10; and therefore the arbitration proceedings afforded no answer.

Ryan v. Patriarche, 13 O.L.R. 94 (Magee, J.).

Under Railway Act.]—See RAILWAY.

—Costs—Disposition of—Exceeding powers conferred.]—An action for trespass to land was brought by M. against H. and an action of ejectment by T. M. H. against M., both actions resulting from a disputed boundary between the lands of the respective parties. By agreement the question of the boundary was referred to arbitration "including the disposition of costs in the said actions." The arbitrators totalled the costs in the two actions and in their award directed them to be paid in certain proportions:—Held, that the words of the submission in reference to costs meant clearly "party and party costs" and that the arbitrators having undertaken to deal with the costs and expenses of both sides in the two actions, including costs between solicitor and client, exceeded their powers and the award was invalid and must be set aside.

Messenger v. Hicks, 42 N.S.R. 13.

—Law of arbitration—Arbitration as to value of land expropriated also appointed mediators—Award set aside—Terms of submission exceeded.]—When arbitrators were appointed under deeds of submission to value three expropriated lots of ground and fix the indemnity for damages, it being declared that they should act as mediators (amiables compositeurs), but should be bound to conform to the provisions of s. 161 of the Railway Act (1903), and the award, in lieu of valuing the third lot, ordered that the expropriators should return it in part and construct a road on their own adjoining land, to be maintained by them in perpetuity, for the benefit of the parties expropriated:—Held, that arbitrators who are also appointed mediators cannot disregard their instructions and that the error vitiated the whole award.

Quebec Improvement Company v. Quebec Bridge & Railway Co. (1908), A.C. 217; 17 Que. K.B. 353 (P.C.), affirming 16 K.B. 107, which reversed 39 Que. S.C. 328.

—Reference to three arbitrators—Different awards made on different dates.]—In an agreement between the parties, provision was made for the submission of any dispute to three persons as arbitrators, the arbitration to be in accordance with and subject to the provisions of the Arbitration Act. On a reference, following a dispute, under the agreement, the arbitrators being unable to agree, drew up and rendered three separate awards Two of the arbitrators agreed in their findings. Morrison, J., came to the conclusion that the agreement of a majority constituted an award, pursuant to s. 10, sub-sec. 36 of the Interpretation Act:—Held, that said sub-sec. 36 does not apply to the construction of a document inter partes, as here, but to something done pursuant to statute.

McLeod v. Hope, 14 B.C.R. 56.

—Setting aside award—Improper rejection of evidence.]—Held, that the fact that the umpire was appointed before and sat with the arbitrators during the hearing is not a ground for setting aside an award, but quaere, whether it might not be a valid objection if the umpire had interfered during the hearing so as to prevent a final agreement. (2) That an award will be set aside if the arbitrators refuse to receive evidence properly offered and relevant to the issue. (3) That an award will be set aside if the arbitrators when the hearing is practically over hear further evidence

in the absence of one of the parties without notice to him.

Annable v. Annable, 1 Sask. R. 222.

—Award not made within the time limited —When arbitrator functus officio.]—An arbitrator is functus officio as soon as he had made an award or as soon as the time fixed, whether by consent or otherwise, within which he shall make his award has expired. Ruthven v. Ruthven (1847), 8 U.C.R. 12, followed. A previous arbitration to settle the same matter having failed by reason of no award having been made, Benetto took proceedings under the Winnipeg charter for a fresh arbitration and applied to have an arbitrator appointed by the County Court Judge to act on behalf of the city as the city had failed to make a fresh appointment relying on the former appointment which had not been cancelled:—Held, that a new appointment was necessary and the city was not entitled to an order prohibiting the County Court Judge from proceeding to make it.

Bennetto v. City of Winnipeg, 18 Man. R. 100.

—Delay in making award—Waiver.]—In order to impeach an award of arbitrators which determined certain specific matters, on the ground that it does not dispose of all the questions to be disposed of under a general submission of matters in dispute, it must be shewn affirmatively that there were matters in dispute other than those disposed of. (2) That, after one of the parties has accepted the award, he is estopped from objecting that it was not made within the time limited by the submission.

Morrow v. Lindsay, 1 Sask. R. 5.

—Statutory arbitrators — Jurisdiction — Awards "from time to time"—Res judicata—Common school fund.]—The statutes authorizing the appointment of arbitrators to settle accounts between the Dominion and the Provinces of Ontario and Quebec and between the two provinces, provided for submission of questions by agreement among the governments interested; for the making of awards from time to time; and that, subject to appeal, the award of the arbitrators in writing should be binding on the parties to the submission. The provinces submitted to the arbitrators for determination the amount of the principal of the Common School Fund to ascertain which they should consider not only the sum held by the Government of Canada but also "the amount for which Ontario is liable." In 1896 by award No. 2 the arbitrators determined that moneys remitted to purchasers of school lands unless made in fair and prudent administration, and uncollected purchase money of patented lands, unless good cause was shown for non-collection should be deemed moneys received by Ontario, and in 1899 the amount of liability under these heads was fixed by award No. 4. In 1902 the Privy Council held that the arbitrators had no jurisdiction to entertain a claim by Quebec to have Ontario declared liable for the purchase money of school lands yet unpatented allowed to remain uncollected for many years. In making their final award in 1907, the arbitrators refused an application by Quebec for inclusion therein of the amounts found due from Ontario for remissions and non-collections and held that they had exceeded their jurisdiction in determining such liability. On appeal from this determination embodied in the final award:—Held, that the arbitrators had no jurisdiction to determine the liability of Ontario for moneys remitted or not collected. Attorney-General for Ontario v. Attorney-General for Quebec (1903), A.C. 39, followed. Held, that awards Nos. 2 and 4 in so far as they determined this liability were absolutely null, and, therefore, not binding on Ontario.

Province of Quebec v. Province of Ontario, 42 Can. S.C.R. 161.

—Value of buildings on leasehold property —Evidence of rentals and expenditure.]—Evidence of rentals and other income received from buildings erected on leasehold property, and of all outgoings or expenditure in respect thereof during the term, is admissible on an inquiry before an arbitrator for the purpose of determining the value of the same, although owing to exceptional circumstances the revenue derived by the lessees may not in fact afford assistance. A question as to the admissibility of evidence is one of law within the meaning of s. 41 of the Arbitration Act.

Rogers v. London and Canadian Loan and Agency Co., 18 O.L.R. 8.

—Award—Option of one of two alternatives—Failure to declare option.]—The party, to whom an arbitration award gives an option to do one of two things, cannot be presumed to have declared for either alternative by mere lapse of time, and if he fails to declare his option, he must be put in default, before the other party can seek to enforce the award. Hence, when the option consists in either taking over hardwood logs sunk in a pond, as being of a stated quantity, for a lump sum, or, as soon as the ice is gone from the pond, of fishing them up jointly with the other party, to be sawed and the output to be divided between them in certain proportions, the standing by, after the ice is gone, by the party having the option, or his doing nothing during the summer, does not give the other the right to sue for the lump sum on the assumption that he has implicitly elected the first alternative. A putting in default, mise en demeure, is at least required, before an action will lie.

Ross v. Fletcher, 35 Que. S.C. 113 (C.R.).

Action for money demand—Plea of payment of amount ascertained by award—Amendment of statement of claim—Allegation of invalidity of award.]—
Johannesson v. Galbraith, 1 W.L.R. 445 (Man.).

—Arbitration clause—Rescission of contract—Stay of proceedings—Willingness to arbitrate.]—
Fernan v. Moniter, 3 W.L.R. 426 (B.C.).

—Motion to set aside award—Misconduct in arbitrators — Gross undervaluation of mining claim.]—
Harrigan v. Klondike Mines Ry. Co., 5 W.L.R. 137 (Y.T.).

—Misconduct of arbitrators—Gross undervaluation of mining claim—Interested motives alleged against arbitrators.]—
Harrigan v. Klondike Mines Ry. Co., 6 W.L.R. 417 (Y.T.).

—Action to enforce award—Uncertainty.]—
Messenger v. Hicks, 2 E.L.R. 76 (N.S.).

—Agreement to refer—Stay of action—Inconsistent provisions of agreement—Parties not ad idem.]—
Kerr v. Brown, 1 W.L.R. 379 (N.W.T.).

— Defective award — Motion to enlarge time.]—
Smith v. Zwicker, 1 E.L.R. 70 (N.S.).

ARCHITECT.

Architects' fees—Compensation where work not proceeded with.]—By a special Act of the Legislature of Nova Scotia (Acts of 1903, c. 169) reciting the gift to defendant of the sum of $15,000 for the erection of a library building on certain conditions, including the providing of a site for the building and a yearly sum of money for its support and maintenance, and that such gift had been accepted, and the required expenditures approved of by the ratepayers, defendant was authorized to include in its estimates of expenditure, extending over several years the amount required for the purchase of the site for the building, and also, for all time, the sum of $15,000 annually for its support. Plaintiffs were employed to prepare plans and specifications for the building, and did so, but the project was abandoned and plaintiffs claimed payment of the sum of three per cent. on the estimated cost of the building as compensation for the work done by them:—Held, that while there was no specific declaration in the enacting part of the statute that defendant was empowered to erect the building, looking at the whole act, such power must be considered to be impliedly given, and concluded defendant's liability to plaintiffs for the work done by them:—Held, that plaintiffs, on the evidence, were entitled to recover the full amount of the percentage as claimed, and that the judgment in their favour below for a smaller amount must be varied by being increased to the full amount, and defendant's appeal dismissed with costs.
Chappel v. City of Sydney, 44 N.S.R. 27.

—Architects—Preparation of plans—Contract—Joint enterprise.]—In an action by architects to recover from a land owner fees for preparing plans and specifications for the erection of an apartment house upon the defendant's land:—Held, upon conflicting evidence, that the plans and specifications were prepared by the plaintiffs, at their own risk, as sharers with the defendant and others in a contemplated enterprise, and that the defendant was not liable to the plaintiffs.
Melville v. Stirrett, 14 W.L.R. 557 (Man.).

—Preparing plans—Value of services—Evidence.]—In an action by architects for fees for preparing plans for a building which was never erected, the plaintiffs were held, upon the evidence, entitled to recover the amount which they claimed, there being no evidence as to the value of their services, of any weight as opposed to the testimony of the plaintiffs themselves.
Smith v. Crump (No. 2), 14 W.L.R. 297 (Man.).

—Instructions to architects—Plans for proposed building—Authority of agent.]—The plaintiffs, who were architects, prepared plans for a theatre proposed to be erected on the land of the defendant in a city, having received their instructions from C., who had acted as the defendant's agent in that city (she residing in another country) in the collection of rents and looking after her real estate, etc.:—Held, upon the evidence, that the defendant was not liable for the value of the plaintiffs' services in preparing the plans; the theatre was not to be built for her, but for a company, of which C. and one of the palintiffs were promoters, and her only connection with the enterprise was as a subscriber for shares in the company and lessor of the land upon which the theatre was to be built.
Smith v. Crump (No. 1), 14 W.L.R. 295 (Man.).

—Contract for services—Divisibility.]—The agreement by which an architect undertakes to prepare plans and specifications, receive tenders and award the contract, direct the contractors and superintend the work of erecting two buildings, creates an obligation divisible and susceptible of executing in portions. Therefore, the absence of the architect during the course of the work only gives the owner a right to a reduction of the sum agreed to be paid to him in proportion to the prejudice suffered.
Mann v. Rudolph, Q.R. 37 S.C. 299 (Ct. Rev.), reversing 36 S.C. 57.

Architect—Whether liable for loss caused by mistakes in estimates.]—In making his estimates of the cost of a building an architect is only required to use a reasonable degree of care and skill, and if he does this he is not liable for any loss caused by error in the estimates.

Grant v. Dupont, 8 B.C.R. 7.

—Contract to prepare plans, etc.—Right to recover where work not proceeded with.]—Plaintiff was engaged by defendants to prepare plans and specifications for an hotel building, to cost not more than $4,000 or $5,000, for which he was to receive a commission of two per cent. on the cost, with one per cent. additional for superintendence. Instructions as to size, number of rooms, etc., were given by defendants. Before the plans were completed changes were made by additions to the original plan, involving an additional expenditure of $1,500. The plans were approved of by the defendants, when completed, and tenders called for, and the work partly proceeded with. It was then found by defendants that, owing to an advance in the price of materials, the building would cost much more than they had expected, and the work was stopped:—Held, affirming the judgment appealed from, that plaintiff was entitled to recover from defendants the stipulated commission of two per cent. on the estimated cost of the building with the additions agreed upon.

Hutchinson v. Conway, 34 N.S.R. 554.

—Whether liable for loss caused by mistakes in estimates.]—In making his estimates for the cost of a building an architect is only required to use a reasonable degree of care and skill, and if he does this he is not liable for any loss caused by error in the estimates.

Grant v. Dupont, 8 B.C.R. 223, affirming 8 B.C.R. 7.

—Contract to prepare plans—Work not proceeded with—Commission on estimated cost.]—Defendant requested plaintiff to prepare for him plans for a building to cost from $15,000 to $18,000. After inspecting the plans, the defendant objected that the building shown would not give him sufficient room, and suggested changes which, he was told, would increase the cost. Defendant assented, and the plans, as finally prepared, were for a building which would cost $25,000:—Held, that plaintiff was entitled to be paid a percentage on the latter amount, and that, in the absence of evidence to fix the value independent of the special contract proved by plaintiff, the amount allowed by the trial Judge could not be reduced.

Chappell v. Nolan, 38 N.S.R. 74.

—Liability of architect—Plans of house—Servitude.]—The architect employed by a land owner to design and superintend the construction of a house, on a vacant site not subdivided into building lots for sale, incurs no liability from the fact that an oblique view is given through a window, in the house designed by him, onto a part of the land sold by the owner to a third party, after the inception of the building. In this case, the proximate cause of the servitude is to be found, not in the plan devised by the architect, but in the disposal made by the owner of his property, in a manner to make one portion of it bear the relation of a servient tenement, to that on which the house is built.

Saint-Jean v. Strubbe, Q.R. 27 S.C. 266.

—Contract with architect for plans—Parol testimony.]—(1) A contract with an architect for the drawing, at a cost exceeding $50, of plans and specifications for a proposed building, is not a commercial matter and cannot be proved by parol testimony. (2) When inadmissible evidence is received without objection, the party against whom it is given may move for its rejection at any time before the trial is over.

Wright v. Davies, 33 Que. S.C. 346 (C.R.).

Action for fees—Counterclaim for negligence.]—

Russell v. McKerchar, 1 W.L.R. 138 (Man.).

—Fees for services—Drawing plans—Supervision of buildings.]—

Schwab v. Shragge, 3 W.L.R. 463 (Man.).

—Preparation of plans and estimates—Remuneration.]—

Lachance v. Wilson, 7 W.L.R. 646 (Sask.).

—Professional services — Preparation of plans and specifications—Contract—Limited price.]—

Smith v. Czerwinski, 4 W.L.R. 563 (Man.).

ARREST.

Bond for release of defendant arrested under capias—Abandonment of property.]—(1) Sureties for a defendant arrested under a capias, that he will make an abandonment of his property within thirty days after judgment is rendered maintaining the capias, and that he will surrender himself within thirty days of the service upon him of a Judge's order to that effect, are not relieved from liability by an abandonment of property by the defendant, which is, after contestation, set aside by a judgment declaring it fraudulent and condemning the defendant to six months' imprisonment in consequence. (2) The undertaking in a bail-bond, under Art. 913 C.P., to pay costs in addition to the principal and interest,

includes the costs on all the incidental proceedings in the case of which the capias is the initial one.

McManamy v. Hazer, 38 Que. S.C. 441.

—Criminal proceedings.] — See CRIMINAL LAW.

—Capias—Petition to quash—Secretion of property.]—A debtor who sells all his effects and the products of his immoveable property so as to compel the bailiff to make a return of nulla bona and who puts said effects beyond the reach of his creditors, while he himself is able to have the use of them, is guilty of secretion and may be arrested on a capias.

Ethier v. Poirier, 12 Que. P.R. 20.

—Capias—Damages—Exception.]—When a capias is issued for a sum claimed as salary due under an engagement in writing and for a specified commission by contract between the parties it is not a case of unliquidated damages. An exception claiming that the capias could not issue without a Judge's order will be dismissed.

Day v. Paillard, 11 Que. P.R. 295.

—Rule nisi—Imprisonment for Costs—Service.]—A rule for a capias for non-payment of the costs of an action will not be made absolute if the bill of costs has not been served on the opposite party nor taxed in presence of both parties. The application for a capias should be preceded by service of an order to pay and notice that the defendant will be arrested in case of non-payment within three months from the date of such service. The new Code of Civil Procedure has not altered the provisions of the former Code in this matter.

Laudskrowner v. Corber, 11 Que. P.R. 397.

Arrest—Discharge from arrest—Terms—Discretion.]—Where an order to arrest is made upon materials which justify it, although the defendant may be discharged from custody under it upon fresh affidavits, the Judge may, in his discretion, impose terms of bringing no action, and may withhold costs.

Sullivan v. Allen, 1 O.L.R. 53.

—Order for arrest—Want of cause—Liability of justice.]—A justice of the Peace who issues a warrant of arrest without inquiry into the informant's grounds of suspicion against the accused is liable to the latter if the complaint is not justified on any serious ground, reasonable or plausible.

Murfina v. Sauve, 19 Que. S.C. 51 (S.C.).

—Prisoner suffered to go at large—Re-arrest upon same warrant—Legality of.]—The prisoner, who had been arrested under a warrant to serve a sentence of imprisonment for an offence against the Canada Temperance Act, was, upon his own request, suffered to go at large for a time by the officer who had the execution of the warrant. Shortly after he was again arrested upon the same warrant and conveyed to the county gaol to serve his term of imprisonment. Upon an application for an order in the nature of a habeas corpus:—Held, (per Tuck, C.J., Hanington, Landry, Barker, and McLeod, JJ., Van Wart, J., dissenting), that the second arrest upon the same warrant was legal, and that the order should be refused.

Ex parte Doherty, 35 N.B.R. 43.

—Judgment debtor—Application for discharge—Interest in real estate.]—A judgment debtor, having made application to be discharged from custody under an execution issued out of a justice's Court, in the course of his examination disclosed that he and his wife resided upon land of which his wife had the fee, and that there were growing crops upon it created by his labour:—Held, that as this disclosed an interest in real property that could not be taken under an execution issued out of a justice's Court, the debtor could not be discharged. The husband's estate of curtesy exists during the lifetime of the wife

Ex parte Geldert, 34 N.B.R. 612.

—Public officer—Art. 833 C.P.Q.]—To subject a person to arrest under Art. 833 C. P.Q., it is necessary that he should have the custody of money or other effects under judicial authority and not otherwise. A secretary-treasurer directed by the trustees of a parish to raise the amount of an assessment for construction of a church is not subject to arrest under a judgment condemning him to make restitution of the money received by him in that capacity.

Trustees of the Parish of St. Antoine de Longueuil, v. Gingras, 3 Que. P.R. 557 (S.C.).

—Damages for personal injuries—Contrainte par corps.]—Under the provisions of par. 4 of Art. 833 C.P.Q., an arrest (contrainte par corps) is permitted on a claim for compensation for personal injuries, in this case for damages in consequence of injuries inflicted on the plaintiff by means of a bicycle ridden by defendant.

Chouinard v. Raymond, 18 Que. S.C. 319 (S.C.).

—Personal injury—Contrainte par corps—Chose jugee — Cession — Art. 833 C.P.Q.]—Damages obtained by plaintiff, a municipal councillor, from a fellow councillor who had taken part in his expulsion from the council on the ground that he was a member of the provincial police when he was only a prison guard, do not constitute "damages for personal injuries" under Art. 833, par. 4 C.P.Q., and therefore do

not justify the demand for defendant's arrest; and it is of no importance that the judgment for such damages declared that they were given for annoyance (avanie) or for personal injury, such judgment not having the force of chose jugée as to the nature of the injury or the question of whether or not it could authorize a demand for arrest. An abandonment of property after the institution of the action, but before judgment was given therein is an answer to a demand for arrest in execution of said judgment when plaintiff did not contest the defendant's schedule within the four months which he could have done notwithstanding his claim for damages was then opposed by defendant.

Keating v. Burrows, 8 Que. Q.B. 1, discussed; Bedard v. Grosboillot, 18 Que. S.C. 363 (S.C.).

—Capias—Security—Renewal—Art. 913 C. P.Q.]—Failure by a defendant arrested on capias to renew the security furnished, notwithstanding an order of the Court for him to do so, constitutes a good reason for returning him to the custody of the sheriff.

Beliveau v. Boselieu, 4 Que. P.R. 62 (S.C.).

—Execution against body—Decree for payment of money—Disobedience.]—Where defendant made default in paying to the plaintiff under the decree of the Court a sum of money received by the defendant as a donatio mortis causa in favour of the plaintiff an order was granted under Act. 53 Vict. c. 4, s. 114, as amended by Act 58 Vict. c. 18, s. 2, for an execution against his body. An order under the above Act for an execution against the body of a party making default to a decree of the Court for payment of a sum of money will not be granted where the Court is satisfied that the party in default has no means, and has not made a fraudulent disposition of his property, and that his arrest is sought for a vindictive purpose, or to bring pressure upon his friends to come to his assistance.

Thorne v. Perry (No. 2), 2 N.B. Eq. 276.

—Application for discharge—Onus—Intent to defraud—Former absconding—Bond—Restoration.]—The expected departure from Ontario with intent to defraud is an essential ingredient of the case to be made out by the applicant for an order of arrest, but it is a question of fact, and the Judge may infer it from the facts and circumstances shown by the affidavits. The decision of the Judge who grants such an order is subject to review, but the onus of showing that he was wrong rests upon the party who complains of it. Under the circumstances of this case the order was rightly made. The former conduct of the defendant in respect to the same debt was a fact or circumstance to be taken into consideration on the question of intent. The impecunious or insolvent condition of the defendant does not, of itself, minimize or rebut the fraudulent intent. Decision of a Divisional Court, 19 P.R. 207, reversed. Held, also, that the order of the Court below directing that the bond given by the defendant should be delivered up and the surety therein released, was erroneous; the bond ought to have remained upon the files of the Court, being a record thereof; and the order ought only to have directed that an exoneratur be entered thereon; therefore the bond should be restored.

Beam v. Beatty, 2 O.L.R. 362 (C.A.).

—Motion—Contrainte par corps—Service.]—Before giving judgment on a motion for a rule for arrest (contrainte par corps) the Court will order it to be served on the adverse party.

Ridgeway v. Duckworth, 18 Que. S.C. 126 (S.C.).

—Capias—Affidavit for—Art. 901 C.P.Q.]—When, in an affidavit to obtain a writ of capias ad respondendum the applicant swears that he is informed of facts on which he bases his demand for issue of the writ, he should give the name of the person who furnished such information, or otherwise the writ will be quashed.

Lemieux v. Bussiere, 18 Que. S.C. 499.

—Ca. re.—Secretion of property—Arts 832, 897, C.P.C.]—Under the law of Quebec, as well since as before the new Code of Procedure, the capias ad respondendum still exists; and not only before but also after judgment, as a means whereby a creditor may cause to be arrested his debtor who, in order to defraud and prevent recovery of the debt, has concealed and carried off his property. Art. 897 C.P.C. is not repugnant to Art. 832, the latter applying only to contrainte par corps, while the other relates to the capias, two things absolutely different.

Elliott v. La Banque Québec, 9 Que. Q.R. 532, affirming 16 S.C. 393.

— Capias — Proceedings to quash.] — See PLEADING.

Todd v. Murray, 3 Que. P.R. 521.

—Capias—Irregularity or nullity—Waiver by giving bail.]—After the issue of the writ in an action a summons was taken out entitled "In the matter of an intended action":—Held, by Irving, J., dismissing the summons, that it was wrongly entitled. A Judge has power to direct a summons to be issued and be returnable in a registry other that that where the writ was issued. By the giving of special bail, a defendant arrested on a capias waives his right to object to the writ.

Tanaka v. Russell, 9 B.C.R. 24.

—Capias—Affidavit—Omission of the word "immediately"—Art. 895, C.C.P.] — The omission of the word "immediately," in the affidavit for capias, in connection with the intended departure of the debtor, is fatal, and the capias will be quashed and set aside.

Kidd v. McKinnon, 20 Que. S.C. 300 (Davidson, J.).

—Ca. re.—Appearance.]—A writ of ca. re. must state the nature of the action. It is not necessary for a person arrested under a writ of ca. re. to enter an appearance before applying for his discharge.

Wehrfritz v. Russell (No. 1), 9 B.C.R. 50 (Hunter, J.).

—Capias — Debtor — Order for discharge—Mandamus.]—The order provided for by 60 Vict. c. 28, s. 15, is a substitute for the remedy by writ of mandamus, and it will therefore be granted only in cases where mandamus will lie. In discharging or refusing to discharge a debtor who has made a disclosure under 59 Vict. c. 28, s. 7, the Judge or other officer is acting judicially and not ministerially, therefore the Court refused to make an order until the said s. 15 commanding the Judge of the County Court of S. to discharge a debtor who had made a disclosure before him.

Ex parte Keerson, 35 N.B.R. 233.

—Under warrant of commitment—Temporary release of prisoner—Promise of prisoner to surrender himself—Re-arrest.]—Where the officer executing a warrant of commitment releases the prisoner, at his request, for a temporary period, on his promise to surrender himself, such does not constitute a voluntary abandonment of the arrest, and re-arrest is justified upon the same warrant.

The King v. O'Hearon (No. 2), 5 Can Cr. Cas. 531.

—Contrainte par corps — Discharge — Cession de biens.]—The defendant condemned by a judgment to damages for verbal injuries, and on the point of being imprisoned under a writ of contrainte par corps may obtain a suspension of the writ by making an assignment of his property provided he gives security for his return into the custody of the sheriff when required. But he cannot be discharged by the assignment before the expiration of the delays given to the creditor to contest it.

Frechette v. Prevost, 4 Que. P.R. 404 (Sup. Ct.).

—Contrainte par corps—Action for damages—Malicious injury.]—An action for damages against a person who, through malice, had opened a tap for supplying water to his co-tenant is not one of those admitting of a conclusion for arrest on failure to pay the damages awarded, and conclusion to that effect will be rejected on dêfense en droit.

Phaneuf v. Knight, 5 Que. P.R. 70 (Sup. Ct.).

—Affidavit for ca. re—Practice.]—The affidavits leading to an order for ca. re. must show that there is a debt due from the defendant to the plaintiff. It is not sufficient to show that there is a debt due from the defendant to one who bears the same name as the plaintiff. A statement in an affidavit that deponent has caused a writ of summons to be issued against defendant, without stating in what action the writ was issued, is not sufficient to show that plaintiff and deponent are one and the same person.

Wehrfritz v. Russell (No. 2), 9 B.C.R. 79 (Martin, J.).

—Order for arrest—Setting aside—Inference from affidavits.]—Defendant was arrested under an order for arrest granted on the affidavit of plaintiff's solicitor that he had probable cause for believing, and did believe, that defendant, unless he was arrested, was about to leave the province. The order for arrest was set aside, and the bond directed to be delivered up to be cancelled by order of the Chief Justice at Chambers, who was satisfied, on reading the affidavits produced before him, that defendant, at the time of his arrest, was not about to leave the province:—Held, the judgment of the learned Judge at Chambers was one that the Court, on appeal, would not interfere with. Held, also, following Hunt v. Harlow, 1 Old 709, that a statement of belief that defendant is about to leave the province being all that is required under the practice to procure an order for arrest, defendant is entitled to be discharged if he negatives that intention, unless plaintiff can state facts from which it can be clearly inferred that it was the intention of defendant to leave. Held, also, that such an inference was not to be drawn from affidavits merely tending to show that defendant was keeping out of the way to avoid service of an order for his examination under the Collections Act. Held, also, that it would be futile to allow plaintiff's appeal as, at the time the order for defendant's examination under the Collections Act was served, the order for arrest was effete, and the bond cancelled, and no stay of proceedings had been obtained, and the liability of the sureties could not be restored. Held, that while defendant was entitled to have plaintiff's appeal dismissed with costs, the costs must be set off against plaintiff's judgment in the action.

McLaughlin Carriage Co. v. Fader, 34 N.S.R. 534.

—Ca. sa.—Issue of concurrent writ after expiry of original—Motion for discharge.]

—A concurrent writ of ca. sa. should not be issued after the original writ with which it is concurrent has expired by lapse of time under Con. Rule 784, and such a writ so issued will be set aside as having been improperly issued. The right to make a motion for discharge from custody upon the merits and upon the ground of concealment by the plaintiff of material facts upon his application, founded upon Con. Rule 1047, is not confined to the case of an order for arrest made before judgment and does not extend to a ca. sa. The defendant had been arrested under an invalid concurrent writ of ca. sa., and was in the custody of a sheriff to the knowledge of the plaintiffs' solicitor, who prepared an affidavit entirely suppressing the fact of the arrest, and upon which he obtained an order for and issued a new writ of ca. sa. Upon an appeal to a Divisional Court from a judgment of a Judge in Chambers refusing to set aside the latter order and writ, and motion for discharge. It was held, that the application should not be treated as an appeal upon new material from the discretion of the Judge who made the order, as such an application having for its object the setting aside of the order and writ, must upon the authorities have failed: Damar v. Busby (1871), 5 P.R. 356, at p. 389. But was really one to the undoubted jurisdiction of the Court to set aside in its discretion orders which had been made by the wilful concealment or perversion of material facts, and that a clear case had been made out, and the order and writ should be set aside and prisoner discharged from custody. Judgment of Falconbridge, C.J.K.B., reversed.

The Merchants' Bank of Canada v. Sussex, 4 O.L.R. 524.

—Illegal arrest—Claim for special damage—Right to recover for money paid.]—A warrant for taxes alleged to be due the defendant town was issued by the town treasurer and placed in the hands of a constable for collection. The constable went to plaintiff's place of business to collect the amount, but, it being Saturday night, an arrangement was made between the constable and plaintiff that the latter would go up on Monday morning and see about the taxes. Plaintiff went to the treasurer's office and contended that the amount claimed in the warrant had been paid, but, as the treasurer insisted that the amount had not been paid, plaintiff handed him the amount claimed. It appeared that the amount in dispute was due in respect of a property which plaintiff sold to Y., who agreed to pay the taxes upon it, and paid the same to the treasurer, intimating that it was paid on account of plaintiff's property, but the treasurer appropriated the amount in payment of a like amount due by Y. personally. Plaintiff brought an action for illegal arrest, and claimed, as special damage, "amount wrongfully extorted from plaintiff, as set forth in paragraph 4 of the pleadings, $8.25." Paragraph 4, referred to, detailed the issue of the warrant "whereby plaintiff was unlawfully compelled to pay an illegal demand of defendants, to wit, the sum of $8.25":—Held, affirming the judgment appealed from, that, even on plaintiff's own evidence, the action must fail.

Walker v. Town of Sydney, 36 N.S.R. 48.

—Capias—Affidavit—Amendment — Time and place of debt.]—Held, 1. The affidavit required for the issuing of the writ of capias is not a proceeding susceptible of being amended. 2. That such affidavit must mention the time and place where the indebtedness occurred, within the limits of the Provinces of Quebec and Ontario.

Julien v. Chuna, 5 Que. P.R. 413 (Curran, J.).

—Judgment debtor — Imprisonment of—Fraudulent disposition of property.]—1. The Court will not set aside an order committing a judgment debtor to prison on the ground of his having made a fraudulent disposition of his property whereby the judgment creditor is materially prejudiced in obtaining satisfaction of his judgment, unless it appears that the Judge making the order has taken some manifestly mistaken view of the law of the facts. As such Judge has had the opportunity of hearing the witnesses give their testimony viva voce, and of observing their demeanour, his decision on questions of fact must be taken to have the same weight as the verdict of a jury. 2. On an application for a rule nisi to rescind a Judge's order imprisoning a judgment debtor the applicant can not show by affidavit what took place before the Judge to whom the application was made; the stenographer's return of the evidence must be produced.

Ex parte Despres; In re O'Leary v. Depres, 36 N.B.R. 13.

—Judgment debtor—Committal order—Conditional—B. C. practice.]—An order to commit under s. 193 of the B. C. County Courts Act must be absolute, not conditional. Where an order to commit a party is made in his absence he must be served with a copy of the order before arrest. Orders to commit should be drawn up and should contain the terms on which discharge out of custody may be obtained as required by Order XIX., R. 13. Where a registrar is present and takes a minute of an order, the minute so taken is conclusive, even though the Judge's recollection of the order is different.

Wallace v. Ward, 9 B.C.R. 450 (Drake, J.).

—Capias—Place where the debt was contracted—C.P. 895.]—When it appears by affidavit for capias that the plaintiff as well as the defendant both reside in the Province of Quebec, it is not necessary to allege specially that the debt was contracted within the province.

Beauchemin v. St. Pierre, 5 Que. P.R. 484 (Tait, A.C.J.).

—Limit bond—Officer of Superior Court—Privilege from arrest—Bond assigned on same day as action brought thereon.]—The arrest of a person, having privilege by reason of his being an officer of a Superior Court, under an execution issuing out of the City Court of S., is not void, nor does such privilege afford any defence to an action on a limit bond entered into by such officer in order to obtain his discharge. If two things are done upon the same day, it will be assumed that that which ought to have been first done was so done; therefore, in an action upon a limit bond by the assignee of the sheriff, it was held, in the absence of proof to the contrary, that, though the assignment and the writ commencing the action were dated upon the same day, the bond was assigned before the writ was issued. Further held, that the assignment by the sheriff being a mere formality, only going to show that the assignee was satisfied with the security, the date thereof was immaterial.

Dibblee v. Fry, 35 N.B.R. 282.

—Demand of abandonment—Debt contracted before ceasing to trade—Capias.]—It is not necessary that a person be actually engaged in trade when a demand of abandonment is made upon him. Even where he has ceased for several years to carry on trade, he is nevertheless subject to a demand of abandonment based on a commercial debt contracted by himself or his firm while he was engaged in trade; and, consequently, in such case, under Art. 895 C.C.P., he is liable to arrest under capias for refusal to make an abandonment. Carter v. McCarthy, R.J.Q. 6 B.R., p. 499, followed; and Roy v. Ellis, R.J.Q. 7 B.R., p. 222, distinguished.

Perkins v. Perkins, 22 Que. S.C. 72. Mathieu, Doherty, Lavergne, JJ.

—Capias—Sheriff's mileage.]—A sheriff arresting under a capias is entitled, if there is no gaol in his own country, to confine the debtor in the nearest gaol in another county and to charge mileage therefor.

Carson v. Carson, 10 B.C.R. 83.

—Contrainte par corps—Negligence—Accident—Art. 833 C.P.Q.]—Injuries caused by a mere accident due to the negligence of a person who had no intention of doing harm do not constitute a personal injury for which an arrest (contrainte par corps) of such person may be ordered.

Chartrand v. Smart, Q.R. 23 S.C. 304, 5 Que. P.R. 173 (Sup. Ct.).

—Civil imprisonment—Liberation—Second imprisonment.]—1. A writ or order of the Court or Judge for coercive imprisonment is exhausted by the imprisonment of the debtor, followed by his liberation, and no new arrest or imprisonment can thereafter be executed in virtue of the said writ. 2. A writ or order for coercive imprisonment cannot be issued by a deputy-prothonotary of the Court, and an imprisonment effected in virtue thereof is illegal.

Gaudet v. Archambault, 6 Que. P.R. 27 (Doherty, J.).

—Action against testamentary executor for share of reliquat—Civil imprisonment.]—The civil imprisonment does not lie against a testamentary executor for the reliquat of his account.

Morris v. Meehan, 6 Que. P.R. 43 (Doherty, J.).

—Capias—Personal debt—Place of contract.]—A capias will be quashed on petition if the affidavit does not show that the debt for which it was issued was a personal debt, or if it does not show the place where the debt originated or became due and exigible.

European Importing Co. v. Mallekson, 5 Que. P.R. 255.

—Capias—Security—Motion to have deposit forfeited.]—A plaintiff who has succeeded upon a capias cannot, by motion, ask to have the deposit placed in the hands of the sheriff, as security, paid over to him.

Rosenberg v. Nelankow, 5 Que. P.R. 378.

—Capias ad respondendum—Affidavit—Defendant about to leave Quebec and Ontario.]—An affidavit for capias must set forth that the defendant is immediately about to leave the Provinces of Quebec and Ontario, and a capias issued upon an affidavit merely stating that the defendant is about to leave the said provinces, will be quashed on petition to that effect.

Kidd v. MacKinnon, 5 Que. P.R. 177 (Davidson, J.).

—Capias—Petition to quash writ—Denial of debt.]—Under the new Code of Procedure in a petition to quash a writ of common capias (bref d'arret simple) the existence of the debt may be attacked, the same being one of the essential allegations of the affidavit for procuring the issue of the writ.

Quebec Bank v. Hallé, Q.R. 13 K.B. 44.

—Coercive imprisonment—Irregularities.] —Proceedings leading to coercive imprisonment ought to be marked with certainty and full regularity, and no rule will be maintained if the proceedings are irregular.

Montreal Life Ass. Co. of Canada v. Lionais, 6 Que. P.R. 359 (Davidson, J.).

—Civil imprisonment — Jurisdiction of bailiff.]—1. The writ of habeas corpus will not lie in favour of a party imprisoned under commitment of a Court of competent jurisdiction in civil matters, remedy being given by Articles 846 and 847 C.P. to correct any irregularities that might exist in the commitment. 2. A bailiff has concurrent jurisdiction with the sheriff in the execution of a writ of civil imprisonment for non-production of moveables entrusted to a guardian.

Ex parte Kenatosse, 6 Que. P. R. 89 (K.B.).

—Arrest and imprisonment—Disclosure—Order of discharge.]—An order of discharge made by the clerk of the peace for the County of Victoria under 59 Vict. (N. B.), c. 28, s. 32, which states that the party discharged had been in custody in the county of Victoria by virtue of an order of render made by the police magistrates of the district of Andover and Perth civil Court; that due notice of disclosure had been given, and that the hearing took place at the time and place mentioned in the notice, which order is signed by the clerk of the peace of the county of Victoria, is a sufficient statement on the face of the order of the territorial jurisdiction of the officer making the same, and will not be quashed on certiorari. If there is evidence from which the officer making the order for discharge might be satisfied that a full disclosure had been made, the Court will not set aside the order, even though they are not satisfied that the disclosure is a full one, or of the bona fides of it.

The King v. Straton; Ex parte Porter, 36 N.B.R. 388.

—Capias from Quebec—Execution thereof in Ontario.]—The service, in the Province of Ontario of a capias issued in the Province of Quebec, according to a permission of a deputy-prothonotary, allowing the service to be made in Ontario on any day and at any hour, is valid.

Bernard v. Charbonneau, 6 Que. P.R. 194 (Trenholme, J.).

—Seizure by police of prisoner's effects—Restoration to accused of goods not connected with the charge.]—A Superior Court of criminal jurisdiction may order the restoration, to an accused person committed for trial, of articles taken possession of by the police, which are not connected with the offence charged, and are not required for the purpose of evidence.

Ex parte MacMichael, 7 Can. Cr. Cas. 549.

—Contrainte par corps—Arts. 837, 838 C.P.Q.]—Notice to the party is not necessary for putting in execution the contrainte par corps under writ or order of the Court according to the provisions of Art. 838, C.P.Q.

In re Clement, 6 Que. P.R. 60 (Lavergne, J.).

—Capias after judgment—Description of party.]—In a capias issued after judgment the plaintiff may be described as in the original action, although he has changed his domicile since the action was instituted. On a capias after judgment the official fees are as on an alias writ.

Edgerton v. Lapierre, 6 Que. P.R. 434 (Ct. Rev.).

—Affidavit to hold to bail.]—An affidavit to hold to bail in New Brunswick need not show on its face the jurisdiction of the Court out of which the capias issues, by stating the place of residence of the parties.

Temperance and General v. Ingraham (No. 2), 35 N.B.R. 510.

—Municipal corporation — Special constables—182, 199 M.C.]—Where a writ of arrest, signed by the Mayor and entrusted to special constables of a municipality, is executed beyond its limits, the municipal corporation is not responsible, the said constables, in effecting the arrest, not having acted in the performance of duties for which they were employed.

Milton v. Parish of La Cote St. Paul, Q.R. 24 S.C. 541 (Sup. Ct.).

—Capias—Petition to quash.] — A capias issued upon an affidavit which does not state that, owing to the secretion charged, the plaintiff will be deprived of his recourse against the defendant, is illegal and will be quashed on petition.

Hochar v. Drimer, 7 Que. P.R. 156 (Davidson, J.).

—Capias—Service out of Province—Art. 895 C.P.Q.]—When it has jurisdiction over the claim the Superior Court can issue a writ of capias and cause the same to be executed in Ontario.

Gravel v. Lizotte, 7 Q. P.R. 201 (Sup. Ct.).

—Capias—Partnership—Personal indebtedness—Art. 895, C.C.P.]—In an action accompanied by capias ad respondendum, the plaintiff made affidavit, and also alleged in his declaration, that the defendant was personally indebted to him in the sum of $100, the plaintiff being entitled to one-

fifth of the profits of a partnership of which he and the defendant were members, which partnership had realized $500 profits, and that the defendant was about to leave the Provinces of Quebec and Ontario with the entire sum On inscription in law:—Held, that by the alleged illegal appropriation of the entire profits and the intended departure therewith, the defendant's possession of the sum of $500 had changed its nature, and that, without the previous institution of an action pro socio, a personal indebtedness existed on the part of the defendant to a co-partner entitled to a share of the sum illegally appropriated, which was sufficient to justify the issue of a capias under Art. 895, C.C.P.

Ferries v. Vathakos, 25 Que. S.C. 530, C.R.

—Constable—Arrest of person suspected of offence—Defective warrant.]—Defendant was arrested by W., a provincial constable, who, when asked to show his authority for the arrest, produced and read a warrant against F. E. and others, for breaking and entering a shop and stealing a quantity of goods therefrom. At the time of the arrest the constable believed that a robbery had been committed and that defendant was one of the parties who committed it. Defendant, seeing that his name was not mentioned in the warrant, resisted arrest, and in so doing assaulted the constable. Defendant was tried and convicted for assaulting a police officer in the execution of his duty, with intent to resist lawful arrest:—Held, affirming the conviction, that the arrest could be justified under the statute notwithstanding the warrant was insufficient.

The King v. Sabeans, 37 N.S.R. 223.

—Examination of debtor—Evidence on—Divestment of property—Payment of bona fide debt.]—The Judge of the County Court of St. John made an order under 59 Vict. c. 28, as amended by 61 Vict. c. 28, committing the applicant to prison for three months, because, after his arrest in a civil suit in the Saint John City Court, he had made an appropriation of property in payment of another debt without paying the debt sued for. The Judge based the order upon evidence given in a former proceeding against the debtor, and not upon the hearing of any application for the order in question. The order did not show on its face the grounds upon which it was issued. By 61 Vict. c. 28, s. 8, amending 59 Vict. c. 28, an appeal is given to the Supreme Court from any order for imprisonment made under ss. 46, 48, 49, 51 and 53 respectively of 59 Vict. c. 28:—Held, that the fact that the right to appeal is given by statute does not deprive the party of his right to a certiorari, and this Court will grant the writ, if, in their opinion and discretion, the circumstances warrant it. That an order for imprisonment made by a County Court Judge on the ground that the debtor, since his arrest, has divested himself of the means of paying the debt for which he is sued is bad if it does not show on its face the grounds upon which it was issued. That the mere payment of a bona fide debt, after he is sued, is not such a divesting of property as will render the debtor liable to imprisonment under the Act. That an order based upon evidence given in a former proceeding against the debtor, and not re-proved upon the hearing of the application for the order in question is bad.

The King v. Forbes, Ex parte Dean, 36 N.B.R. 580.

—Contrainte par corps—Delays.]—A writ of arrest (contrainte par corps) can only be executed fifteen days after service of the judgment directing it to issue and, in any event, after the expiration of fifteen days from the date of such judgment.

Demers v. Payette, Q.R. 26 S.C. 534 (Cir Ct.).

—Writ of capias—Expiry.]—Where a writ of capias issued after judgment has not been served within six months after its issue, and no Judge's order extending the time has been made within the six months, the writ becomes non-existent. The defect is not a mere irregularity and is not waived by failure to invoke it within the delays prescribed for preliminary exceptions, but where the nullity is not so invoked costs will not be granted.

Demers v. Girard, 7 Que. P.R. 214 (Doherty, J.).

—Capias—Affidavit.]—It is not sufficient that a debtor resides in the Province of Quebec for his creditor to have a right to a writ of capias against him, but he must show where the debt was created or is payable, and such place may be within the Province of Quebec or in Ontario.

D'Amico v. Galardo, 7 Que. P.R. 234 (Sup. Ct.).

—Capias—Motion to quash—Arts. 214, 919 C.P.Q.]—There is no necessity for a special defence to an application to quash a writ of capias for irregularity of the affidavit and untrue allegations therein and such defence will be rejected on inscription en droit.

Demers v. Girard, 7 Que. P.R. 134 (Sup. Ct.).

—Capias after judgment—Designation of defendant.]—It is sufficient, in a writ of capias issued after judgment, to designate the defendant in the manner stated in the original writ of summons even though he may since have changed his residence. The stamps to be affixed to a writ of capias are those prescribed for an alias writ.

Edgerton v. Lapierre, Q.R. 27 S.C. 20 (Ct. Rev.).

—Capias ad respondendum—Arrest outside the Province.]—The writ of capias ad respondendum is not executory outside the limits of the Province; any such writ will be quashed at the instance of a defendant arrested under it in the Province of Ontario.

Gravel v. Lizotte, 28 Que. S C. 338, 7 Que. P.R. 354 (C.R.).

—Capias ad respondendum—Issue of writ pendente lite—Attachment.]—When writs of capias ad respondendum and simple attachment have issued after the return of an action and there have been issues joined on the merits and these writs, at the same time, the plaintiff may inscribe for hearing first upon the merits, and, after recovering judgment, proceed upon the contestations of the capias and attachment.

Cazal v. Mattia, Q.R. 28 S.C. 131 (Sup. Ct.).

—Capias ad respondendum—Affidavit—Secretion—Delivery of goods sold.]—Under Art. 895 (2) C.P.Q., an affidavit is sufficient for the issue of a writ of ca. sa. when it alleges that, without the benefit of the writ, the plaintiff will lose his recourse against the defendant; charges secretion in the fact that being in treaty with plaintiff for the manufacture of planks, and then insolvent, having obtained an advance of $1,000 to pay the wages of the workmen, he concealed and secreted this sum with the intention of defrauding plaintiff, so that the latter could not get delivery of the goods, the workmen refusing to allow them to be removed.

King Brothers v. Blais, Q.R. 14 K.C. 501.

—Non-payment of costs—Disclosure—Notice of application—Signature.]—A person in custody under a writ of attachment issued out of the Supreme Court of New Brunswick for contempt in not obeying an order to pay costs is entitled to relief under c. 130 of the Con. Stat. 1903, respecting arrest, imprisonment and examination of debtors. A notice of disclosure purporting to be signed by the applicant is sufficient without proof of the signature. An order for discharge will not be quashed on the ground that the notice of the application to disclose was not entitled in the cause, or that the proceedings and order were entitled in the wrong cause if it sufficiently appear in the body of the notice, proceedings and order, in what proceeding the application and order were made. Service of the notice of disclosure on the wife at the husband's place of abode, he then being within the Province, is good, and no order perfecting the service is required. The officer taking the examination has authority to order an equitable interest in personal property to be held for the benefit of the creditor, and the disclosure of such an interest is no bar to a discharge. If a debtor makes such a disclosure of his affairs as fulfils the requirements of the Act, a creditor who allows the proceedings to go by default cannot object that the disclosure was not a full one.

The King v. Straton; Ex parte Patterson, 37 N.B.R. 376.

—Summary conviction—Suspicion and belief—Grounds of—Examination of, by magistrate.]—A magistrate has no jurisdiction to issue a warrant on an information under the Dominion Summary Conviction Act without examining upon oath the complainant or his witnesses as to the facts upon which the information is based. Ex parte Boyce, 24 N.B.R. 347, and The King v. Mills, 37 N.B.R. 122, followed.

The King v. Carleton, Ex parte Grundy, 37 N.B.R. 389.

—Ca. Re.—Special bail.]—The defendant was arrested under an order in the nature of a ca. re., and was released from close custody upon giving special bail by the deposit of a sum of money with the sheriff:—Held, that he had not thereby waived his right to be relieved under Con. Rule 1047; and, it appearing, upon the material filed upon a motion under that Rule, that the order for arrest should not have been made, an order was made for the return to him of the sum deposited.

Adams v. Sutherland, 10 O.L.R. 645 (Anglin, J.).

—Capias after judgment—Service more than six months after issue—Failure to invoke peremption by preliminary plea.]—(1) A writ of capias after judgment is a mode of executing a judgment and is not affected by Art. 120 C.C.P., but remains valid beyond the delay of six months therein mentioned, until it is executed. (2) Even if it be a writ of summons, the peremption in the above article is not absolute, and is waived by failure of the defendant to plead it in the manner and within the delay prescribed in the case of irregularities in such writs.

Demers v. Girard, 28 Que. S.C. 542, 7 Que. P.R. 347 (C.R.).

—Capias—Petition to quash—Exception to the form—Additional amount added to original claim.]—(1) Plaintiff is justified to bring suit for the amount for which the capias has issued, and at the same time to claim an additional sum for damages, inasmuch as the said demands are not incompatible nor contradictory. (2) The omission of the domicile of the deponent and the absence of the date when and the place where the affidavit was made are fatal to the capias.

Burns v. Lee, 8 Que. P.R. 27 (Curran, J.).

—Capias—Irregularity—Cause of action—Averment that it arose within jurisdiction.]—It is not necessary that a summons to set aside a writ in the County Court for irregularity should state the irregularity, nor is it necessary that the grounds should be served with the summons. A writ of capias in the County Court will not be set aside because the words "and of the British dominions beyond the seas" are omitted from the title of the King A County Court capias will not be set aside because it does not aver in the statement of the cause of action that it arose within the jurisdiction of the Court.

Rogers v. Dunbar, 37 N.B.R. 33.

—Action ex contractu—Damages unliquidated—Examination and disclosure.]—The provisions of the Act 59 Vict. c. 28, s. 7, allowing a debtor to make a disclosure of his affairs and authorizing his discharge under certain circumstances, are applicable in the case of a defendant held to bail by Judge's order in an action of breach of promise of marriage. If the disclosure reveals a debt due the person making the same, a demand for the assignment thereof must be made and an opportunity afforded to the applicant for discharge to show why the same should not be assigned or the nature of the security to be given to him by the plaintiff for his protection in the event of a failure to recover. Quære:—Whether the provisions of s. 28 of the said Act relating to the assignment of debts due the defendant as a condition of his discharge have any application in cases where the defendant is not in actual custody.

Rex v. Carleton, Ex parte Akerly, 37 N.B.R. 13.

—Capias—Affidavit.]—The affidavit for capias must show that the debt for which the suit is brought was created or is made payable within the limits of the Provinces of Quebec and Ontario.

D'Amico v. Galardo, 28 Que. S.C. 399 (C. R.).

—Appointment of voluntary guardian—Effect.]—A rule for contrainte par corps cannot be granted against a defendant when effects seized have been taken out of his charge and custody and given over to a guardian for custody and production.

Boissonnault v. Bouchard, 8 Que. P.R. 247.

—Arrest on capias—Deposit of amount endorsed and costs—Order to accept bail.]—The defendant was arrested on a capias and the amount endorsed for bail and $40 for costs was deposited with the sheriff by a friend out of her own money, the sheriff giving a receipt as follows: "Received from Ida Isaacson $540 in lieu of bail in the case of MacAulay Bros. & Co. v. Hyman Jacobson":—Held, that an application for an order that the sheriff accept bail, or in lieu thereof, that the defendant be committed to gaol, and that the deposit be returned, should be refused.

MacAulay v. Jacobson, 37 N.B.R. 537.

—False arrest.]—

See False Arrest; Malicious Prosecution.

—Rule nisi—Slander—Poverty of defendant.]—The fact that the defendant condemned to pay damages for slander alleges that he is poor and aged and that the execution of the judgment should be stayed will not prevent the issue of a rule to show cause why he should not be imprisoned in default of payment.

Busière v. Cadotte, 8 Que. P.R. 369 (Fortin, J.).

—Imprisonment—Maintenance—Fraud.]—A person imprisoned under Arts. 833, 834, C.C.P., alone has the right of maintenance during his detention; a bankrupt imprisoned for fraud has no such right; in such case imprisonment is a punishment, not a mode of execution.

Desbiens v. Desmarteau, 8 Que. P.R. 114 (Pagnuelo, J.).

—Capias—Affidavit.]—In an affidavit for capias it is necessary to allege that the debt was contracted or is payable in the Provinces of Quebec and Ontario; the mere mention of the fact that a judgment had been obtained against the defendant is not sufficient.

Lavoie v. Lévesque, 8 Que. P.R. 275 (Ct. Rev.).

—Decree for payment of costs—Enforcement by ca. sa.—Fi. fa. not concurrent remedy—Satisfaction.]—An arrest under an execution issued under an order of the Equity Court against the body for enforcement of its decree directing payment of taxed costs on dismissing the plaintiffs' bill, operates as a satisfaction, and an execution issued against the goods of the plaintiffs for the same demand will be set aside. A County Court Judge has no jurisdiction under the Act "Respecting Arrest, Imprisonment and Examination of Debtors" (Con. Stat. 1903, c. 130), to discharge persons in custody under such executions.

Petropolous v. Williams Co., 38 N.B.R. 146.

—Capias—Petition to quash—Delay.]—There is no limitation as to the time within which a defendant may apply to be discharged from an arrest on capias; the provision of Art. C.P. 922 as to the application of the rules governing summary matters only refers to delays for joining issue on and the trial of such petition.

Bellingham v. Kampf, 9 Que. P.R. 338.

—Contrainte par corps — Costs — Distraction.]—The application for an order for arrest (contrainte par corps) in execution of a judgment for principal sum and costs distraits can be made in the name of the plaintiff represented by his attorney entitled to distraction. The part taken by the latter is equivalent to the consent provided for by art. 555 C.C P.

Rennie v. Mace, Q.R. 33 S.C. 136 (Ct. Rev.).

—Arrest of debtors—Disclosure—Discharge under—Transfer with intention to defraud.] — In disclosure proceedings the questions whether the debtor has transferred any property intending to defraud the plaintiff, or since his arrest given any preference to any other creditor, are for the officer, taking the examination, and the Court will not interfere with his discretion merely because the circumstances of the transfer are suspicious.

The King v. Ebbett, Ex parte Smith, 38 N.B.R. 559.

—Writ of attachment against the person.] —In applying for a writ of attachment against the person for contempt of Court it is not necessary to show that the equity practice prior to the coming into force of the Queen's Bench Act, 1895, requiring that the copy of the order served should be indorsed with the memorandum prescribed by former equity Rule 290 and schedule N, has been followed, as the words "circumstances" and "manner," used in Rule 704 of the King's Bench Act, which is the rule prescribing the present practice, do not extend to the material to be used on applying for such writ of attachment. The Court drew a distinction between the procedure for obtaining the old ex parte writ of attachment and the present practice, under which notice is always necesary before the writ can be obtained.

Cotter v. Osborne, 17 Man. R. 164.

—Coercive imprisonment for costs—Service of the taxed bill.]—Coercive imprisonment for the amount of a taxed bill of costs will not be ordered, if such bill has not been served upon the party three months at least before the motion for imprisonment is made.

Cordasco v. Vendetti, 33 Que. S.C. 500 (C.R.).

—Affidavit for capias.]—The affidavit for capias is insufficient if it does not allege that the debt was incurred or is payable within the limits of the Provinces of Quebec and Ontario. A judgment does not effect a novation of the debt on which it is based.

Foisy v. Levesque, 9 Que. P.R. 130 (Sup. Ct.).

—Amount claimed—Particulars.]—On application for an order to arrest the defendant to an action he is entitled to the particulars of the sum claimed from him by the rule nisi.

Barbeau v. Thibault, 9 Que. P.R. 329 (Supt. Co.).

—Capias—Re-arrest of defendant.]—The service of a writ of capias and the re-arrest of a defendant made while said defendant is under detention in the common jail on a previous capias by the same plaintiff, which previous capias had been quashed on irregularities, are null and void and will be rejected on exception to the form.

Lazanis v. Marinos, 11 Que. P.R. 29.

—Next friend suing—Non-payment of costs.]—Attachment may issue against a next friend for non-payment of costs after written demand and service of allocatur.

McGaw v. Fisk, 39 N.B.R. 1.

—Capias—Affidavit—Grounds of belief.]—(1) The allegation in an affidavit for capias that it is probable the defendant is immediately to leave the Province of Quebec is uncertain and insufficient. (2) The affidavit must not only allege the belief of the plaintiff that the defendant is about to leave the Province, but also the grounds of his belief.

Shuman v. Goodman, 10 Que. P.R. 256.

—Habeas corpus—Arrest on capias—Service of order.]—A person imprisoned under a Judge's order on writ of capias will be released on habeas corpus if he was not served with a copy of the order.

Barthos v. Valée, 10 Que. P.R. 296.

—Order nisi—Witness in default—Affidavit.]—A party to an action when a motion is made for an order to arrest him may rely on the same grounds that he could set up against the order itself. The failure of a witness to appear should be entered on the docket and also on the plumitif. A motion for a rule nisi against a witness so in default should be supported by affidavit.

Beaucage v. Arpin, 10 Que. P.R. 421.

—Judgment for debt—Contrainte par corps —Service of judgment—Committimus—Delay—Art. 833 par. a, C.P.Q.]—A committimus in execution of a judgment declaring absolute a rule nisi for an order for imprisonment (Art. 833, par. a, C.P.Q.) cannot issue before the expiration of fifteen days from the time the judgment is served on the debtor nor until the judgment is served and the return of the service filed in the office of the prothonotary.

Shawl v. Emond, 10 Que. P.R. 129.

Intent to leave territory — Intent to defraud—Discharge—Bail.]—
Grant v. Reiner, 3 W.L.R. 506 (Y.T.).

—Judgment debtor—Order of commitment—Arrest—Habeas corpus.]—
Moore v. Shackleford, 7 W.L.R. 930 (Y. T.).

—Absconding debtor.]—
Bent v. Morine, 1 E.L.R. 385 (N.S.).

—Committal of debtor—Irregularity— N. S. Collection Act.]—
Re McDonald, 7 E.L.R. 92 (N.S.).

—Order for discharge from custody—Appeal—Constitutional law—Validity of Act for Discharge of Insolvent Debtors, 39 Vic. c. 9—Statutes—Implied repeal.]—
McKinnon v. McDougall, 3 E.L.R. 573 (P.E.I.).

—Capias — Application for discharge under Indigent Debtors' Act—Tort—Malice.]—
Coscombe v. Laird, 3 E.L.R. 499 (N.S.).

—Motion to commit judgment debtor—Imperial Debtors' Act, 1869, in force in Saskatchewan—Saskatchewan Act, 1905—Summons not in compliance with rules—Appearance by counsel to take objection — Waiver.]—
Pearce v. Kerr, 9 W.L.R. 504 (Sask.).

—Absconding debtor—Material to support application—Form of affidavit.]—
Bent v. Morine, 2 E.L.R. 107 (N.S.).

ASSAULT.

—Civil action—Common assault—Information by assaulted party—Payment of fine.] —A summary conviction on complaint of the person assaulted on a charge of common assault followed by payment of the fine imposed is a bar to a subsequent civil action for damages for the same assault instituted by the person assaulted. Hebert v. Herbert (No. 1), 15 Can. Cr. Cas. 258, 34 Que. S.C. 370, affirmed.
Hebert v. Hebert (No. 2), 16 Can. Cr. Cas. 199, 37 Que. S.C. 339.

—Teacher and pupil—Reasonable chastisement.]
R. v. Zinck, 8 E.L.R. 178.

—Action for assault—Medical examination of plaintiff.]—In an action in damages for bodily injuries caused in an assault, the Court will order the medical examination of the plaintiff.
Baxter v. Davis, 4 Que. P.R. 153 (Doherty, J.).

—Aggravated assault—Maliciously inflicting grievous bodily harm—Jurisdiction of magistrate in Ontario—Consent to summary trial—Limit of sentence—Cr. Code ss. 262, 783, 785, 788.]—On a charge under Cr. Code s. 783 (c) of aggravated assault with grievous bodily harm, a police magistrate in Ontario trying the case on the consent of the accused to be tried summarily, the sentence which the magistrate may impose is not limited to six months' imprisonment, but may be as great as can be imposed therefor on a trial on indictment at general sessions. In order to constitute "grievous bodily harm" it is not necessary that the injury should be either permanent or dangerous; and an injury is within the meaning of the term if it be such as seriously to interfere with comfort or health.
R. v. Archibald, 2 Can. Cr. Cas. 159 (Ont.).

—Conviction for—Civil action—Right to maintain.]—A defendant charged with having committed an assault with intent to do bodily harm, on being asked by the justice whether he would be tried before him summarily, or by a jury, elected to be so tried by him, and pleaded guilty to the charge. This was objected to by the prosecutor, when the justice stated that he would first ascertain the extent of the assault. After hearing the evidence, he adjudicated upon the case and drew up a conviction imposing on the defendant a fine, and the costs, which the defendant paid:—Held, that the justice in making the conviction was acting under the special statutory authority for the trial of indictable offences conferred by s. 783, sub-s. (c) and s. 786, under which a defendant is not relieved from further civil proceedings; and that the defendant was liable to a civil action for the assaults.
Clarke v. Rutherford, 2 O.L.R. 206.

—Assault and battery, action for—Reasonable anticipation of title to land coming in question—Costs.]—Where an action for assault and battery was brought in the Supreme Court, and the jury found a verdict for the plaintiff for $35, but the learned Judge, who tried the cause, granted a certificate under 60 Vict. c. 28, s. 74, that there was good cause for bringing the action in the Supreme Court, on the ground that the plaintiff's attorney had reasonable grounds for thinking that the title to land would be brought into question:—Held, that a sufficient case had not been made out to induce the Court to interfere.
Cormier v. Boudreau, 36 N.B.R. 6.

—By Co-passenger—Duty of common carrier—Evidence of provocation.]—See RAILWAY.
Blain v. C.P.R., 5 O.L.R. 334 (C.A.).

—Constable—Assault—Unofficial act—Absence of malice.]—Held, reversing the de-

cision of a Divisional Court, 8 O.L.R. 251, that the defendant, a police constable, who assaulted the plaintiff, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and without authority, or any reason to think that he had, officially, authority to do what he did, and was therefore, although the plaintiff did not prove malice, not entitled to the protection afforded by s. 1, sub-s. 1, of R.S.O. 1897, s. 88, and was liable for the trespass. Kelly v. Barton (1895), 26 O.R. 608, 22 A.R. 522, followed.

Moriarity v. Harris, 10 O.L.R. 610.

—Assault by foreman—Negligence—Scope of employment.]—An employer is not responsible for the consequences of an assault committed by a foreman upon a labourer under him arising out of malice or ill-temper.

Roth v. Canadian Pacific, 4 Can. Ry. Cas 238 (Ont. D.C.).

—Indecent assault—Complaint by prosecutrix.]—Under exceptional circumstances evidence of a complaint made by an adult female of an indecent assault may be admitted although five days have intervened between the assault and the complaint.

The King v. Charles Smith (N.S.), 9 Can. Cr. Cas. 21.

—Evidence—Corroboration.] — Upon the trial of a charge of attempted carnal knowledge of a girl under fourteen who is too young to understand the nature of an oath, a conviction for that offence is not warranted unless her evidence not under oath is corroborated by some other material evidence implicating the accused (Cr. Code 685), but the accused may be convicted of common assault upon the charge so laid if there be corroboration merely by some other material evidence (Can. Evidence Act s. 25).

The King v. De Wolfe (N.S.), 9 Can. Cr. Cas. 38.

—Indecent assault—Evidence of complaint.]—(1) It is not essential in all cases of indecent assault that complaint should have been made at the earliest opportunity after the offence, and evidence of such complaint may, under special circumstances, be received after the lapse of several days' delay. (2) The fact of the girl being only seven years of age, that the act was committed without violence and that the girl did not realize the serious nature of the act, are circumstances which make a complaint made ten days afterwards admissible in evidence.

The King v. Barron (N.S.), 9 Can. Cr. Cas. 196.

—Assault upon girl under fourteen years—Form of indictment—Amendment—Objection.]—Defendant was indicted and convicted for a criminal assault committed upon the person of W., "a girl under the age of fourteen years, to wit, of the age of eight years." Application was made to the trial Judge on behalf of the prisoner to reserve a case for the opinion of the Court on the ground that it was not alleged in the indictment that the person upon whom the offence was committed was not the wife of the prisoner. This having been refused:—Held, that the expression in the Code s. 266, "not being his wife," is an exception, and, if it required to be stated in the indictment and negatived, the defect could have been remedied by the Judge by an amendment under s. 723 (2), and that defendant's counsel was obliged to take the objection before pleading to the indictment under s. 629, and not having done so it was not open to him to take it subsequently.

The King v. Wright, 39 N.S.R. 103, 11 Can. Cr. Cas. 221.

—Forcible removal of trespasser—Liability for excess.]—In an action claiming damages for unlawfully assaulting and beating plaintiff, defendant pleaded that, at the time the acts complained of were committed, defendant was the owner of and engaged in carrying on a lobster factory, and that plaintiff entered and created a disturbance and refused to leave when requested to do so, and that defendant thereupon removed plaintiff, using no more force than was necessary:—Held, that defendant was justified in using such force as was necessary to effect the removal of the plaintiff from his premises, but, as by his own admission, he did more than this, plaintiff was entitled to recover for the excess, and the verdict of the jury in defendant's favour must be set aside.

Doucette v. Therio, 38 N.S.R. 402.

—Entering a dwelling house in the night time with intent—Code s. 415.]—The prisoner was indicted, inter alia, under s. 415 of the Criminal Code for being unlawfully in the house of P. with intent to commit an assault on D. The jury, in effect, found that the prisoner was unlawfully in the house, and committed an assault on D.:—Held, that the intent to commit the assault was involved in the committal of it; that the jury could not find the prisoner guilty of committing the assault without finding that he had the intent to commit it, and, he being in and the intent concurring in point of time, the offence was complete and the conviction must be affirmed.

The King v. Higgins, 38 N.S.R. 328, 10 Can. Cr. Cas. 456.

—Civil action—Previous conviction and fine.]—(1) No action of damages for assault lies in favour of the party aggrieved against an assailant who has been convicted under Code s. 864, and who has

paid the amount of the fine. (2) A summary conviction for assault causing bruises is one of common assault, under s. 864, and not of an assault occasioning bodily harm under s. 262.

Larin v. Boyd, 27 Que. S.C. 472, 11 Can. Cr. Cas. 74.

—Assault committed by prisoner to recover money out of which he had been cheated—Robbery or assault.]—Where the prisoner acted in the bona fide belief that he had been swindled, and, in the belief that he was entitled to retake the money, committed an assault for that purpose alone, and did retake the money, or a portion of it, in that sole and bona fide belief, the jury, on consideration of the facts, would be justified in acquitting him on a charge of robbery, although it was open to them, on the same facts, to convict for assault.

Rex v. Ford, 13 B.C.R. 109, 12 Can. Cr. Cas. 555.

—Common assault—Punishment on summary conviction—Maximum imprisonment] — Per Graham, E.J.: — A summary conviction imposing a sentence of sixty days is not invalid where the statutory maximum is two months, unless there is a reasonable probability of the sixty days' term being in the particular case more than two months. Per Russell, J.:—It being possible that the prisoner might be detained in jail for a longer period than if the sentence had been for one or two months, the conviction is bad and the prisoner entitled to be discharged on habeas corpus.

The King v. Brindley, 12 Can. Cr. Cas. 170.

—Provocation—Mitigation of damages—Finding assault, but no damages.]—In an action for an assault the jury found the defendant guilty, and that the plaintiff had not suffered any damage and returned a verdict for the defendant. A subsequent application to the Judge of the County Court who had tried the cause to set aside the verdict and grant a new trial, or failing that, to enter a verdict for the plaintiff for nominal damages was refused:—Held, on appeal, that the Court had no power to set aside the verdict for the defendant and enter a verdict for the plaintiff, and that a new trial will not be granted merely for the purpose of enabling a plaintiff to obtain nominal damages, where no right is affected except a question of costs. That evidence of provocation by words spoken three days before the assault by the plaintiff to the defendant was properly admitted in mitigation of damages.

Murphy v. Dundas, 38 N.B.R. 563.

—Indictment for robbery with violence and wounding—Finding "guilty of assault"—Interpretation of—New trial.]—On the trial at the general sessions of the peace of an indictment charging two prisoners with robbery with violence and wounding, on the jury bringing in a finding of "guilty of assault," the chairman questioned the county attorney as to its meaning, when he replied, "assault as charged in the indictment." The chairman then asked the foreman, when he replied, "We mean inflicting the blow with a bottle as described, but not guilty of robbery," and, on being questioned as to which prisoner, replied, "Both," whereupon the chairman endorsed the verdict on the record as follows: "Guilty of assault as charged, but not guilty of robbery," he so interpreting the finding:—Held, that the verdict was not properly interpreted and acted upon by the chairman, and was not rightly recorded, and a new trial was directed.

Rex v. Edmonstone, 15 O.L.R. 325, 13 Can. Cr. Cas. 125.

—Assault with intent—Preliminary enquiry before a justice—Information by peace officer—Amendment of information to charge common assault.]—(1) A civil action for damages for assault is not barred under Code s. 734 by payment of the fine, if the complaint in the criminal proceedings was laid by a peace officer in his official capacity and not by the party assaulted, and if the latter took no part in the proceedings other than to give testimony. (2) Where an information is laid before a magistrate for the indictable offence of assault with intent to do grievous bodily harm, the magistrate has no power, even with the consent of counsel for the Crown, to reduce the charge to one of common assault and to thereupon convert the preliminary investigation into a summary hearing and to make a summary conviction in the same proceeding.

Goodwin v. Hoffman, 15 Can. Cr. Cas. 270.

—Summary conviction—Payment of penalty—Subsequent civil action.]—An action for damages for assault does not lie against the offender who has been summarily convicted of the same assault and has paid the penalty.

Hébert v. Hébert, Q.R. 34 S.C. 370, 15 Can. Cr. Cas. 258.

Police officer — Arrest — Unnecessary violence—Conflict of testimony — Damages —Appeal.]—

Hehsdoerfer v. Payzant, 9 W.L.R. 262 (Alta.).

—Action for damages — Trespass — Justification.]—

Benoit v. Delorey, 7 E.L.R. 161 (N.S.).

—Arrest without warrant — Illegality — Technical assault.]—

Iler v. Gass, 7 E.L.R. 98 (N.S.).

—Trespass—Excess.]—
Morash v. Geldert, 2 E.L.R. 56 (N.S.).

ASSESSMENT AND TAXES.

Ontario.

Assessment—Notice of appeal too late—Waiver—Assessment of poles, wires, etc.] —Appeal to the County Judge from the Court of Revision of the Township of Winchester. A preliminary objection was taken that the notice of appeal to the Court of Revision was not given within the time prescribed by the Assessment Act. It appeared, however, that the Court heard both parties, no objection being taken at the time:—Held, that it was now too late to object to the action of the Court of Revision, that the question was now properly before him on appeal from such Court and that any informality had been waived. Held, also, that the only change made by 1 Edw. VII. c. 29, s. 2, sub-s. (a), in the mode of assessing property in a township such as the one in question, is that the property shall be valued as a whole or as an integral part of the whole. The basis of valuing the whole is not in any way affected by the amending Act. Regard must still be had to sub-s. 1 of s. 28 of the Assessment Act, which requires that such property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor.

Re Bell Telephone Company and Township of Winchester, 37 C.L.J. 790 (Liddell, Co. J.).

—Rural telephone companies—Assessment Act (Ont.), s. 14.]—Doyle, Co.C.J., held, that local telephone companies are liable for assessment and taxes under the Ontario Assessment Act, s. 14.

Re North Huron Telephone Co. and Township of Turnberry, 17 O.W.R. 273, 2 O.W.N. 187.

—Exemption of factories—By-laws—Validating statutes.]—By two Acts of the Ontario Legislature, 62 Vict. c. 82 and 63 Vict. c. 98, the council of the city of Stratford were authorized to pass by-laws and enter into agreements with two manufacturing companies, whereby the companies were "to be given exemption from taxation" for the lands and premises whereon their buildings were to be erected, for a period of twenty years. When these special Acts were passed, the Municipal Act in force provided, s. 411, that a municipal council might by by-law exempt any manufacturing establishment in whole or in part from taxation, except as to school taxes, for any period not exceeding ten years; and s. 73 of the Public Schools Act then in force provided that no by-law for exempting any portion of the ratable property of a municipality from taxation in whole or in part should be held or construed to exempt such property from school rates of any kind whatsoever:—Held, Meredith, J.A., dissenting, that in the absence of anything to show that in the special Acts the words "exemption from taxation" were intended to have a larger meaning and to exclude the exception, it should be considered, in accordance with the settled principle of construction, that the Legislature did not intend to do more than to alter the general law in so far as it was necessary to permit a longer period of exemption than by that law the council could grant, or to abandon the settled policy in respect of school rates since 1892; and therefore were liable to pay school rates in respect of the property exempted by the special Acts. Canadian Pacific R.W. Co. v. City of Winnipeg, 1900, 30 S.C.R. 558, and Regina ex rel. Harding v. Bennett (1896), 27 O.R. 314, distinguished. The plaintiff, on behalf of himself and the other ratepayers of the city, brought this action against the city corporation and the two companies for a mandamus compelling the city corporation to assess, levy, and collect from the companies school rates, as well for the past as for the future years of the twenty-year period, and for a declaration that the city corporation were in future bound to collect them:—Held, Osler, J.A., doubting, that, while the plaintiff had a remedy by appeal to the Court of Revision, that was not his only remedy; and he was entitled to a declaration of the true meaning and construction of the documents under which the exemptions were claimed. In the circumstances, the measure of relief was a declaration applicable to the future only.

Pringle v. City of Stratford, 20 O.L.R. 246.

—Tax sale—Assessment Roll—Indefinite description of land—Joining two lots in one assessment—Invalidity of sale.]—In 1906 a city corporation sold to the defendant for the taxes of 1901 and 1902 nine feet of lot 19 on the north side of Lennox street. The land advertised for sale was "part of lots 18 and 19, plan 120, 42 x 53, commencing," etc. Upon the assessment rolls for 1901 and 1902 the land was set down as a vacant lot on Bathurst street, "rear 767-9, 53 x 50," etc. Neither lot 19 nor lot 18 on the north side of Lennox street had any frontage on and neither lot touched Bathurst street:—Held, that the sale was invalid because there was no valid assessment of the land in 1901 and 1902, and there were, therefore, no taxes legally imposed for which it could be sold for taxes, for those years. If the assessment could be treated as one of lots 18 and 19 according to a registered plan, the joining of them in one assessment was improper, and the assessment was, therefore, invalid. And the defect was not cured by s. 172 of the Assessment Act, 1904. Semble,

per Meredith, C.P.C.P., that, as the land was occupied by the defendant when the assessment was made, and was owned by a person not resident in Ontario, who had not required her name to be entered on the assessment roll, it should have been assessed in the name of and against the defendant, and she, for the purpose of imposing and collecting taxes upon and from the land, was to be deemed the owner of it, R.S.O. 1897, c. 224, s. 22; and therefore she was not entitled to become the purchaser at the tax sale, and so to deprive the owner of part of her land, which was sold because the taxes which, if the assessor had done his duty, would have been payable by the defendant, had not been paid.

Blakey v. Smith, 20 O.L.R. 279 (D.C.).

—Exemption—Bed-rooms rented to members.]—By s. 11 of the plaintiffs' incorporating Act, 63 Vict. c. 140, O., the buildings of the plaintiffs and the land whereon the same were erected were declared to be exempt from taxation, "so long as the same are occupied by and used for the purposes of the association." The preamble stated the "object" of the association to be "the improvement of the spiritual, intellectual and social condition of young men;" and s. 3 stated that "the object of the said corporation shall be the spiritual, mental, social and physical improvement of young men by the maintenance and support of meetings, lectures, classes, reading rooms, library, gymnasiums, and such other means as may from time to time be determined upon." By s. 1 the plaintiffs were empowered to acquire and hold real estate in Ottawa, provided the annual value of the real estate "so held and not actually used for the work" of the association should not exceed $10,000; and to acquire other real estate by gifts, etc., under certain conditions. The plaintiffs erected a building for their use in Ottawa, and moved into it in 1909. A part of the building, containing nearly 100 bedrooms for the sleeping accommodation of the members of the association who chose to rent them for that purpose, was assessed by the defendants in 1909:—Held, that the whole of the building, both before and after the plaintiffs moved in, was occupied by and used for the purposes of the association; "purposes" in s. 11 is not synonymous with "object" in the preamble and s. 3; the renting of the bed-rooms did not take that part of the building out of the plaintiffs' occupancy; and it might be a means for the social and physical improvement of young men to supply them with clean and well-ventilated bed-rooms.

Ottawa Young Men's Christian Association v. City of Ottawa, 20 O.L.R. 567.

—Reduction by Court of Revision to less than $20,000—Right of appeal.]—Properties consisting of a number of lots laid out upon the town-site of Cobalt being part of a mining location, some of the lots being vacant and some having dwelling houses and other erections thereon, were assessed against a mining company, who had acquired both the mineral and surface rights in the lots, at $21,475. Upon appeal the Court of Revision reduced the amounts to $17,700. The company, not being satisfied, appealed to the Ontario Railway and Municipal Board. Their appeal was dismissed, and they then applied to the Court of Appeal for leave to appeal to that Court:—Held, that leave should be refused. Per Moss, C.J.O.:—To entitle a person to appeal to the Railway and Municipal Board under the combined effect of s. 51 of the Ontario Railway and Municipal Board Act, 1906, and s. 76 of the Assessment Act, it is not necessary that the amount of the assessment fixed by the Court of Revision on one or more of such person's properties should aggregate $20,000; the amount of the assessment made by the assessor is the determining factor. Buildings upon the lands, whether to be treated as "mineral lands" or otherwise, are subject to be valued and assessed against the owners, and the question of the value is a question of fact, as to which no appeal lies to the Court of Appeal, under s. 51 of the Ontario Railway and Municipal Board Act, 1906, or otherwise. Per Meredith, J.A.:—The question before the Board was one of fact, not one of law; and no appeal lay.

Re Coniagas and Cobalt, 20 O.L.R. 322.

—Buildings on mineral lands.]—Held, affirming an order of the Ontario Railway and Municipal Board, that certain buildings on mineral lands, buildings used for mining purposes, were assessable under the Ontario Assessment Act, 4 Edw. VII. c. 23. Per Garrow, J.A.:—The meaning of sub-s. 3 of s. 36 of the Assessment Act is that all buildings which add to the value of the land for any purpose, and not merely buildings which add to its agricultural value, are to be assessed. That is the sole statutory test applicable to all lands and to all buildings thereon. The construction placed upon s. 36 by Boyd, C., in Canadian Oil Fields Co. v. Village of Oil Springs, 1907, 13 O.L.R. 405, is preferable to that placed upon it by a Divisional Court in the same case. The question whether the buildings were assessable was one of law and a proper subject of appeal to the Court of Appeal under s. 51 of the Ontario Railway and Municipal Board Act, 1906; with the amount of the assessment the Court of Appeal had nothing to do, that being a question of fact.

Re Bruce Mines, 20 O.L.R. 315.

—Railway—Value of land—Right of way—Station ground.]—The land of a railway company, consisting of its right of way, station houses and yards should be assessed at the average value of lands in that locality, without taking into account the value of the grading, rails, and general superstructure.

Re Township of Chatham and Canadian

Pacific R. W. Co., 37 C.L.J. 791 (Bell, Co. J.).

—Exemptions—Trustees—Income.]—Under s. 46 of the Assessment Act, R.S.O. 1897, c. 224, the income derived from property vested in trustees must be regarded for the purpose of assessment as their own income, and is subject to assessment although the trustees have no personal interest in it. Its ultimate destination and mode of expenditure are immaterial, and the obligation of the trustees to pay it to the beneficiaries is not a debt to be offset against it:—Quære, whether the amendment to the section by 63 Vict. c. 34, s. 3 (O.), affects the question. Judgment of McDougall, Co. J., affirmed.

In re McMaster Estate Assessment, 2 O.L.R. 474 (C.A.).

—Assessment and taxes—Sale for taxes—Validity of assessment—Lien for purchase money—R.S.O. 1897, c. 224, s. 218.]—Section 218 of the Assessment Act, R.S.O. 1897, c. 224, which gives a tax purchaser a lien for the purchase money paid by him and the ten per cent. thereon, has no application where the taxes have not been lawfully imposed, or where there are no taxes in arrear. On appeal to the Divisional Court, the judgment, in 32 O.R. 274, was varied by holding that the lands had been validly assessed for the years 1892 and 1893, and that the defendant therefore had a lien for the amount of the purchase money to the extent of the taxes for those years, with costs and expenses, ten per cent. interest, and the taxes subsequently paid, with like interest. In other respects the judgment was affirmed.

Wildman v. Tait, 2 O.L.R. 307.

—Personal property—Illegal distress.]—Under s. 135 a. (1) 3 added to the Assessment Act, R.S.O. 1897, c. 224, by 62 Vict. (2), c. 27, s. 11, goods which are not in the possession of the person assessed in respect to them cannot be distrained for the taxes assessed against them. In this case the goods, which had been mortgaged, were, when seized, in possession of the bailiff of the mortgagee, who had taken possession upon default:—Held, that the plaintiff being a bailiff in possession, had a right to bring action for illegal distress.

Donahue v. Campbell, 2 O.L.R. 124.

—Board of education—Municipal corporations—Annual estimate of expenses—Taxes.]—The annual estimate required to be submitted by boards of education and other public school trustees, to the municipal council, of the expenses of the schools under their charge for the twelve months next ensuing, should be of the same character as the estimates of municipal councils for the purpose of striking the municipal yearly rate, and contain the like details as those upon which the board or trustees have based their own calculations, and not merely state a certain sum as required. The municipal council has the right and it is its duty to take some care that it is not made the instrument by which any excess of the powers of a board of trustees are given effect to by levying for them any sum which the law does not authorize them to exact.

Board of Education of the City of London v. City of London, 1 O.L.R. 284.

—Statutory duty — Prerogative writ of mandamus—Summary application.]—When a public body is required to perform a statutory duty at the instance of one entitled to call for such performance, the practice in England is to move summarily for the prerogative writ of mandamus, according to the prescribed procedure in the Crown office. But in Ontario all the divisions have co-ordinate jurisdiction; and the practice in cases of the prerogative writ is assimilated to that in ordinary applications of a summary nature: See Rules 1084, 1090, 1091, 1092. And where a meritorious application was made, in an action, for a mandamus to compel a city corporation to levy a special rate for library purposes under the Public Libraries Act, R.S.O. 1897, c. 232, it was directed that the affidavits should be re-sworn and intituled as in an application (not in an action) for the prerogative writ.

Toronto Public Library Board v. City of Toronto, 19 Ont. Pr. 329.

—Distress for taxes—Seizure of goods on premises of person taxed—Claim of title through person taxed.]—A., the owner of a mare, transferred her to the plaintiff to hold as security for the protection of certain persons against their liability upon a promissory note which they had indorsed for A. The arrangement was evidenced by a document recorded under the Act respecting Bills of Sale and Chattel Mortgages. A. agreed to care for and exercise the mare, and was to be at liberty to enter her at the races. She was then removed from his premises and boarded at a hotel stable. When out for exercise A. took her upon his premises for a temporary purpose, and she was then distrained by the defendant, a tax collector, for municipal taxes due by A. in respect of his premises, and was ultimately sold—the proceeds being paid to the municipality:—Held, that the mare, being upon A.'s land, and the plaintiff claiming title through A., the person taxed, the defendant had the right to take her: Assessment Act, 4 Edw. VII. c. 23, s. 103. The defendant's appointment as tax collector was by resolution, not by by-law, of the municipal council:—Held, that the defendant was duly appointed. Section 325 of the Consolidated Municipal Act, 3 Edw. VII. c. 19, providing that the powers of the council shall be exercised by by-law, refers to the exercise of municipal legislative power, and not to the performance of a statutory duty. Under s. 295 it is the duty of

the council annually to appoint assessors and collectors; and there is no reason why this duty should not be discharged in any way indicating corporate action, e.g., by resolution. The effect of s. 321 of the Act, and the position of a de facto officer of a municipality, when his actions are directly attacked in proceedings against him personally, referred to but not determined.

Foster v. Reno, 22 O.L.R. 413.

—Special rate—Bonus—Railway.]—By a by-law passed under the provisions of ss. 386, 694, and 696 of the Municipal Act, R.S.O. 1897, c. 223, a township corporation was authorized to raise a sum by issuing debentures, to be met by special rate, to provide a bonus in aid of a railway company, payable upon its compliance with certain conditions, no time for compliance being limited. The debentures were duly executed, but remained unissued in the possession and under the control of the municipality:—Held, that until the sale or negotiation of the debentures, there was no debt on the part of the township, and that the special rate was not leviable though the time fixed for payment of some of the debentures had passed. Judgment of Meredith, J., 32 O.R. 135, reversed.

Bogart v. Township of King, 1 O.L.R. 496 (C.A.).

—Invalid tax sale—Insufficient description—Assessment en bloc instead of according to registered plan.]—An assessment of lots as "Water Lots 436x660" is invalid as not identifying them. An assessment of lots en bloc after they have been subdivided by registered plan, and without showing the known owner against whom particular parcels are assessable, is invalid as disregarding the essential requirements of R.S.O. c. 224, s. 13. The requirements of R.S.O. c. 224, ss. 147, 152-5 inclusive, as to the duties of the collector, treasurer, clerk and assessor, with reference to the list of lands liable to be sold, were held not to have been complied with in this case; and the defects were held not to have been cured by s. 208, which makes the tax deed binding if the land is not redeemed in one year, nor by s. 209, by which the deed is valid if not questioned within two years.

Wildman v. Tait, 32 Ont. R. 274.

—Failure to distrain—List of lands—Non-delivery by clerk to assessor—Omission to notify occupants—Non-delivery by assessor to treasurer of certified list.]—Where after a sale of land for taxes it appeared that there had been a failure to distrain, although sufficient goods were on the premises to have paid the taxes during each of the years they became due, and also that the account furnished by the assessor did not, as required by s. 135 of R.S.O. 1887, c. 193 (R.S.O. 1897, c. 224, s. 147), show the reason why the taxes had not been collected; that there was no delivery to the assessor by the clerk of the list furnished him by the treasurer, as required by s. 141 R.S.O. 1887, c. 193 (R.S.O. 1897, c. 224, s. 153), and no notification, as also required by that section, by the assessor to the occupant or owner of the land, who lived in the vicinity, and whose name could easily have been ascertained, of its liability to be sold for taxes, and no certificate verified by oath, as required by s. 142 R.S.O. 1887, c. 193 (R.S.O. 1897, c. 224, s. 154); nor any list furnished by the clerk to the treasurer of the lands which had become occupied or were incorrectly described, as required by s. 143, R.S.O., c. 193 (R.S.O. 1897, c. 224, s. 155):—Held, that the sale was invalid; and that the invalidity was not cured by ss. 189, 190, R.S.O. 1887, c. 193 (R.S.O. 1897, c. 224, ss. 208, 209), which validate a sale on the expiration of two years from the making of the tax deed.

Boland v. The City of Toronto, 32 Ont. R. 358.

—Notice or demand—Removal of goods from municipality—Magistrate's warrant for distress.]—It is essential to the validity of a notice or demand under R.S.O. 1897, c. 224, s. 134 (1) that it should, as required by sub-s. (2), contain a schedule specifying the different rates, etc. The question whether the collector has such "good reason to believe" a ratepayer is about to remove his goods as would justify him in obtaining a magistrate's warrant of distress under s. 135 (4) is one for the Judge or jury, the onus being upon the collector to prove that he had:—Held, under the circumstances of this case that he had not, and that the plaintiff was entitled to recover damages for illegal distress.

McKinnon v. McTague, 1 O.L.R. 233.

—Franchise—International bridge.]—In assessing for the purpose of taxation that part of a bridge crossing the Niagara River, lying within a township in Canada, regard cannot be had to its value in proportion to the value of the franchise or of the whole bridge, or to the cost of construction, but only to the actual cash price obtainable for the land and materials situate within the township.

In re Bell Telephone Company Assessment (1895) 25 A. R. 351, and in re London Street Railway Company Assessment (1897), 27 A.R. 83, applied.

In re Queenston Heights Bridge Assessment, 1 O.L.R. 114 (C.A.).

—Valuation of property—Electric companies—Rails, poles and wires—Wards—Franchise—Going concern—Integral part of whole—1.Edw. VII. c. 29 (O.).]—The Act. 1 Edw. VII. c. 29, s. 2 (O.), has made no difference in the mode of valuing for

assessment purposes the rails, poles, wires and other plant of electric companies erected or placed upon the highways of municipalities, which was held to be proper by the decision in Re Bell Telephone Co. Assessment (1898), 25 A.R. 351; Maclennan, J.A., dissenting.

In re Toronto Electric Light Co. Assessment, 3 O.L.R. 620 (C.A.).

—Equalization of assessment—Appeal to County Court Judge—Time for delivering judgment.]—The provision in sub-s. 7 of s. 88 of the Assessment Act, R.S.O. 1897, c. 224, that the judgment of the County Court Judge on appeal from the equalization by the county council of the assessment of the county shall not be deferred beyond the 1st day of August next after such appeal, is imperative. Proceedings for equalization of the assessment, and the rolls of what financial year are to be equalized, considered. Judgment of a Divisional Court, 3 O.L.R. 169, reversed.

Re Township of Nottawasaga and County of Simcoe, 4 O.L.R. 1 (C.A.).

—Distress—"Owner"—Agent for mortgagees in possession—Conditional purchase.]—The plaintiff agreed with mortgagees of land in possession to purchase the property at a sum equal to principal, interest and costs, such purchase to be carried out so soon as the mortgagees should obtain a final order of foreclosure, and in the meantime that he should, as their agent, manage the property:—Held, that the plaintiff, who had not been assessed for the property in question, and against whose name the taxes in question had not been charged on the collector's roll, was not an "owner" of the premises within s. 35, sub-s. 3 of the Assessment Act, R.S.O. 1897, c. 224, whereby the collector is authorized to levy unpaid taxes "upon the goods and chattels of the owner of the premises found thereon," and such taxes could not be levied upon his goods.

Lloyd v. Walker, 4 O.L.R. 112.

—Onus of proof of taxes due—Improvements—63 Vict. c. 103, s. 11 (O.).]—In an action for foreclosure of a mortgage of land in Toronto Junction, defendant set up a purchase at a tax sale prior to 1899, and a conveyance of the equity of redemption to him from the mortgagor, but did not prove the regularity of the sale or that taxes were in arrear, and also claimed for improvements as made under a mistake of title:—Held, that the onus of proof that there were taxes in arrear for which land might rightly be sold was upon the person claiming under the sale for taxes and had not been satisfied. Stevenson v. Traynor (1886), 12 O.R. 804, followed. Held, also that s. 11 of 63 Vict. c. 103 (O.), "An Act Respecting the Town of Toronto Junction," declaring that all sales of vacant lands for taxes held prior to the year 1899 in the said town were thereby ratified and confirmed, means sales for taxes for which the lands might rightly be sold. Held, lastly, under the circumstances here, that there was no valid claim for improvements, as defendant had simply improved his own land, which he took subject to the mortgage

Hislop v. Joss, 3 O.L.R. 281.

—Tax sale—Power of treasurer—Advertising expenses—R.S.O. 1897, c. 224, s. 224.]—A treasurer of a town has no authority to bind the municipal corporation by a contract to pay the cost of advertising his list of lands for sale for arrears of taxes. Under the Assessment Act, R.S.O. 1897, c. 224, s. 224, he is only persona designata to act on behalf of the municipality, and the municipality has no authority to interfere with him in the performance of such defined duties. A creditor in respect to the publication of such advertisements must look to him personally. Warwick v. The County of Simcoe (1900), 36 C.L.J. 461, approved of and followed.

Canadian Bank of Commerce v. Town of Toronto Junction, 3 O.L.R. 309.

—Distress for taxes—"Owner"—Agreement for purchase—Part performance—Local improvement rates.]—A purchaser who has gone into possession and made part payment of the purchase money under an agreement for the sale of land unexecuted by the vendor, which provides for payment by the purchaser of the taxes, rates and assessments rated or charged from the date of the agreement is an "owner" within the provisions of s. 135 of the Assessment Act, and is liable for the taxes accruing during his occupancy, although they may have been assessed against a former owner. Local improvement rates grouped with other taxes under the Assessment Act, and included in the collector's roll, are "taxes" in its broad sense and may be collected or realized by uniform statutory process.

Sawers v. City of Toronto 2 O.L.R. 717.

—"Owner"—Person in possession under agreement to purchase—R.S.O. 1897, c. 224, s. 135, sub-s. 1. (3).]—A person in possession of land under an agreement to purchase, is the owner thereof within the meaning of sub-s. 1 (3) of s. 135 of the Assessment Act, R.S.O. 1897, c. 224, and liable to pay the taxes chargeable against it. Judgment of Boyd, C., 2 O.L.R. 717, affirmed.

Sawers v. City of Toronto, 4 O.L.R. 624 (C.A.).

—Local improvement—Sidewalk.]—Under the agreement of 20th of March, 1889, entered into by the Crown as representing the University of Toronto and the City of Toronto, confirmed by 52 Vict. c. 53 (O.), College street in the City of Toronto has

become so far a public highway of the city as to make the interest of a lessee from the Crown of land fronting on that street liable to assessment for the due proportion of the cost of the construction as a local improvement of a sidewalk in front of the leased land, even though the lease has been made before the agreement.

In re Leach and City of Toronto, 4 O.L.R. 614 (C.A.).

—Statute labour—Separate assessment of distinct lots—Ont. Assessment Act, s. 109.] —S. 109 of the Assessment Act, which provides that "the statute labour shall be rated and charged against every separate lot or parcel according to its assessed value," is imperative, and not merely directory. Where, therefore, instead of the amount chargeable against each of several lots owned by the plaintiff being rated and charged against each of such lots, a bulk sum was assessed for statute labour and charged against the whole of them, such assessment was held invalid. Love v. Webster (1895), 26 O.R. 453, followed.

Waechter v. Pinkerton, 6 O.L.R. 241.

—Tax sale—Invalidity—Onus—Proof of taxes in arrear—Assessor's return—Irregularity—Action not commenced within three years.]—In an action brought on the 23rd April, 1902, for a declaration that a tax sale and conveyance under which the defendants claimed title to, and were in possession of, a certain town lot, were illegal and void as against the plaintiffs, the rightful owners, the plaintiffs proved a sufficient paper title. It was also proved that one of the defendants was in possession and had erected a valuable building, claiming title under a sale by the town treasurer, made on the 7th October, 1898, for arrears of taxes for 1895, 1896, and 1897, and a deed made in pursuance thereof on the 15th November, 1899, registered 12th December, 1899, by the proper officials to the assignee of the tax purchaser, and a subsequent conveyance, duly registered, to the defendant in possession:—Held, that the onus of proof of the invalidity of the tax title rested on the plaintiffs. Taxes for the whole period of three years next preceding the 1st January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day, the lot was, by s. 152 of the Assessment Act, R.S.O. 1897, c. 224, liable to be sold in 1898 for such arrears. The proceedings leading up to the sale were substantially regular, with one exception, the omission of the clerk of the municipality to furnish the treasurer, as he is required to do, by the last clause of s. 153, with a true copy of the list furnished by the latter under s. 152, with the assessor's return, certified to by the clerk under the seal of the corporation:—Quære, whether this requirement of s. 153 was of so essential a character as, conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action came into operation. Love v. Webster (1895), 26 O.R. 453, distinguished:—Held, however, that as in this case the taxes had been legally imposed, the omission worked no injury to the plaintiffs, who had all the notices and delays to which they were entitled, and in respect to whose land all the other conditions essential to a valid tax sale existed, and, as the action was brought more than three years after the sale and more than two years after the deed, the defendants were entitled to rely upon ss. 208 and 209 of the Assessment Act as a defence.

Kennan v. Turner, 5 O.L.R. 560 (Osler, J.).

— "Rolling stock, plant, and appliances" — Construction of statute — Ejusdem generis.]—The statute 2 Edw. VII. c. 31, s. 1, amending s. 18 of the Assessment Act, R.S.O. 1897, c. 224, provides by sub-s. 3 for the assessment as "land" of "the rails, ties, poles, wires, gas and other pipes, mains, conduits, substructures and superstructures" of companies of the kind referred to in the section,—"upon the streets, roads, highways, lanes and other public places of the municipality,"—and by sub-s. 4, that "save as aforesaid, rolling stock, plant and appliances" of such companies, "shall not be 'land' within the meaning of the Assessment Act, and shall not be assessable":—Held, that upon the proper construction, this means that the rolling stock, rolling plant, and rolling appliances of such companies, which is found and used on the streets, etc., shall not by reason merely of the wide words "substructures and superstructures in sub-s. 3, be liable to assessment as "land" save as mentioned in sub-s. 3. There is no intention to exempt the companies in question from assessment in respect of such of their plant and appliances, as is otherwise "land" within sub-s. 9 of s. 2 of the Assessment Act, but is not on the street, etc. Held, also, that the lamps, hangers and transformers of an electric light company, though easily transferable from one place to another, were "superstructures" upon the street within the meaning of sub-s. 3.

Re Assessment Appeals, Toronto Ry. Co. et al., 6 O.L.R. 187 (C.A.).

—Exemptions—Property of municipality situate in another municipality.]—Upon the proper construction of s. 7, sub-s. 7, of the Assessment Act, R.S.O. 1897, c. 224, providing that "the property belonging to any county or local municipality" shall be exempt from taxation, property acquired by the corporation of a town under a special Act, 62 Viet. c. 64 (O.), as amended

by 2 Edw. VII. c. 53, situate in a neighbouring township, at a distance of nineteen miles from the town, and consisting of land, buildings, machinery, and plant, for the purpose of generating and transmitting electrical energy to the town for lighting, heating, manufacturing, and such other purposes and uses as might be found desirable, with power to distribute, sell, and dispose of such electrical power in the town and elsewhere within a radius of 25 miles, is exempt from taxation by the township corporation.

Re Town of Orillia and Township of Matchedash, 7 O.L.R. 389 (C.A.).

—Tax sales—Omission to furnish list of lands to be sold—Conveyance by owner after sale.]—The omission of the treasurer of the municipality to furnish to the clerk a list of lands liable to be sold for taxes is a fatal objection to the validity of a sale for taxes, and neither the limitation sections of the Assessment Act, nor the provisions of the special Act relating to sales for taxes in Port Arthur, 63 Vict. c. 86 (O.), are a protection to the tax purchaser. The owners of land sold for taxes conveyed it after the tax sale to the plaintiff who then brought an action against the tax purchaser, who was in actual possession at the time of the conveyance to the plaintiff, to set aside the sale. The statute 32 Hen. VIII. c. 9, was in force when the conveyance was made, and when the action was brought, but was repealed before the trial of the action:—Held, that the prohibition of the statute applied, and that the action could not be maintained.

Ruttan v. Burk, 7 O.L.R. 56.

—Piping—Scrap iron—"Land" of companies—2 Edw. VII. c. 31. s. 1.]—The provisions of s. 18 of the Assessment Act, R.S.O. 1897, c. 224, as amended by 2 Edw. VII. c. 31, s. 1, relating to the assessment of the land of certain companies, only apply to companies of the specific description therein mentioned, and, therefore, do not apply to the pipe line of a company carrying on the business of procuring and transmitting crude petroleum.

Re Canadian Oil Fields and Township of Enniskillen, 7 O.L.R. 101 (C.A.).

—Local improvements—General by-law.]—The defendant corporation provided by a by-law under s. 667 of the Municipal Act, that every petition for or against the construction of a sidewalk as a local improvement should be left with the clerk of the council, whose duty it should be to examine it, and to report at the next meeting of council whether it was sufficiently signed, what real property would be benefited, and the respective frontages, and the probable lifetime and probable cost of the sidewalk. A petition for the construction of a sidewalk as a local improvement was handed to the clerk, who examined it and came to the conclusion that it was signed by two thirds of the owners. It was on the same day presented to the council, who resolved that the prayer of the petition should be granted, and that the clerk should determine forthwith whether the petition was sufficiently signed. The clerk immediately reported that it was sufficiently signed, and his report was received and adopted, but he did not report as to the other matters. The council then proceeded under s. 672 to have the work done, and on its completion the clerk prepared, and certified to the correctness of, a schedule of the frontages and assessments, etc., and the council passed a by-law directing the assessment of the lands, and, subject to appeal to the Court of Revision, adopted the particulars set out in the schedule and directed notice to be given to the owners affected:—Held, that the assessment was valid, the clerk's failure to observe the provision as to reporting at the next meeting of the council being a mere irregularity and not a fatal objection. Judgment of Falconbridge, C.J., affirmed.

Canada Company v. Town of Mitchell, 7 O.L.R. 482 (C.A.).

—Local improvement by-law—Personal service of notice—Waiver.]—It is a fatal objection to the validity of a municipal by-law authorizing a work as a local improvement, that notice of the intention of the council to undertake the work was not given to the owners of the property benefited thereby, by personal service, etc., as provided by s. 669 (la) of the Municipal Act, 1903. Semble, that an owner might waive such notice; but held, that in this case there was no conduct amounting to waiver. Semble, also, that while the direction of the statute (see 64 of the Assessment Act, R.S.O. 1897, c. 224), that the members of the Court of Revision are to be sworn, should not be ignored, it does not follow that neglect or failure to take the oath renders their acts void.

Re McCrae and Village of Brussels, 8 O.L.R. 156, C.A., reversing 7 O.L.R. 146.

— Electric railway.] — Electric cars of a street railway are personal estate, inasmuch as they are not part of the railway and are not fixed in any sense to anything which is real estate. Judgment of the Court of Appeal of Ontario reversed.

Toronto Railway Co. v. City of Toronto, [1904] A.C. 809.

—Lands acquired by municipality at tax sale—Subsequent sale by tender.]—A municipal corporation occupies, as regards corporate property, the position of a trustee, and is amenable to the like jurisdiction of the Courts as is exercised over trustees generally. A number of lots which

had been acquired by the corporation of a city for arrears of taxes, were directed to be sold, and where offers should be less than the amount for which they had been acquired and the subsequent taxes, such offers were to be dealt with by a committee composed of the mayor, one of the aldermen and the treasurer. Against the protests of the mayor, the other two members of the committee accepted an offer for a less amount than the mayor stated could be obtained therefor, from the plaintiff, and on the matter being brought before the council it was decided to ask for tenders. This was accordingly done, and tenders put in by the alleged purchaser and the plaintiff, the plaintiff's being the higher one, but, the council notwithstanding, rejected it, accepting the lower one:—Held, that, under the circumstances the alleged sale could not be supported, and that the sale should have been to the plaintiff; but if the corporation desired an opportunity of showing any good reasons for their action in the matter there might be a further trial on that point.

Phillips v. City of Belleville, 9 O.L.R. 732.

—Agreement for lease of municipal lands —No covenant to pay taxes—Liability.]—Where an agreement between the appellant railway and the respondent municipal corporation provided for a renewable lease from the latter to the former of a large tract of land for railway purposes, but was silent as to payment of taxes by the appellant:—Held, that the lease should contain a covenant by the appellant to pay the same partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corporation, and partly because a covenant to that effect was shown to be a usual covenant in the sense that the corporation invariably insisted on it in their leases. Judgment of the Court of Appeal (Ont.), 5 O.L.R. 717, varied.

Canadian Pacific Ry. v. City of Toronto [1904], A.C. 33.

—Court of Revision and appellate tribunals — Valuation — Business or income tax.]—The jurisdiction of the Court of Revision and the Courts exercising appellate jurisdiction therefrom, is confined to the question of valuation, namely, whether or not the assessment is too high or too low. Whether the property is assessable or not is for the assessor alone to determine, from which there is no appeal. Toronto R.W. Co. v. City of Toronto, [1905] A.C. 809, followed. There is, therefore, no jurisdiction in the appellate Courts to determine whether or not a business or income tax should be imposed. A bridge over the Niagara River between this Province and the United States was built by a bridge company for the passage over it of trains having connecting lines on either side of the river:—Held, that the rule of valuation to be applied is that provided by s. 43, s. s. 2 (a), of the Assessment Act, 4 Edw. VII. c. 23 (O.), namely, that part of the structure within the Province is to be valued as an integral part of the whole, and at its cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises, and subject to similar conditions and burdens, and incorporating the provisions and basis of the Assessment Act, set forth in s. 42, sub-s. 2.

International Bridge Company v. Village of Bridgeburg, 12 O.L.R. 314 (C.A.).

—Exemptions—Railway—By-law of municipality—Commutation — School rates.]—A city council in 1897 passed a by-law providing that a certain annual sum should be accepted from a railway company for 15 years "by way of commutation and in lieu of all and every municipal rate or rates and assessment," in respect of certain lands owned by the railway company. This by-law was passed under the authority of a special Act respecting the railway company, 48 Vict. c. 65 (O.), s. 3 of which provided that it should be lawful for the corporation of any municipality through which any line of the railway had been constructed to exempt the company and its property within such municipality, in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum or otherwise in gross or by way of commutation or composition for payment of all municipal rates. By a subsequent general enactment, 55 Vict. c. 60, s. 4 (O.), it was declared that no municipal by-law thereafter passed for exempting any portion of the ratable property of a municipality from taxation, in whole or in part, should be held or construed to exempt such property from school rates. The general Act did not by express words repeal the special Act:—Held, that it did not effect a repeal by necessary implication—generalia specialibus non derogant. Held, also, that there was nothing to show that the sum which the railway company were to pay was not more than the school taxes which they would be liable to pay if they were not entitled to any exemption.

Way v. City of St. Thomas, 12 O.L.R. 238 (D.C.).

—Income assessment—Dividends on shares in Ottawa Electric Railway Company—Agreements between company and city corporation—Exemptions.]—By an agreement dated the 28th June, 1893, between the corporation of the City of Ottawa and the two companies which were amalgamated under the name of the Ottawa Electric Railway Company, by statutes which confirmed the agreement, it was provided, inter alia, that

"the corporation shall grant to the said companies exemption from taxation and all other municipal rates . . . on the income of the companies earned from the working of the said railway":—Held, that the plaintiff's income from dividends upon shares of the capital stock of the Ottawa Electric Railway Company was not, by reason of the agreement in part above recited, nor by reason of an earlier agreement, exempt from municipal taxation. Held, also, that the Ottawa Electric Railway Company is not a company which would, but for the agreements mentioned, be liable to be assessed for income under the provisions of the Assessment Act, 1904; and therefore s. 5, sub-s. 17, does not apply to exempt dividends or income from the stock. The Assessment Act does not confer upon the shareholders of a company which is not liable to income assessment, but is liable to business assessment, an exemption from assessment upon their dividends from stock in the company, except as contained in s. 10, sub-s. 7.

Goodwin v. City of Ottawa, 12 O.L.R. 234 (D.C.).

[Leave to appeal refused, 12 O.L.R. 603.]

—Superannuated Dominion official—Income—Exemption.]—The annual income allowed under the Superannuation Act, R.S.C. 1886, c. 18, to an official of the Dominion who has been superannuated and is no longer in the active service of the Dominion, is not exempt from municipal taxation. Leprohon v. Corporation of Ottawa (1878), 2 A.R. 522, distinguished.

Bucke v. City of London, 10 O.L.R. 628 (D.C.).

—Social club—Business assessment.]—The object of s. 10 of the Assessment Act, 4 Edw. VII. c. 23 (O.), is to reach the income derived by the land holder from the various occupations, mentioned in the section, carried on by him upon the land, and perhaps indirectly the stock in trade and personal property belonging to the business, and the word "business" in that section means something which occupies time and attention and labour, and is followed for profit. And a social club, having no capital stock, and consequently no dividends, profits, or earnings to be divided among its members, although it furnishes meals and liquors to them and their guests, is not a club within the meaning of sub-s. (e) of the section, and hence is not liable to a "business assessment." Judgment of Mabee, J., 12 O.L.R. 275, reversed.

Rideau Club v. City of Ottawa, 15 O.L.R. 118 (C.A.).

—Tax sale—Invalidity—Lands not included in list of lands liable to sale—Vague description in assessment rolls.]—A sale to the defendant on the 10th April, 1901, and a subsequent conveyance of lots 2 and 3 in block B on the east side of Gladstone avenue on plan 396, in the City of Toronto, for the arrears of taxes thereon for the years 1893 to 1898, inclusive, were set aside, for the direct breach of s. 176 of the Assessment Act, R.S.O. 1897, c. 224, the provisions of which are imperative, by selling in April, 1901, without having either in the preceding January or in January, 1900, which preceded the date of the mayor's warrant, included the two lots in the list of lands liable to sale furnished to the clerk under s. 152, and also because the description of the lands in the assessment rolls from 1893 to 1898 was too vague and indefinite to be a compliance with the Act: see ss. 13, 29, 34. The assessments being invalid, the defendant was not entitled to a lien under s. 218 for the amount of purchase money paid by her, but was entitled to a lien for taxes paid by her for the years 1900 to 1906, inclusive, the assessments for those years being sufficient, and interest thereon, but less the rents and profits derived therefrom, subject to a deduction for repairs, improvements, etc. Fenton v. McWain (1877), 41 U.C.R. 239, and Wildman v. Tait (1900-1), 32 O.R. 274, 2 O.L.R. 307, followed.

Carter v. Hunter, 13 O.L.R. 310 (Magee, J.).

—Mining lands—Value as agricultural lands—Buildings.]—Mining lands were assessed at their value as agricultural lands under sub-s. 3 of s. 36 of the Assessment Act of 1904. The assessor also assessed the buildings and mining plant as such, and adding the two latter together entered them on the roll as the assessed value of the buildings:—Held, that that method was an attempt to evade the fair meaning of the Act, and that the assessment of the exempted property, the plant, was illegal. It was not for the assessor in the exercise of his judgment to assess the exempted property for taxation at any amount and the illegality being established the Court had jurisdiction to deal with the matter outside of the machinery provided by the Assessment Act for dealing with such a complaint.

Canadian Oil Fields Co. v. Village of Oil Springs, 13 O.L.R. 405 (D.C.).

—Timber licenses—Lumber camps—Business tax.]—The company, being manufacturers of lumber, held licenses to cut timber on Crown lands for 1906 and 1907. They were assessed in 1907 upon their licenses, and upon their lumber camps, and for business tax at the camps, and upon slides and dams. The company were not the owners of any land nor had they any office or mills in the township wherein they were assessed, nor did they carry on any business therein, but cut timber there, and hauled and floated it to their mills at Bracebridge, where they owned a mill and

factory, and which was their chief place of business, and where they were assessed on such factory and mill and also on business:—Held, (1), that timber licenses are not assessable, not being real property within s. 5 of the Assessment Act, 3 Edw. VII. c. 23 (O.), and also because there is nothing to remove the land from the category of property of the Crown exempt from taxation. What the holder of a timber license acquires is a right to convert into personal property, and to thereby acquire a title to himself in that which until the act of conversion is real property belonging to the Crown. (2) Lumber camps are not assessable. They are mere temporary constructions, and are removed from time to time, so that it is quite possible they may be in one municipality one day and in another the next. (3) The company were not assessable for a business tax, under the conditions mentioned, with respect to their camps. Semble, under s. 10, for a business to be assessable, the land occupied or used for the purpose of the business must be land subject to taxation. (4) Slides and dams constructed on streams running through Crown lands out of logs the property of the Crown, and of no value as timber, and used by all persons who have the right to float down logs are not assessable.

Re J. D. Shier Lumber Company, 14 O.L.R. 210.

—**Case stated for opinion of Court—"Question of general application"—Departmental store.**]—It is not a question of general application under s. 77 (1) of the Assessment Act, 4 Edw. VII. c. 23, whether a person is carrying on the business of a departmental store or retail merchant dealing in more than five branches of retail trade or business in the same premises or in separate departments of premises under one roof, or in connected premises, within the meaning of clause (e) of s. 10, sub-s. 1 of the Act. The principle of Re Norfolk Voters' Lists (1907), 15 O.L.R. 108, applied:—Held, also, that the words "upon an appeal of a person, partnership or corporation assessed," in s. 77 (1) of the Act, refer to the appeal to the county Judge and are not referable to the earlier appeal to the Court of Revision.

Re S. H. Knox & Co. Assessment, 17 O.L.R. 175.

—**Sale of land for arrears of taxes.**]—Held, that, according to the true construction of ss. 20 and 26 of R.S.O. 1897, c. 23, the purchaser at a Government sale of lands for arrears of taxes who has obtained a certificate of sale under s. 20 becomes the effective owner thereof if the defaulting owner does not redeem within one year, and is absolutely entitled to a conveyance under s. 26, notwithstanding that the certificate is in the possession of the defaulting owner. Held, further, that the plaintiff, who claimed title under a conveyance from the defaulting owner registered prior to the purchaser's, obtained under s. 26, could not rely on an alleged redemption by him after the expiration of one year, but must in order to succeed prove a valid written transfer to him by the purchaser of the lands in suit. The purchaser having failed to obtain and register his deed of conveyance under s. 20 within eighteen months after the sale:—Held, that priority of registration by the plaintiff did not avail under R.S.O. c. 193, s. 184, sub-s. 1, applicable to the case by virtue of s. 31 of the said c. 23, in the absence of proof of his actual purchase.

McConnell v. Beatty, [1908] A.C. 82.

—**Sale of lands for taxes—Notice in writing—Waiver.**]—The plot of land in suit in the city of Toronto belonging to the respondent was advertised to be sold on April 10, 1901, under Ontario Assessment Act, 1897, for arrears of taxes, and after an adjournment was bought by the appellants on April 24. The appellants in the interval had advertised their intention to purchase in case the amount bid was less than the arrears due, but omitted to give the respondent a notice in writing under s. 184, sub-s. 3, to that effect. In an action by the respondent in September, 1906, to set aside the sale on the grounds (1) that the land was insufficiently described in the assessment roll; (2) that he did not receive the said notice:—Held, (1) that s. 8 of 3 Edw. VII. c. 86, cured the defect (if any) in the assessment roll; (2) that the Act intended that the notice under s. 184, sub-s. 3, should be given to the owner, but that the respondent could and did waive it; otherwise that the failure to give it was within the words of the said s. 8 and was cured by it. Held, further, with regard to the respondent's alternative claim to redeem, that the period of one year from the date of sale allowed by the Assessment Acts of 1892 and 1897 had not been altered by subsequent legislation in any manner applicable to this case.

Toronto Corporation v. Russell, [1908] A.C. 493, reversing 15 O.L.R. 484.

—**Income tax—Mining company—"Income derived from the mine."**]—The Assessment Act, 4 Edw. VII. c. 23, s. 36, sub-s. 3 (O.), provides: "In estimating the value of mineral lands, such lands, and the buildings thereon, shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under this Act":—Held, that the net receipts for the year's work of a mine, left after deducting working expenses, etc., is "the income" derived from the mine within the

meaning of the above section, at any rate where, as in this case, dividends have been declared based upon the net receipts as ascertained.

Re Coniagas Mines Co. and Town of Cobalt, 15 O.L.R. 386 (C.A.).

—Toll bridge over navigable waters—Liability to assessment.]—A toll bridge across the waters of the Bay of Quinté and its approaches, erected by a company incorporated by 50 & 51 Vict. c. 97 (D.), and acquired by the plaintiffs, who were incorporated by 62 & 63 Vict. c. 95 (D.), was held to be liable to assessment, as regards the part situate in the township of Ameliasburg, as real property, within the meaning of the Ontario Assessment Act, 4 Edw. VII. c. 23. The effect of the two Dominion statutes referred to is to confer a perpetual right in the nature of an easement to construct and maintain the bridge across the navigable waters of the Bay of Quinté; the words "real property," in s. 2 (7) of the Assessment Act, by virtue of s. 2 (8) of the Municipal Act, 1903, include an easement; and the bridge comes within none of the exemptions mentioned in the Assessment Act. The interest of the Crown in any property is exempt, but that leaves the interest of any person else not holding for the Crown, or in trust for the Crown, liable under the general words of the statute; and the plaintiffs were not agents or trustees for the Crown. S. 37 of the Act applies only to a bridge forming part of a toll road, and not to this bridge; nor is this bridge a public road or way, within the meaning of s. 5 (5) of the Assessment Act.

Belleville and Prince Edward Bridge Co. v. Township of Ameliasburg, 15 O.L.R. 17[illegible] (D.C.).

—Business tax—Express company.]—

Dominion Express Co. v. The Corporation of the Town of Niagara, 15 O.L.R. 78.

—Tax sale—Onus—Proof of validity of assessment and subsequent proceedings.]—The onus of proving a valid sale for taxes is upon the party setting up title under a tax deed; the production of the deed is not enough; further evidence must be given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited. Jones v. Bank of Upper Canada (1867), 13 Gr. 74, and Stevenson v. Traynor (1886), 12 O.R. 804, followed. The defendant contended that an easement or right of way enjoyed by the plaintiff over ten feet of land sold for taxes was extinguished by the sale in 1893, as being included in the word "privilege" used in the Consolidated Assessment Act, 1892, s. 137, then in force:—Semble, that the law of Ontario does not provide for the taxation of easements; and the title to an easement cannot be extinguished by the sale for taxes of the servient tenement, without notice to the person who uses it and without opportunity for him to exonerate the land by the payment of taxes.

Essery v. Bell, 18 O.L.R. 76.

—Departmental Store.]—By sub-s. 3 of s. 51 of the Ontario Railway and Municipal Board Act (1906) 6 Edw. VII. c. 31, an appeal from the decision of the Board on an appeal thereto from a Court of Revision, lies only upon a question of law. Whether or not a firm carried on the business of what was known as a departmental store or that of a retail merchant dealing in more than five branches of retail trade or business in the same premises or separate departments of premises under one roof or in connected premises, so as to be liable to the assessment imposed by s. 10 (1) (e) of the Assessment Act, 4 Edw. VII. c. 23 (O.), is a question of fact and not of law. Leave, therefore, to appeal in such a case from the decision of the Board was refused.

Re S. H. Knox & Co., 18 O.L.R. 645.

Quebec.

—"Properties fronting"—Interpretation.]—The clause "properties fronting" on the line of a street includes properties adjoining or contiguous to the line of the street on any side, although the buildings thereon front on a street intersecting the other and the properties are only bounded on the side line by the street first mentioned.

Watson v. Maze, 17 Que. S.C. 579.

Sale of land for taxes—Certificate—Possessory action.]—The purchaser, on a sale for municipal taxes under the provisions of Arts. 1000 and 1001 M.C., of part of a lot of land who receives the certificate provided for in Art. 1004 M.C. which does not define the situation or boundaries of the land has not the seizin which entitles him to maintain a possessory action therefor. In such case his action will be dismissed with reservation of his right to sue again, especially where it is impossible, with the evidence adduced, to establish without having a bornage the situation, in one or the other of two municipalities, of the land in question, and, consequently, the validity of the sale of it. The notices required by Arts. 961 and 1006 M.C. need not be given to persons acquiring possession of immovables who have not been made aware, in the manner provided by Art. 746 M.C. of the change of ownership, nor to absentees who have not appointed agents as required by Art. 222.

Saint Apollinaire v. Roger, Q.R. 36 S.C. 520.

—**Taxes — Privilege—Liquor license.**]—The right to sell intoxicating liquors under a license is distinct from the business and, therefore, is not subject to the privilege for municipal taxes. This privilege on property results only from statutory provisions which should be strictly construed. The provisions creating it for the taxes levied by the city of Montreal (secs. 587a and 388 of the charter) relate only to movable goods and thereby exclude incorporeal rights such as those arising from a license for the sale of intoxicating liquors issued under the Quebec License Act.

Mitchell v. City of Montreal, Que. S.C. 11.

—**Tax sale—Redemption—Interpretation of statutes.**]—The rule that repeal by implication of an existing enactment will not be inferred from a subsequent one, unless both are incompatible, applies in the case of a statute "to revise and consolidate" those on a given subject, v.g., a city charter. Hence, if, in an existing Act, a right to redeem property sold for taxes by a city is given with a proviso that privileged and hypothecary claims shall thereby revive, a subsequent Act "to revise and consolidate the different Acts of the Legislature relating to that city," that embodies the enactments for the sale of property for taxes and its redemption, but omits the proviso for the revival of privileged and hypothecary claims, will not be deemed to repeal the latter by implication and it continues in force and vigour.

Kennedy v. Godmaire, 38 Que. S.C. 527.

—**Tax sale—Irregularity.**]—A trustee may sue to annul the sale for taxes, under municipal authority of an immovable belonging to the trust estate. When the charter of a city empowers it to sell immovables for taxes imposed upon them on condition, among others, of announcing the amount due in the notice of sale, the declaration at the sale that it is made for an amount greater than that announced makes it void. It is likewise void when there has been no previous levy on the movables of the owner when the charter provides therefor and requires it.

McConnell v. City of Hull, Q.R. 38 S.C. 434 (Ct. Rev.).

—**Valuation — Error — Oral testimony.**]—Oral evidence is inadmissible to prove that a cadastral number was given to an immovable in the valuation roll by inadvertence instead of the real number of the immovable valued by the assessors.

Village of Cowansville v. Nozes, Q.R. 38 S.C. 427.

—**Valuation rolls—Over valuation.**]—(1) The valuation roll of a town may be set aside by the Superior Court, on a petition to that effect, "by reason of illegality," R.S.Q., s. 4376. Such illegality must be of a kind that vitiates the roll, as a whole, and over-valuation in particular cases affords no ground for such a proceeding. The party affected, in such a case, has a right of complaint to the town council, an appeal from the decision of the latter to the Circuit Court, within a prescribed delay. The remedy by petition to the Superior Court, and that by complaint and appeal to the Circuit Court, are distinct in their purposes, and a party using the former will not be allowed to so amend his petition as to make it include the other. (2) Allegations in a petition to quash, setting forth in substance that, in making the valuation roll, the valuators did not give their own estimated value of the property therein, but, at the bidding of the council, over-valued it in order to make the borrowing of money by the corporation more easy, are not demurrable, as they amount to charges of illegality for which, if proved, the roll should be set aside. (3) The oaths of office of valuators need not be in writing. (4) When no substantial wrong is shown, a valuation roll will not be set aside for mere irregularities, such as insufficient notices, irregular adjournments of sessions of the town council, the refusal to examine the valuators at the hearing of a complaint, or mistakes as to valuation in particular cases. (5) When the valuators are two or more in number, they are not bound to jointly visit or inspect the properties they have to value.

Percival v. Town of Montreal West, 37 Que. S.C. 456.

—**Petition to set aside a valuation roll.**]—No appeal lies to the Court of Review from a judgment of the Circuit Court dismissing a petition to set aside a valuation roll.

Martel v. Corporation of South Marston, 37 Que. S.C. 289.

—**Local improvement—Rating in proportion to benefit—Trivial objections first taken in appeal.**]—Where a statute for the widening of a street directs that part of the cost shall be paid by the owners of property bordering on the street, the apportionment of the tax should be made upon a consideration of the enhancement in value accruing to such properties respectively and the rate levied in proportion to the special benefit each parcel has derived from the local improvement. Where an assessment roll covering over half a million dollars has been duly confirmed without objection on the part of a ratepayer that his property has been too highly assessed by a comparatively trivial amount, he cannot be permitted afterwards to urge that objection before the courts upon an application to have the assessment roll set aside. Judgment appealed from (Q.R. 9 Q.B. 142) reversed; judgment of the Montreal Superior Court (Q.R. 15 S.C. 43) restored.

The City of Montreal v. Belanger, 30 Can. S.C.R. 574.

—Pasture land—Valuation — Art. 942a M.C.]—The C. P. Railway Co. had acquired more than 200 arpents of land for railway purposes, but changing its intention, let it as a farm by an annual lease, with the condition that it should only be used for pasturage, for which it was entirely unsuited. The company had also prepared a plan for dividing the land into lots, and had taken steps to have it adopted by the corporation and the Government and a cadastre made. It even gave notice of its sale in lots. For assessment purposes the land had been appraised at its real value, and the company petitioned the corporation to reduce the valuation. This having been refused, the company appealed to the Circuit Court, claiming that the land should be valued according to its value for agricultural purposes only:—Held, that the property should be estimated at its real value, and not according to any value it might possess for agricultural purposes alone.

Canadian Pacific Railway Co. v. Corporation of the Village of Verdun, 20 Que. S.C. 194 (Cir. Ct.).

—Municipal appraisement—Valuation of immovable—Review.]—A Judge cannot modify the valuation of an immovable made under oath by the appraisers of a municipality unless it was made on a wrong principle or was so evidently erroneous that a competent and honest man would not have arrived at the same result.

Bagg v. Town of St. Louis, 20 Que. S.C. 149 (Sup. Ct., Langelier, J., in Chambers).

—Public instruction—Assessment roll—Valuation—Errors.]—The valuators appointed by the superintendent of public instruction have a right to demand payment for their services from the school commissioners. The school commissioners cannot declare void the assessment roll prepared by its valuators because land owned by the dissenters may be entered therein, or because the description of lands in it may be erroneous, but they should, under the provisions of Art. 353 of the Law of Public Instruction correct the errors that they may find in the roll.

Robert v. School Commissioners of St. Hermenegilde, 20 Que. S.C. 540 (Cir. Ct.).

—Road work—Subsequent purchaser — Arts. 948, 397 M.C.]—Held, a municipal corporation has no right of action to recover the cost of road work against the subsequent purchaser of the land assessed, but must first take judgment against the person liable for such work.

Township of Roxton v. De Lorimier, 24 Que. S.C. 57 (Lynch, J.).

—Contestation of valuation roll—Discretion of valuators—Interest of petitioners.]—(1) Valuators must proceed strictly according to law, and it cannot be said, in answer to a petition to set aside a valuation roll, that they have acted in the exercise of their discretion or according to an established practice. (2) It cannot be alleged that the party who contests a valuation roll is acting in the interests of other parties, unless it is also alleged that the petitioner himself is without any interest whatever.

Leitch v. Town of Westmount, 5 Que. P.R. 225 (Levergne, J.).

—Tax on telegraph companies—Companies incorporated by Parliament—Interprovincial lines.]—1. The Quebec Act, imposing an annual tax of $2,000 on all telegraph companies having a paid-up capital exceeding $50,000, and operating lines of telegraph for the use of the public within the Province, and doing business there, is intra vires of the Legislature. 2. The telegraph company, appellant, although incorporated by Parliament and operating interprovincial lines of telegraph, that is to say, in all the Provinces of Canada, except British Columbia and Prince Edward Island, having a paid-up capital exceeding $50,000, is liable for this annual tax of $2,000, inasmuch as it carries on business in the Province of Quebec and operates a part of its lines of telegraph therein for domestic despatches, that is to say, for despatches sent from one point to another within the Province. 3. The action of the collector of revenue in his capacity as such for the recovery of the tax is presumed to be managed and directed by the Attorney-General, who is dominus litis thereof, and consequently, the intervention of the Attorney-General for the purpose of sustaining the constitutionality of the statute is a useless and superfluous proceeding, in respect of which, under the circumstances, he cannot be given costs. 4. The Court of Appeal will not take into consideration objections more to the form than to the merits of the case, which have not been taken in the Court of first instance.

The Great North-West Telegraph Co. v. Fortier, 12 Que. K.B. 405.

—Land purchased by provincial government.]—An immovable purchased by the provincial government for the purpose of establishing a normal school thereon does not, by being so acquired, become exempt from taxation. A municipal tax only becomes a charge upon immovables affected by the bringing into force of the collector's roll imposing the assessment.

Parish of Notre Dame de Quebec v. The King, Q.R. 25 S.C. 195 (Sup. Ct.).

—Assessment roll—Irregularity—Jurisdiction to quash.]—Under the provisions of Art. 4376 R.S.Q., a Judge in Chambers has jurisdiction to quash, on petition, an as-

sessment roll, for illegality. The inscription upon the roll as owners of property of persons who are not such, or the valuation of property at a sum much above or below its real value constitute an illegality. In the present case notice should have been given to the persons whose names the petitioner wished to have struck from the roll.

Truchon v. Town of Chicoutimi, Q.R. 25 S.C. 55 (Ct. Rev.).

—Prescription—City of Montreal—Special assessment—Contestation—Interruption of prescription.]—Held, (affirming the judgment of the Superior Court, Doherty, J., 23 Que. S.C., p. 461):—1. Under the former charter of the City of Montreal (52 Viet. c. 79), the contestation of a special assessment roll, by a person assessed therein, had not the effect of interrupting prescription as regards other persons subject to such assessment. 2. The fact that the person contesting the roll obtained a temporary order enjoining the city against making any collection under the roll attacked, did not constitute an interruption of prescription as regards other persons assessed by the same roll, where such order was made without objection on the part of the city, and no steps were subsequently taken by the city to obtain the rescission of the order.

City of Montreal v. Land and Loan Company, 13 Que. K.B. 74.

—Municipal corporation—Proces-verbal—Municipal work.]—At common law, as well as under the Quebec Municipal Code, no person except the parties interested can be compelled or called upon by procès-verbal to contribute to the cost of work ordered to be done in connection with a water course. Arts. 811, 870, 871, 881 and 882 M.C. Therefore, a procès-verbal assessing ratepayers for a proportion of the cost of work in which they have no interest is illegal and unjust and should be quashed and annulled.

Paquet v. Corp. of St. Nicholas (Huot mis-en-cause), Q.R. 13 K.B. 1.

—Tax sale—Mistake—Retrocession.]—The sale of another person's property is radically null; thus, the sale of an immovable, through error, for municipal taxes assessed on the adjoining property, is void and does not discharge the hypotheecs with which the immovable sold is affected. In the case in Court the retrocession obtained by the real owner from the purchaser or his creditors cannot be deemed an acknowledgment of the validity of such sale; and even when the transaction is recognized as valid by the owner such recognition can only be deemed a new sale by him not affecting the rights of third parties.

Humphreys v. Desjardins, Q.R. 24 S.C. 250 (Ct. Rev.), affirmed by K.B. 25 Feb. 1904.

Action for municipal and school taxes—Jurisdiction — Declinatory exception.]—In a suit in the Superior Court, claiming municipal taxes to an amount exceeding $100, accompanied with a demand for school taxes, a declinatory exception asking the dismissal of that portion of the demand which is for school taxes, on the ground that the Circuit Court has exclusive jurisdiction, will be maintained, notwithstanding Art. 170 C.C.P., it being impossible in such a case to transmit the whole record to the Circuit Court.

Township of Dudswell v. Quebec Central Ry. Co., 19 Que. S.C. 116 (White, J.).

—Sale of land—Warranty—Special assessment—Prescription.]—Where an immovable is sold with warranty against all troubles and charges whatsoever the existence at the time of the sale of a rate for construction of a church does not give the purchaser a recourse on warranty for reimbursement against the vendor if the purchaser at the time was aware of the rate being fixed. School taxes and rates constituting a charge affecting an immovable, being public charges, or of general application, should enter into the calculation of a purchaser of the immovable and are an obligation on him from the time of the sale. A purchaser with legal warranty, who has paid municipal or school taxes due by the vendor, cannot claim repayment thereof from the latter if, at the time of such payment, the debt of the vendor to the municipality for such taxes was prescribed, since the purchaser, being subrogated to the rights of the municipality, was in no better position than the latter as against the vendor.

Peabody v. Vincent, Q.R. 26 S.C. 253 (Ct. Rev.), affirming 26 S.C. 37.

—Contestation of roll—Limitations of actions—Interruption of prescription—Suspensive condition.]—The prescription of three years in respect of taxes provided by the Montreal City Charter, 52 Viet. c. 79 (Q.), runs from the date of the deposit of the assessment roll, as finally revised, in the treasurer's office, when the taxes become due and exigible, and the prescription is not suspended or interrupted by a contestation of the assessment roll, even although the contestation may have been filed by the proprietor of the lands assessed. Judgment appealed from reversed, Girouard and Nesbitt, JJ., dissenting.

City of Montreal v. Cantin, 35 Can. S.C.R. 223.

—Assessment due on filing of the roll—Action—Limitation.]—Under s. 231 of the City of Montreal charter, 1889 (52 Viet. c. 79), the amount of an assessment becomes due and recoverable on the filing of the roll of assessment in the office of the

City Treasurer. In an action by the city to recover after the period of prescription enacted by s. 120, calculated from the date of filing, had elapsed, it appeared that the respondent's predecessor had been a party to proceedings had for its annulment:—Held, (1) That the period was not interrupted thereby within the meaning of Art. 2227 of the Civil Code, for there had been no acknowledgment of liability. (2) That there had been no impossibility to sue within the meaning of Art. 2232, for the right of action was not by the above Act suspended during the proceedings. (3) That the debt in suit was not dependent on a condition within the meaning of Art. 2236; though s. 144 of the Act limited the time within which the roll might be annulled, it did not make the date of its coming into force conditional on the roll not being either attacked or annulled.

City of Montreal v. Cantin, [1906] A.C. 241, 15 Que. K.B. 103, affirming 35 Can. S.C.R. 223.

—**Taxation—Company—"Freeholder"—Religious denomination.**] — The term "Catholic freeholder" in a statute authorizing the levy of a tax does not apply to a company incorporated for secular purposes.

Syndics de St. Paul de Montréal v. Compagnie de des Terrains de la Banlieue de Montréal, Q.R. 28 S.C. 493 (Sup. Ct.).

—**Municipal corporation—Statute labour—Sale for taxes.**]—A municipal corporation may, at the cost of a ratepayer obliged to maintain a public road, cause a ditch obstructed by him to be cleared by the road inspector if he fails to do so himself upon being notified and required to remove the obstruction. (2) The municipality cannot be held liable in damages on account of a resolution to the above effect, nor for including the cost of the work as part of the municipal taxes due by the ratepayer in the statement sent to the secretary-treasurer of the county under Art. 373 of the Municipal Code to be advertised on the sale, for the whole amount, of the property affected in virtue of Arts. 998 to 1001 of the Municipal Code.

Lagacé v. Village of St. Joseph de Bordeaux, Q.R. 28 S.C. 319 (Sup. Ct.).

—**Sale of immovables for municipal taxes—Recitals in deed—Burden of proof—Prescription.**]—(1) The sale of immovables for taxes not assessed upon them, or for an amount in excess of such taxes, is null and void. (2) The recitals in a deed of sale, under Arts. 1008 and 1009 M.C., do not afford a presumption juris et de jure of a valid sale, and evidence of its nullity is admissible, e.g., to show that the taxes for which it was made were not due, and that the formalities required by law were not complied with. (3) The burden of proof of the legality of the sale is upon the purchaser when it is challenged or impugned by the original owner, or by those whose title is derived from his. (4) A deed of sale for taxes which is void as stated firstly above, is not a title (juste titre) that can avail as a ground for prescription by ten years, nor does the prescription of two years of Art. 1015 M.C. apply to it.

Cameron v. Lee, 27 Que. S.C. 535.

—**"Current year"—Assessment and taxes—Limitation of action—Local improvements.**]—By s. 120 of the charter of the City of Montreal, 52 Vict. c. 9 (Que.), the right to recover taxes is prescribed and extinguished by the lapse of "three years, in addition to the current year, to be counted from the time at which such tax, etc., became due." A special assessment for local improvements became due on the 14th of March, 1898, and action was brought to recover the same on the 4th of February, 1902:—Held, affirming the judgment appealed from (Q.R. 15 K.B. 479) the Chief Justice and Duff, J., dissenting, that the words "current year" in the section in question, mean the year commencing on the date when the tax became due and that the time limited for prescription had not expired at the time of the institution of the action.

Vanier v. City of Montreal, 39 Can. S.C.R. 151.

—**Right to appeal of married woman inscribed as landowner on roll of valuation.**]—(1) A married woman who is the owner of real estate in a municipality, whose name is on the valuation roll as such and who is a taxpayer, is qualified and has the right to take the appeal to the Circuit Court given in s. 4 of Article 1061 M.C. (2) Amendments of the valuation roll, in any year in which a new roll is not made, can only be made in the District of Quebec in the months of June or July. Hence resolutions passed by a local council in the District of Quebec in the month of September, to erase the names of proprietors inscribed on the valuation roll and to substitute in their stead the names of a large number of other parties, are null and void and will be quashed on appeal.

Boucher v. Corporation of Limoilou, 31 Que. S.C. 178.

—**Levying taxes—Notice.**]—The proceedings of boards or committees of municipal councils, in the absence of ratification by the latter, cannot be admitted as evidence against the corporation from which the committees were formed. The special notice provided for by Art. 961, M.C., and Arts. 4550, R.S.Q., and by s. 544, sub-s. 2 of 52 Vict. c. 80 (Que.), is only required as a condition precedent for levying municipal taxes by seizure of movables or immov-

ables. Recourse by ordinary action in Court is open in whihe notice is not required. The expression "when proceedings are taken" in s. 552 of 52 Vict. c. 80, refers to seizure of movables or immovables in levying for taxes and not to the recourse by action. In exercising the latter the corporation cannot demand the additional 10 per cent. provided for by the section.

Morgan v. City of Sorel, Q.R. 15 K.B. 247.

—Tax under repealed by-law—Recourse for repayment.]—The repeal of an Act which authorizes the corporation of a city to impose a tax by by-law involves the repeal of every by-law passed pursuant to such Act. Therefore, a ratepayer who has paid a tax imposed by by-law after repeal of the Act under which it was passed has recourse by action for money paid by mistake (répétition de l'indu) to recover back the amount. The corporation cannot set up against such action the fact that after the payment and before the action was instituted the repealed Act was again brought into force.

City of Montreal v. Royal Ins. Co., Q.R. 15 K.B. 574, affirming 29 S.C. 161.

—Jurisdiction of the Court of Review—Warranty—Principal action for recovery of school taxes.]—The Superior Court sitting in Review has no jurisdiction over a judgment rendered by the Circuit Court, sitting at Stanstead, in an action of warranty brought by a defendant against whom the principal action is for the recovery of $124 school taxes, and an inscription for review of such a judgment will be struck on motion.

School Commissioners of Coaticook v. Coaticook Electric & Power Company, 29 Que. S.C. 264.

—Street widening—Local improvement tax—Instalments.]—A provision in a city charter that one half of the cost of certain improvements shall be levied upon a class of taxpayers by ten annual instalments is not impliedly repealed, as to the division of the assessment into instalments, by a subsequent statute which alters the proportion of the amount to be levied from one half to three-eighths without mention of the mode of payment.

City of Montreal v. Milligan, 30 Que. S.C. 394.

—Valuation roll—Notice of deposit and of revision by the council.]—(1) Notice of the deposit of a valuation roll, under Art. 732 M.C., and of its revision by the municipal council, under Art. 736, may be given simultaneously by one and the same document, no interval of time being required to lapse between the two. (2) Municipal councils in revising valuation rolls have a discretion with which the Courts will not interfere by the exercise of their reforming power except in cases of evident injustice amounting to oppression.

Ledoux v. Ste. Edwidge de Clifton, 30 Que. S.C. 29 (Hutchinson, J.).

—Quality of persons named on roll—Presumption.]—The insertion on an assessment roll of the names of persons as owners of property is not conclusive as to such ownership. Therefore, a person who has paid the taxes on an immovable, having been placed on the roll as owner thereof, has a right to be re-imbursed the amount on establishing that he was not the owner at the time the taxes were imposed.

Couture v. St. Etienne de Lauzon, Q.R. 31 S.C. 395 (Sup. Ct.).

—Exemptions—Meaning of "parsonage."]—(1) An appeal lies to the Superior Court sitting in review from a final judgment of a Recorder's Court, for an amount exceeding five hundred dollars, in an action for municipal or school taxes. (2) Under 3 Edw. VII. c. 62, s. 36 (Que.), a parsonage is a house set apart by a church or congregation for the residence of its priest or minister and actually occupied by him as such. Failing either of these two conditions, a house is not exempt from taxation under the statute.

City of Montreal v. Meldola De Sola, 32 Que. S.C. 257.

—Land sold for taxes—Mode of redemption.]—The right to redeem an immovable sold for taxes under 62 Viet. c. 58, s. 402 (Que.), like that of redemption under the title "sale" of the Civil Code cannot be exercised by a reciprocal deed of retrocession. These rights operate as resolutory conditions and are exercised, by those entitled to them, by a unilateral deed expressing consent the effect of which is to replace matters in the condition in which they would have been if the sale had not been made. The parties remain with their respective rights subject to the legal obligations to which redemption is subordinated. Therefore, one who exercises this right of redemption cannot demand a deed or declaration respecting it especially if provisions are introduced into such documents involving obligations.

Parent v. Kennedy, Q.R. 33 S.C. 55.

—Schools Act—Collection roll—Description of immovable.]—The description of an immovable as "No. P628 of the official cadastre of the parish of . ." in a collection roll for school rates is sufficient within the terms of ss. 342 and 360 of the Education Act when part only of the lot described under its cadastral number in the municipal assessment roll is situated within the limits of the school district. Moreover, such an irregularity (if it is one) can only be invoked by a demand for rectification or, at most, as a preliminary ob-

jection and cannot be opposed to the merits of an action to recover the amount of the tax. The judgment dismissing an action for non-compliance with precedent formalities is not chose jugée against a second action brought after these formalities have been observed. Where the first action was dismissed with costs the payment of such costs is not a condition precedent to the institution of a second.

School Commissioners of St. Boniface de Shawinigan v. Shawinigan Water Power Co., Q.R. 31 S.C. 81 (Ct. Rev.).

—Municipal corporation—Conveyance of land for street—Obligation to open—Sidewalks—Adjoining owners—Action for cost of sidewalks—Notice.]—The agreement by which a ratepayer conveys land to the municipal corporation on condition that it be opened does not oblige the corporation to make sidewalks. When municipal by-laws place on adjoining owners the obligation to construct sidewalks and in default authorize their construction by the municipality after notice to the defaulters and permit it to recover from the latter the cost, the omission to give such notice is a defence to the action only when the sum claimed exceeds what the execution of the work would have cost the defendants had they themselves performed it.

Corporation of Three Rivers v. Dumoulin, Q.R. 31 S.C. 75 (Ct. Rev.).

—Delay for contesting collection rolls—Special exemption from tax by contract.]—(1) An action to recover a debt, which, on the face of the declaration, falls under Art. 2267 C.C., is open to demurrer by the defendant, who may set up the short prescription by inscription in law. (2) When the charter of a municipal corporation provides that its collection rolls for taxes must be contested within a fixed delay, a ratepayer, who has a special right, under a contract, to refuse payment of the tax, is not bound to act thereon within the delay so fixed. He may stand by until called upon to pay, and then set up his right, though the delay to contest the roll has expired.

Joyce v. Town of Outremont, 18 Que. K.B. 447.

—Street railway—Special privileges—Assessment roll—Description of property.]—A municipal corporation which, under authority of a special Act, grants to a street railway company, in consideration of the annual payment of a percentage of its profits, the privilege of establishing its right of way, and erecting poles and other necessary constructions on the streets and elsewhere in the municipality, is not thereby deprived of its power to tax such constructions, etc., under the general powers given to it by its charter. The following description in the valuation and collection rolls of such property, "William Street, St. Ann's Ward, part of 1209 and motive power on subdivisions 1-8, 1218 pt. 1209, land $34,000, buildings $60,000, 1-8, 1218 buildings $220,000," is sufficient within the terms of 62 Vict. c. 79, s. 375. A waiver in writing by a ratepayer of the prescription against collecting his taxes is valid and prevents the time from running.

City of Montreal v. Montreal Street Railway Co., Q.R. 35 S.C. 321 (Ct. Rev.).

—Assessment roll—Joinder of lots—Sale—Description — Division on sale.]—The joinder, in the valuation and assessment rolls, of two cadastral lots as a single entry for municipal purposes is at most an irregularity of which the owner must take advantage within the prescribed delays, after which he cannot, in the absence of prejudice, have the entry struck out of the rolls. In the statement of taxes due prepared by the secretary-treasurer of the local council, and in the extract sent by him to the secretary-treasurer of the county, as well as in the list of sales published by the latter, all of which is provided for by Arts. 371, 373, 998-9 M.C., the lots should be described as in the said rolls as forming one property. Taking the bid at the sale for the smallest portion as provided in Art. 1001 M.C. is a severance of the two lots so joined as one. Hence, the offer to pay the amount due for taxes and costs by the purchase of one of the two lots is not a valid bid, and the sale of the one chosen by the purchaser and certificate of its delivery to him are void.

Donais v. County of Shefford, Q.R. 36 S.C. 367.

—Taxes—Action to recover amount—Defence—Objection to collection roll.]—A ratepayer sued for the amount of his municipal taxes cannot set up as a defence to the action objections to the collection roll for which he could, within the prescribed delay which has expired, have demanded that it be annulled.

Cameron v. Town of Westmount, Q.R. 18 K.B. 300.

—Valuation roll—Over value of the property ordered by the council.]—It is legal, in an action to annul a valuation roll, to allege that the corporation defendant dictated to the valuators to over value the properties, in general, irrespective of the real value of said real estate, this irregularity being sufficient to justify the annulment of the roll.

Percival v. Montreal West, 11 Que. P.R. 69.

—Prescription—Notarial agreement.]—The right to object to the legality of an assessment imposed by a municipal by-law is not prescribed by the lapse of three months (R.S.Q. 4397), if there is a notarial agree-

ment apparently including a settlement of the matters in litigation.

Joyce v. Town of Outremont, 10 Que. P.R. 328.

—Taxes—Sale of land—Redemption.]—The owner of an immovable, sold by the sheriff under the provisions of s. 401 of the Charter of Montreal for taxes, or his representative, who has redeemed under s. 402 has a right of action against the purchaser for a judicial declaration of his exercise of the right of redemption and observance of the necessary formalities. The purchaser cannot set up, as a defence, the expenses which he has been obliged to incur, but retains the right to claim reimbursement thereof when a demand for possession of the immovable is made on him.

Parent v. Kennedy, Q.R. 34 S.C. 535, varying 33 S.C. 55.

Eastern Provinces.

—Appeal from assessment—Judgment confirming—Payment under protest—Res judicata.]—J., having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council and then applied to the Supreme Court of New Brunswick for a writ of certiorari to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. In 1897 he was again assessed under the same circumstances and took the same course with the exception of appealing to the Supreme Court of Canada from the judgment refusing a certiorari, and that could held the assessment void and ordered the writ to issue for quashing. J. then brought an action for repayment of the amount paid for the assessment in 1896:—Held, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a certiorari to quash the assessment in 1896 was res judicata against J., and he could not recover the amount so paid.

Jones v. City of St. John, 31 Can. S.C.R. 320.

—Assessment, warrant of—Certiorari.]—The municipality of the county of Westmorland having issued a warrant of assessment to the city of Moncton under the provisions of the Act respecting Rates and Taxes, C. S. 1903, c. 170, s. 34, before the same was delivered to the city assessors or any assessment made thereunder the city of Moncton applied for certiorari to remove the warrant alleging that part of the amount to be assessed under it was not properly chargeable to the city. There was no evidence that the city itself was liable to be taxed as a rate payer:—Held, that there was no ground for the application there being no assessment for the Court to act upon and the city as such having no interest in the assessment.

Ex parte City of Moncton, 39 N.B.R. 326.

—Action for rates and taxes—Defence of excessive amount—Proof of assessment.]—Defendant was assessed in the City of Halifax for city, poor, county and school rates and taxes for the years 1894 and 1895, the property upon which the rates were assessed being the S.S. "Newfoundland," then lying in Halifax harbor, of which defendant was alleged to be owner, and the valuation of which, for the purposes of assessment, was placed at the sum of $5,000. Under the provisions of the Halifax City Charter Acts 1891, c. 58, s. 341, a court is established for the purpose of hearing all appeals from assessments, and is empowered, under subsequent sections of the Act, to determine and hear all objections of ratepayers, who shall have duly appealed, to the valuations or assessments which have been made upon such ratepayers and their properties, and to reduce or increase the valuations, etc. In an action by plaintiff to recover from defendant the amount claimed to be due for rates and taxes, defendant pleaded among other things that at the time of the said assessments, defendant was not the owner of more than a one-quarter interest in said ship:—Held, (following the Town of Westville v. Munro, 32 N.S.R., p. 311), that the defendant having received notice of the assessment, if he was dissatified therewith, should have brought the matter before the Assessment Appeal Court, established for that purpose, and, having failed to do so, that the assessment was conclusive, and could not be attacked in an action to recover the amount assessed. The only evidence before the court of the assessment and the rate due thereon, was the city collector's certificate of taxes unpaid, and s. 362 of the City Charter, which provides that all rates and taxes shall become due the 31st day of May in each year, and that it shall be the duty of the city collector, immediately thereafter, to take proceedings, etc. There was no evidence to prove the collector's signature to the certificate or that he was collector:—Held, that the evidence was wrongly received. Held, nevertheless, that as defendant, in his defence, admitted that he was assessed for the amount claimed, and that the rate alleged to be due on such assessment was correct, it was not necessary for plaintiff to prove the assessment or the rate due thereon.

City of Halifax v. Farquhar, 33 N.S.R. 209

—School rate — Distress — Second distress —Abandonment after abortive sale—Arrest under individual warrant — Estoppel — Amendment—Costs.]—

Matheson v. Reid, 2 E.L.R. 340 (N.S.).

—Tax arrears — Seizure — Replevin.] — Hagarty v. McGrath, 7 E.L.R. 79 (N.S.).

—Illegal assessment—Execution for—False imprisonment.]—A municipal corporation is liable to respond in damages for the act of its secretary-treasurer in sending to a collecting Justice the name of the plaintiff as having made default in the payment of a rate, which had been illegally imposed upon him, at the same time instructing the Justice to enforce payment of the same, which the Justice did by issuing an execution against the plaintiff, under which, for want of goods and chattels whereon to levy, he was lodged in prison.

Mellon v. Municipality of Kings County, 35 N.B.R. 153.

—Exemptions from taxation — Words "government building"—Held to extend to house under lease to war department.]—Under the provisions of the Halifax City Charter, Acts of 1891, c. 58, s. 336, the following, among other property, is exempted from assessment: "All personal property of military persons residing in government buildings or barracks," etc.:—Held, that a private house in the city, under lease to His Majesty's Principal Secretary of State for the War Department, for the purpose of being used as a place of residence by a military person, for whom there was no suitable accommodation in any barracks in Halifax, was a "government building" within the meaning of the statute, and that personal property contained in such building was exempt from taxation for civic purposes.

Smith v. City of Halifax, 35 N.S.R. 373.

—Assessment of partnership—N.S. Acts, 1895, c. 1.]—See PARTNERSHIP.

Trustees v. Oland, 35 N.S.R. 409.

—City Sewers—Frontage and entry fees—Permits to enter.]—The city of M. by its act of incorporation is authorized to levy on the owners of lots frontage fees for sewers and to collect them as ordinary city taxes; the Act also gives authority to make by-laws to regulate the way and manner of entering the sewers and to prevent the entry of any sewer, unless the entry and frontage fees were first paid. A by-law was made providing that no person should enter any public sewer until all entry and frontage fees were paid. E., the owner of a lot by purchase from the sheriff under an execution by the city of M. for general city taxes (not frontage fees) on which frontage fees had been rated against a former owner and not paid applied for a mandamus to compel the city to grant him a permit to enter a sewer without payment of the frontage fees:—Held, refusing the mandamus, that the city could not be compelled to issue the permit until the fees were paid, even though they had lost the right to enforce payment against the owner of the lot.

Ex parte Edgett, 36 N.B.R. 224.

—Road taxes—Certiorari—Proceedings of ministerial character.]—A writ of certiorari was directed to the road commissioners of district 17 in the municipality of Halifax, to remove the record of the assessment roll of said district assessing the inhabitants for road taxes, and the return made to the county treasurer of persons who had made default. A writ was also directed to the stipendiary magistrate for the county to remove the record of a return of defaulters who had not paid or commuted their taxes, and the warrant of distress issued by him thereon. There was a motion to quash or set aside the assessment roll, the warrant of distress, etc. It appeared that the allowance of the writs had not been opposed, and there was no motion to set aside the orders, or to quash the writs or either of them The amount of the tax was fixed by law the value of the property by the county assessors, and the rate of assessment by the county council, and the stipendiary magistrate, in issuing his warrant of distress against defaulters, was not called upon to exercise any judicial function:—Held, that the proceedings were of a purely ministerial character and were not a proper subject for certiorari. Held, that the process having improvidently issued, the Court had power of its own motion to set it aside and that, under the circumstances appearing in this case, the writs should be superseded and the returns thereto taken off the files of the Court. The affidavits filed showed an intention to attack the legality of the formation of the district under Acts of 1900, c. 23, and the appointment of the commissioners. Held, that this could not be done in this form of proceeding.

Rex ex rel. Corbin v. Peveril, 36 N.S.R. 275.

—Rates and taxes—Discrimination against non-residents by under-valuation.]—In a petition for relief by a non-resident ratepayer under 44 Vict. c. 9 (Acts 1881), it is sufficient evidence of authority to warrant the judge in acting, that the party petitioning describes himself as the agent of the person aggrieved in the matter of the assessment, and swears to the truth of the statements in the petition. The time within which the petition must be presented under the Act does not begin to run until after the assessment complained of has been made up from the corrected list and filed with the County Secretary, and then within one month, either from notice of the assessment from the county officer charged with the duty of giving notice, or from the time the person assessed first heard or knew of such assessment. It is no objection to an application under

the Act that objection to the valuation of the property was made to the assessors under Consolidated Statutes, c. 100, s. 59, and that the objection might have been further prosecuted before the valuators under s. 68. Where one of the objections under the Act is that the property of residents had been greatly undervalued, the effect of which was to increase the rate of non-residents, it is not necessary that the residents, the valuation of whose property is attacked, should have notice of the application. Per totam curiam. The right to apply for relief from general county taxes is not waived by payment of the school tax. The petition under the Act must contain facts from which it can be collected that the petitioner is aggrieved, or must state the fact. The specific grounds upon which a certiorari is granted, must, under Rule 7 Mich., 1899, be stated, and a general statement, i.e., "also all other grounds taken at the hearing in the court below," is objectionable.

The King v. Wilkinson; Ex parte The Restigouche Salmon Club, 35 N.B.R. 538.

—Taxation—Book debts—Railway bonds—Mortgages.]—Book debts are assessable in the City of St. John under s. 121 of 52 Vict. c. 27, as amended by 63 Vict. c. 43. Railway bonds secured by a mortgage are not exempt under the said Acts.

The King v. Sharp; Ex parte Turnbull, 35 N.B.R. 477.

—Ratable personal property—Resident trustees—Exemptions of mortgages—Railway bonds secured by mortgage.]—The whole of an estate of a deceased person, liable to be assessed in the City of St. John, may be rated in the names of the resident trustees under 52 Vict. c. 27, s. 135, though one of the three trustees, in whom it is vested, is resident abroad. Railway bonds, secured by a mortgage, are not mortgages within the meaning of s. 121 as amended by 63 Vict. c. 43, and are not exempt from taxation.

The King v. Sharp; Ex parte Lewin, 35 N.B.R. 476.

—Goods in the custody of the law—Jurisdiction.]—A writ of replevin brought to try the legality of an assessment for taxes, and the execution issued thereon, both of which were claimed to be void for want of jurisdiction, will not be set aside on a summary application on the ground that at the time the goods were replevied they were in the custody of the law, unless the proof is satisfactory that all the conditions necessary to give jurisdiction have been fulfilled.

Macmonagle v. Campbell, 35 N.B.R. 625.

—Exemption — Railways—Imposition of tax—Date.]—S. 3 of R.S.N.S. (1900), c. 73 (Assessment Act) exempted from taxation "the road, rolling stock . . . used exclusively for the purpose of any railway, either in the course of construction or in operation exempted under the authority of any Act passed by the legislature of Nova Scotia." Prior to the passing of this Act the appellants' railway had always been exempt from taxation, but all former Assessment Acts were repealed by these Revised Statutes, so that it was not "exempted" when the latter came into force. By 2 Ed. 7, c. 25, assented to on March 27th, 1902, the word "exempted" was struck out of the above clause, and in May, 1902, the appellants were included in the assessment roll for that year for taxation on their railway:—Held, by Taschereau, C.J., that under the above recited clause the railway was exempt from taxation. Held, by Sedgewick, Davies, Nesbitt, and Killam, JJ., that if the railway could be taxed under the Assessment Act of 1900, the rate was not authorized until the amending Act of 1902 by which it was exempt had come into force and no valid tax was, therefore, imposed.

Dominion Iron and Steel Company v. McDonald 35 N.S.R. 98.

—Right of company operating railway to exemption—Branch lines—Property not used exclusively for railway purposes.]—The Assessment Act R.S. N.S. 1900, c. 73, s. 4, sub-s. (p), (as amended by Acts of 1902, c. 25) exempts from taxation "the road, rolling stock, track, wharves, station houses, buildings and plant used exclusively for the purpose of any railway either in course of construction or in operation under the authority of any Act passed by the Legislature of Nova Scotia:"—Held, that this exemption extended to all lines of railway built, owned or operated by the plaintiff company, including road bed, right of way, piers, and plant and appurtenances of extensions sought to be assessed by the defendant, but not to lands which formed no part of the land used exclusively for railway purposes or which, having been at one time so used, had been abandoned or appropriated to other purposes, or to a steamer used solely for the company's own purposes. It could not have been the intention of the Legislature, in granting exemption, to permit a general system of railways and connections to be so cut up that certain parts should be liable to taxation while other parts were exempted. Neither is it sufficient to deprive a company of the benefit of exemption that, at the time in question, only coal mined by the company is carried over one of its extensions, there being provision under the Railway Act to compel it, if necessary, to carry freight for any other person or company.

Dominion Coal Co. v. City of Sydney, 37 N.S.R. 504.

—Exemption from taxation—Manufacturing concern—Construction of Act—Words "law" and "county."]—Plaintiff company was given power by its act of incorporation (Acts of 1899, c. 84, s. 6) "to purchase, acquire, hold, use, occupy, sell and convey real estate, etc." By another section (s. 14) it was provided that, if the company should locate any of its works in any part of the County of Cape Breton, all the property, income and earnings of the company should be exempt from taxation "under any law, ordinance, or by-law of any municipal or local authority;" provided that such exemption should not apply "to any building used as a dwelling house, or for any purpose not connected with the business of the company, nor to land on which the same is erected." The defendant municipality sought to assess lands not purchased for the works or operations, or in connection with the operations of the company, and which were offered to the public for sale at a price greater than that paid for them:—Held, the word "law," as used in s. 14, must be read in the sense of general law of the Province relating to assessment, there being nothing in the context to restrict its meaning. Also, that the word "county" must be read as meaning the whole geographical area of the County, including any city or town within its borders. Also, that the wording of the Statute made it clear that with the exception specifically mentioned, the exemption given to the company, was intended to apply to all taxation, whether general assessment for the county or local.

Dominion Iron and Steel Co. v. City of Sydney, 37 N.S.R. 495.

—Municipal by-law—Exemption to "company" — Discrimination.]—By Act, the council of the Town of Woodstock are empowered from time to time, at their discretion, to give encouragement to manufacturing enterprises within the town by exempting the property thereof from taxation for a period of not more than ten years:—Held, that a by-law of the council exempting any company establishing a woollen mill in the town from taxation for a period of ten years, was ultra vires, being a discrimination in favor of a company as against private persons engaged in the same business. A bill alleging that plaintiffs were entitled to exemption from taxation under a by-law passed by the defendants, held sufficient on demurrer without alleging that the by-law was authorized by statute.

Carleton Woollen Company, Limited, v. Town of Woodstock, 3 N.B. Eq. 138, affirmed, 37 N.B.R. 545.

—Parting with property by conveyance after assessment—Liability.]—Under the provisions of the Halifax City Charter, s 303, the annual assessment is to be rated on the owners of real and personal property by an equal dollar rate upon the value of real and personal property within the city. By s. 302, the annual assessment is to be prepared and delivered to the city collector not later than the 15th day of March in each year. Defendant was the owner of a lot of land which was assessed for the purpose of rates and taxes for the year 1903-4, and, on the 15th March, the book of general assessment was delivered to the collector of rates and taxes in the form prescribed by law. Several weeks later, defendant conveyed the lot of land so assessed to a purchaser who went into possession:—Held, that, in addition to the lien on property for taxes, there is also a personal responsibility, and the mere fact of defendant parting with the land by conveyance, after it had been duly assessed, could not in any way affect the liability imposed upon the owner when once the property had been properly assessed in his name.

City of Halifax v. Wallace, 38 N.S.R. 564.

—Dyked lands—Cost of making repairs—How assessed—Old and new work—Notice to proprietors — De facto officers.]—A writ of certiorari was allowed to remove a rate made by the Board of Commissioners of the Trecothic Marsh for expenditures incurred in replacing an aboiteau and making repairs to the running dyke, etc., and sought to be recovered from the proprietors, on the ground that the sum of $68 was included which had not been mutually agreed upon or valued by the freeholders under the Marsh Act, R.S. 1900 c. 66, s. 22. Against this sum there was a claim for damages from one claimant amounting to $500, and the affidavits showed that more than the estimated amount was justly due to claimants and must be ultimately raised and paid:—Held, allowing the appeal of the commissioners on this point (and distinguishing the case In re Bishop's Dyke, 20 N.S.R. 263), that there is nothing in the statute now in force to prohibit the commissioners from imposing a rate to meet a liability lawfully incurred until the precise amount is ascertained. Held affirming the judgment on other points. (1) That the notice called for under s. 22 of the Act relates to new undertakings, as to which the commissioners are judges of the necessity and expediency of borrowing money, and not to the replacing of old work which has been carried away, and that the statute is a directory one instructing the commissioners, if they contemplate borrowing money when they undertake work, that they must proceed in the way indicated. Also, that it is competent for the commissioners to proceed in certain cases without a meeting of proprietors, and to proceed in all cases when there is, as there

was in this case, such a meeting. Also, that as the party applying for the writ was present at the meeting when the resolution authorizing the building of the aboiteau was passed, he should have taken the objection at that time. (2) That the applicant, who had notice and was present at the meeting of the proprietors, could not raise the point that others who were present were not notified, without showing that he was ignorant of such want of notice at the time. Also, that there was a presumption in favour of the regularity of the proceedings, and the affidavits of the clerk that all the proprietors of the tract whose names appeared on the previous rate, and who represented the majority in interest under the statute, were notified, should be accepted as evidence on that point. Also, that if notice to every proprietor was not required in the case of commencing a new work, it was, a fortiori, not required in the case of an old work. Also, that the appointment of additional commissioners in charge was sufficient to make the persons so appointed good officials de facto. (3) That in apportioning the contribution among different proprietors the commissioners proceeded properly in arriving at the value of each proprietor's land for purposes of contribution, taking into consideration the quantity, quality and benefit, that is, the value as enhanced by the execution of the work, then striking a rate and ascertaining what each one had to pay. (4) That it was not necessary that each proprietor should be heard before his rate was fixed. (5 and 6) That legal expenses paid by the commissioners to their own solicitor (not adversely to a contestant) were properly included in the rate, as, also, was an amount paid in connection with the abandonment of a contract. (7) That as the evidence established that the marsh in question was a "tract" of marsh land to which the Act applied, no plan was required (8) That it was not necessary, under the Act, that bills due for work done and other purposes should have been actually paid before they could be included in the amount to be raised.

In re the Trecothic Marsh, 38 N.S.R. 23.

—County school fund—Liability of incorporated towns to contribute.]—Prior to the incorporation of the Town of D., the inhabitants of the town and their property were liable, under the provisions of the Education Act, to contribute their proportion of the county school fund, but under provisions contained in the Act incorporating the town, it was held exempted from making such contribution, and thereafter received and disbursed the Government grant, and also its own rates, without contributing to the county fund, or receiving any share thereof. Subsequently, by Acts of 1903, c. 6, s. 7, it was enacted as follows: "The clerk of the municipality of every county or district shall annually add to the amount required for county purposes a sum sufficient . . . to yield an amount equal to 35c. for every inhabitant . . . of the municipality, and of all incorporated towns which before incorporation territorially formed part of such county or district." Then followed provisions for the collection and division of the amount between the municipality and incorporated towns, in the same proportion as the county fund, and a provision "notwithstanding" the provisions of any statute of Nova Scotia, that every incorporated town should annually, on or before a fixed date, pay to the treasurer of the municipality of the county or district of which it before incorporation territorially formed a part, its proportionate part of the said sum:—Held, that the language of this Act referred directly to the Act incorporating towns, including the Town of D., and its effect was to displace the implication from expressions in the Act of incorporation under which the town had been held exempted from contribution to the county fund. And that the maxim generalia specialibus non derogant was not applicable, the Act incorporating the town being general in its character, while the Act in question was a special one containing special terms and dealing with a special subject, viz., the contribution to be made by incorporated towns to the county school fund. Semble, there is a difference between rendering inoperative implications placed upon expressions contained in an Act and repealing them.

County of Halifax v. Town of Dartmouth, 38 N.S.R. 1, affirmed 37 Can. S.C.R. 514.

—Exemption from taxes—Resolution of council—Discrimination—Establishment of industry.]—By s. 1 of 36 Vict. c. 81, the New Brunswick Legislature authorized the Town Council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years by a resolution declaring such exemption." In 1892 the council passed the following resolution: "That any company establishing a woollen mill in the Town of Woodstock be exempted from taxation for a period of ten years:"—Held, per Davies, Idington and Maclennan, J.J., that this resolution provided for discrimination in favour of companies and against individuals who might establish a woollen mill or mills in the town and was therefore void. City of Hamilton v. Hamilton Distillery Co., 38 Can. S.C.R. 239, followed:—Held, per Davies, J.: The resolution exempting any company and not any property of a company was too indefinite and uncertain to be the basis for a claim for exemption.

In 1893 a woollen mill was established in Woodstock by the Woodstock Woollen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution and two months later the Carleton Woollen Co. (appellants), were incorporated and acquired the said mill from the purchaser at the sheriff's sale and have operated it since. Held, that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woollen mill without showing that when it was acquired it had ceased to exist as such which they had not done. Judgment appealed from, affirming that of Barker, J., at the hearing, 3 N.B. Eq. 138, affirmed.

Carleton Woollen Company v. Town of Woodstock, 38 Can. S.C.R. 411.

—Municipal tax—Foreign company—"Doing business in Halifax."]—An Ontario company resisted the imposition of a license fee for "doing business in the City of Halifax" and a case was stated and submitted to the Supreme Court of Nova Scotia for an opinion as to such liability. On appeal from the decision of the said Court to the Supreme Court of Canada counsel for the City of Halifax contended that the proceedings were really an appeal against an assessment under the city charter, that no appeal lay therefrom to the Supreme Court of the Province, and, therefore, and because the proceedings did not originate in a Superior Court, the appeal to the Supreme Court of Canada did not lie:—Held, per Fitzpatrick, C.J., and Duff. J., that as the appeal was from the final judgment of the Court of last resort in the Province this Court had jurisdiction under the provisions of the Supreme Court Act and it could not be taken away by provincial legislation. Per Davies, J. Provincial legislation cannot impair the jurisdiction conferred on this Court by the Supreme Court Act. In this case the Supreme Court of Nova Scotia had jurisdiction under Order XXXIII., Rule 1, of the Judicature Act. Per Idington, J. If the case was stated under the Judicature Act Rules the appeal would lie, but not if it was a submission under the charter for a reference to a Judge at request of a ratepayer. By s. 313 of the said charter (54 Vict. c. 58), as amended by 60 Vict. c. 44, "Every insurance company or association, accident and guarantee company, established in the City of Halifax, or having any branch office, office or agency therein shall . . . pay an annual license fee as hereinafter mentioned. . . . Every other company, corporation, association or agency doing business in the City of Halifax (banks, insurance companies or associations, etc., excepted) shall . . . pay an annual license fee of one hundred dollars:"—Held, that the words "every other company" in the last clause were not subject to the operation of the ejusdem generis rule, but applied to any company doing business in the city. Judgment appealed from overruled on this point. A carriage company agreed with a dealer in Halifax to supply him with their goods and give him the sole right to sell the same, in a territory named, on commission, all monies and securities given on any sale to be the property of the company and goods not sold within a certain time to be returned. The goods were supplied and the dealer assessed for the same as his personal property. Held, that the company was not "doing business in the City of Halifax" within the meaning of s. 313 of the charter and not liable for the license fee of one hundred dollars thereunder. Judgment of the Supreme Court of Nova Scotia (39 N.S. Rep. 403) affirmed, but reasons overruled.

City of Halifax v. McLaughlin Carriage Co., 39 Can. S.C. 174.

—Non-resident ratepayer—Failure to give notice.]—The Assessment Act, R.S., c. 73, s. 16, provides that the assessors, on the completion of the assessment roll, shall give notice to the parties assessed by: (b) Serving each person . . . not residing . . . within the district . with a notice in writing showing the respective amounts at which his real and personal property has been assessed upon such roll. Sub-s. (2) provides that "No such assessment shall be rendered invalid by failure to serve such notice." The assessment of property of G. was increased from $1,200 to $8,800, and the assessors, expressly relying upon the provision in s. 16, sub-s. (2) of the Act, omitted to give G. notice of any kind, thus depriving him of the right of appeal. The assessment was brought up by certiorari:—Held, (1) That certiorari would lie. (2) That the words of sub-s. (2) did not take away the right of the party assessed to notice, and that in the absence of such notice the assessment was invalid and must be set aside with costs. Per Drysdale, J.—That the costs taxed should not include affidavits read on the question of value, such question not being open to review on this application.

Re Gillies Assessment, 42 N.S.R. 44.

—Municipal taxation—Official of Dominion Government—Taxation on income.]—Sub-s. 2 of s. 92 B.N.A. Act, 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the Province, etc.," is not in conflict with sub-s. 8 of s. 91 which provides that Parliament shall have exclusive legislative authority over "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada:"—Held, therefore, that a civil or other officer of the Government of Canada may be lawfully taxed in respect

to his income as such by the municipality in which he resides.

Abbott v. City of Saint John, 40 Can. S.C.R. 597, affirming Ex parte Abbott, 38 N.B.R. 421.

Western Provinces.

—Tax sale—Municipal ordinance—Neglect of purchaser to apply for transfer.]—Though a purchaser at a municipal tax sale did not, within one month after the expiration of the time for redemption, make a demand upon the treasurer for a transfer, nor pay to him the $2 for such transfer, and it was not until long after the expiration of the said month that such demand and payment were made and such transfer executed, the treasurer had authority to execute the transfer to the purchaser.

In re Prince Albert Tax Sales, 4 Terr. L.R. 198.

—Express company—Provincial tax—Municipal business tax.]—Section 3 of the Corporations Taxation Act provides that every express company doing an express business shall pay a tax to the province; and s. 18 provides that, where a company pay the tax, no similar tax shall be imposed or collected by any municipality in the province:—Held, that a business tax imposed by a city corporation in respect of the premises occupied by an express company in the city, under the Assessment Act, 63 and 64 Vict. c. 35, s. 2, was a "similar tax" to that imposed by the province, which had been paid by the express company; and was, therefore, illegal and void. The Assessment Act and the Corporations Taxation Act having been assented to on the same day, it was intended that s. 18 of the later Act should govern and exclude the tax imposable under the earlier.

Dominion Express Co. v. City of Brandon, 15 W.L.R. 26 (Man.).

—Validity of assessment—Meetings of council and Court of Revision not held in municipality—Statute—Tax sale by-law.] — In an action to set aside a sale made in 1898 by the municipality of South Vancouver of lands in that municipality for the taxes of the years 1893 to 1897, the plaintiff alleged that there was never a valid assessment or levy during all those years, by reason of the fact that the various meetings of the municipal council and of the Court of Revision at which the question of taxes was dealt with, were held, not within the limits of the municipality, but in the city of Vancouver:—Held, that there was no reason in law (apart from statute) why the meetings of the council, whether for ordinary business or as a Court of Revision, should not have been held at any place without the limits of the municipality, and the provision in the Municipal Act of 1892, s. 103, had no relation to this question. The statute of 1894, s. 15, provides that "all meetings of a municipal council shall take place within the limits of the municipality, except where the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the municipality." Held, that the existence of this unanimity on the part of members of the council might be proved otherwise than by the passing of a formal resolution entered in the minutes. No hint of objection from any member of the council or from any one else appeared upon the minutes or otherwise during all these years; and, in these circumstances, the condition mentioned in the Act of 1894 was complied with. After so great a lapse of time, the presumption that the meetings were regularly held was insurmountable. Meetings of the council sitting as a Court of Revision were in the same position as ordinary meetings. Held, also, that any illegality such as alleged, if it existed, was cured by statute. The various assessment by-laws of 1898 were valid municipal enactments, being ex facie valid, and not moved against, and were validated by s. 126 of the Municipal Act, 1892, notwithstanding any want of substance or form; and that enactment continued in force until 1899. It was also alleged that in certain respects the municipality did not observe the requirements of their own tax sale by-law, passed in 1898, under which this sale took place. Held, upon the evidence, that the plaintiff must be taken, by his inaction and apparent acquiescence with full knowledge, to have been a consenting party to the sale, waiving the non-observance of any provisions in his favour as to notice, publication, etc. City of Toronto v. Russell, [1908] A.C. 493, followed. Held, also, that there was no substance in any of the objections advanced, such as that public notice of the lands for sale was not given in the manner prescribed, that the notice to the plaintiff was not posted in the proper post office, and that there was no proof of "expenses" incurred, the sale being made to satisfy expenses as well as taxes. On the 5th April, 1899, an order confirming the sale was made by a Judge of the Supreme Court, upon an application by the municipality, ex parte. Held, that the order was properly made ex parte, under the statute then in force, c. 35 of the British Columbia statutes of 1898, s. 14. Re South Vancouver, 9 B.C.R. 572, remarked upon. Held, also, that, even if the order was invalid, the plaintiff could not in this action take advantage of the invalidity. The plaintiff must, if he desired to put an end to the interest of the tax sale purchaser, pursue the remedy provided by the statute of 1898, s. 15, namely, tender to the municipality the purchase price paid. That he had not done; and, even if the confirming order was a nullity, he had nothing more than a right of redemption, enforceable only as set out in the statute.

Anderson v. South Vancouver, 13 W.L.R. 226.

—Value of lands in city—Fair actual value—Farm lands.]—Clause 12 of s. 138 of the Municipal Ordinance provides that "the decision and judgment of the Judge" (i.e., a District Court Judge, upon appeal from an assessment) "shall be final and conclusive in every case adjudicated upon, and can only be appealed from by a unanimous vote of the council:"—Held, that, although a right of appeal was not expressly given, this clause must be interpreted as permitting an appeal if the council by a unanimous vote authorized it—a provision within the powers of the Legislature; and, although no provision as to the Court for hearing the appeal or the machinery of appeal was made, in order to give effect to the right of appeal, it must be assumed that the appeal should be to the same Court and in the same manner as any other appeal from the decision of a District Court Judge. The Strathcona city charter provides that a majority shall be present for the purpose of the transaction of business. Held, that, although only six of the eight aldermen of the city were present when the council voted in favour of an appeal, as the six were unanimous, and were a majority of the eight, the vote was a unanimous vote of the council within the meaning of clause 12 of s. 138 of the Municipal Ordinance. Upon the hearing by the District Court Judge of the appeal from the assessment, neither he nor any other person present took notes of the evidence. Held, that the city corporation, appealing from his decision, should not thereby be deprived of their appeal; and the witnesses who gave evidence before the County Court Judge were called before the Supreme Court en banc, and gave, as far as possible, the same evidence as was given below, but no new evidence. The lands in question, 309 acres, within the city, were purchased by a syndicate, more than a year before the appeal, for $350 an acre. They were assessed at $250 an acre, and that was reduced by the District Court Judge to $150 an acre. Section 3 of title 31 of the Strathcona charter provides that "land shall be assessed at its fair actual value," and continues: "In estimating the value, regard shall be had to its situation and the purpose for which it is used, or, if sold by the present owner, it could and would probably be used in the next succeeding 12 months." There was no evidence of any depreciation in value since the syndicate bought; but the evidence showed that the lands were situated at the outermost point of the city, a mile from the nearest subdivided portion of the city, two miles or more from the chief business portion of the city, and having no communication by roads or streets with other parts of the city; that the lands were not at present used for any purpose, and were covered with bush, and, even if sold, would not probably be used for building within the next 12 months; there was no suggestion of any other use, except for farming purposes; and the assessor stated that adjoining farm lands were assessed at $100 an acre. Held, that the rate fixed by the County Court Judge was the fair actual value of the property. Section 3 of title 31 further provides that there shall be no reduction, unless the difference between the value and the assessment be gross, if the assessment bears a fair and just proportion to the assessment of other lands in the immediate vicinity. Held, that this provision had no application, because the difference was gross, and because there was no evidence from which the relative values of this and other adjoining lands could be ascertained.

Re City of Strathcona and Edmonton and Strathcona Land Syndicate, 15 W.L.R. 254 (Alta.).

—Assessment and Taxation by Province—Property and civil rights—Crown lands.]—The Calgary & Edmonton Land Co., under the Act of Canada, c. 4 of 53 Vict. (1890), and by virtue of a contract entered into pursuant to orders in council issued under that Act, was entitled to receive certain lands from the Dominion of Canada in aid of the construction of a railway. By the terms of the statute it was provided:—"The said lands shall be free grants, subject only to the payment by the grantees" of the survey fees "in cash on the issue of the patents therefor." The company designated certain lands to be allotted to it pursuant to the order-in-council and contract, and in 1892 assigned by deed all its estate, right, title, interest, claim and demand in certain of the said lands to the C. & E. Land Co., which assignment was registered with the Department of the Interior. In 1906, before the land was actually granted, it was taxed by Local Improvement District No. 607, under authority of the Ordinance of the North West Territories (1903), c. 24, as amended by the Ordinance of 1904, c. 8, and by the Act of Alberta of 1906, c. 11. On application to Sifton, C.J., under the provision of s. 91 of the Local Improvement Act, c. 11 of the Acts of Alberta (1907), the assessment was confirmed, from which order the C. & E. Land Co., appealed:—Held, per Harvey and Beck, JJ., that:—(1) After the land was designated by the Railway Co. and after the Railway Co. had dealt with the land as its own by making an assignment thereof, a presumption was raised against the company that it was then entitled to a grant from the Crown pursuant to its contract, and it became, presumably, entitled to the whole equitable interest in the land, the Crown in the right of the Dominion retaining only the bare legal estate, and thereafter as far as any questions arising under assessment or taxation acts are con-

cerned the land was not land "belonging to" the Crown in the right of the Dominion, within the meaning of s. 125 of the B.N.A. Act, and was therefore not exempt from taxation under that section. (2) The reservation by the Crown in the right of the Dominion of the right to hold the patent until survey fees were paid did not take away the right of the Province to affect that land by legislation under the sub-section of s. 92 relating to "property and civil rights," and a vesting order made upon default of payment of taxes could be made vesting the land in the Province, subject only to the liability of the Province to account to the Dominion for the amount of the Dominion's claim upon the land. (3) The issue of a certificate of title to land upon a patent issued by the Dominion, is conclusive evidence that the Dominion has no claim upon the land for survey fees. (4) The rule with respect to the interpretation of assessment and taxation acts is that it must be quite clear upon the face of the statute that the person or property sought to be taxed comes within the class of persons or property made liable by the statute to be taxed. There must be strict compliance with the procedure laid down for imposing the tax; once, however, the tax is validly imposed there may be less strict compliance with the procedure laid down for collecting the taxes:—Held, per Stuart, J., that:—(1) Under the circumstances the interest of the Crown in the right of the Dominion in the lands in respect to which survey fees were still payable was a higher interest than the bare legal estate, and (2) The interest only of the C. & E. Land Co. in the land subject to survey fees was taxable—but (3) It appearing that the survey fees had been paid, the lien for taxes given by the Taxation Act could be enforced against the whole beneficial interest. (4) As between the Crown in the right of the Dominion and the Land Co., this company was bound to pay the taxes, and the words "free grant" should be interpreted in the same manner as the words would be interpreted as between an ordinary vendor and purchaser. Judgment of the Chief Justice affirmed.

Re Calgary & Edmonton Land Co. and Local Improvement District, 2 Alta. R. 446. 11.

—Occupant of Crown Land—Actual and Comparative Values.]—Appellant was a lessee of Crown land and was assessed therefor by the respondent for the full cash value. He claimed to be liable for assessment only in respect of the value of his interest therefor, and in any event that the assessment was excessive:—Held, that in view of the provisions of sec. 26, sub-sec. 2, of the Schools Assessment Ordinance of 1901, which directs that the occupant of Crown lands shall be assessed therefor and, as by the only provision respecting the basis of assessment, section 30 of the same ordinance, it is directed that real property shall be assessed at the actual cash value thereof it must be held that the occupant must be assessed for the full cash value. (2) That the adoption of a flat assessment rate per acre throughout a district does not constitute an equitable assessment, unless it be shown that all the land is equally valuable, and that the rate adopted is the fair cash value of such land, and the land in question not being equally as valuable as are other lands assessed, it must be assessed at its actual cash value.

In re Wauchope School District Assessment, 2 Sask. R 327.

—Injunction—Levy of illegal tax by municipality.]—A party who brings an action against a municipality for a declaration that he is not liable for a tax imposed upon him, and for an injunction to restrain the attempted levy of such tax, is not entitled to an interim injunction to restrain such levy, as he has another adequate remedy, namely, to pay the tax under protest and sue to recover it back.

Dominion Express Company v. City of Brandon, 19 Man. R. 257.

—Arrears of taxes due school district—Unlawful and excessive distress.]—Plaintiff had been for a number of years an occupant of Crown lands for which he had been assessed by the school district. No taxes were paid by plaintiff, and other parties subsequently assessed for the same land paid none. In 1908, these taxes being unpaid and the plaintiff having 73 head of horses on the land, the defendant school district authorized the defendant Hopper to seize the goods of plaintiff and the other occupants for such arrears. In pursuance of such warrant Hopper seized 73 head of horses belonging to plaintiff and two belonging to the other occupants. At most there was only $200 due for taxes. The proceedings connected with the seizure appeared to be regular. It was objected, however, that the assessment was irregular, but it had not been appealed from, nor were any grounds laid which would invalidate all the assessments. In an action for trespass and excessive seizure:—Held, that while Crown lands cannot be assessed, yet the occupant thereof can be assessed in respect of his interest therein. 2. That even if certain of the assessments were irregular, some of the taxes were properly due, and distress for a greater amount than that actually due is not per se actionable. 3. That the seizure of 73 head of horses to satisfy a debt not exceeding $200 was an excessive distress for which the plaintiff was entitled to damages.

Robertson v. Hopper, 2 Sask. R. 365.

—Exemption—Charter of Edmonton—"License fee."]—The provision of the charter of the town of Edmonton, N.W.T. Ord.,

1904, c. 19, title xxxii., s. 3, s-s. 4, exempting any person assessed in respect of any business from the payment of "a license fee in respect of the same business" does not apply to fees exigible upon licenses issued by the provincial government under the "Liquor License Ordinance," Con. Ord. N.W. Ter., c. 89. Judgment appealed from, 2 Alta. L.R. 38, affirmed.

York v. City of Edmonton, 42 Can. S.C.R. 363.

—Deposits in chartered bank.]—Money held on deposit not being the property of the bank, notes and bills representing such moneys and the bank's own notes representing no value until issued are not assessable; but bills of other banks, Dominion bills and bills of exchange, representing moneys held otherwise than on deposit are assessable.

Re Lang School Assessment, 2 Sask. R. 322.

—Exemption—Property leased to the Crown.]—The plaintiff was owner in fee of certain lots in the town of Edmonton, which, with the buildings thereon, had been leased to the Government of Canada, through the Commissioner of the North-West Mounted Police, and were used as a barracks for that force at the Edmonton post. The municipal authorities in the years 1895, 1896 and 1897 assessed the plaintiff for taxes in respect of these lots, and, the taxes being unpaid, were proceeding to sell the said lots under the provisions of the Municipal Ordinance. Sub-s. 1 of s. 121 of that Ordinance exempts from taxation "all property held by Her Majesty or specially exempt by the Parliament of Canada or for the public use of the Government of the Territories:"—Held, following Attorney-General of Canada v. City of Montreal, 13 S.C.R. 352, that the entire estate in the lands, including both the reversion and the leasehold, was exempt under the Ordinance.

Macdonald v. Town of Edmonton, 37 C.L.J. 438 (Rouleau, J.).

—Exemption from taxation—Board of Revision — Judicial functions.] — The "Vancouver Incorporation Act," 64 Vict. c. 54 (B.C.), by sub-s. 3 of s. 46, provides that "the buildings and grounds of and attached to and belonging to . . . any incorporated seminary of learning, public hospital, or any incorporated charitable institution, whether vested in trustees or otherwise, so long as such buildings and grounds are actually used and occupied by such institution, or if unoccupied, but not if otherwise used or occupied; provided, that such grounds shall not exceed in extent the amount actually necessary for the requirements of the institution. The question as to what amount of land is necessary shall be decided by the Court of Revision, whose decision shall be final":—Held, per Davies, Duff and Anglin JJ., that the functions in respect of the limitation of exemptions from taxation so vested in the Court of Revision are quasi-judicial and must be exercised in each case with respect to that case alone; it is not vested with power to lay down a general rule based solely upon general considerations. Per Idington J.—That the provision in question was merely a delegation of a legislative or administrative power, probably carrying with it a duty, but in no manner implying the discharge of a judicial duty subject to review or supervision. In proceedings, by certiorari, to remove a decision of the Court of Revision, the evidence adduced in support of the contention that the Court had failed to dispose of the question in a proper manner consisted merely of a minute of its proceedings whereby it was resolved "that all charitable institutions mentioned in subsection 3 of section 46 of Vancouver Incorporation Act be exempted from taxation to the extent of the area occupied by the buildings thereon and an additional amount of land equal to 25 per cent. of the area, and that the assessment roll for 1900, as amended, be confirmed." Held, affirming the judgment appealed from (15 B.C. Rep. 344), that this minute, in the absence of further evidence, was not incompatible with the view that the Court of Revision had examined each particular case before deciding to act in the sense of the minute and that it would be a proper direction in each individual case.

Sisters of Charity v. City of Vancouver, 44 Can. S.C.R. 29.

—Completion of assessment roll—Time for —Omission—Property acquired prior to completion of assessment roll—Assessor's powers.]—The provisions of the School Ordinance which require the assessment roll to be completed by the first of April, or so soon thereafter as may be, are as against a ratepayer directory only, but imperative as against the trustees. Any property, liable to taxation, acquired before the actual completion of the assessment roll, is liable to assessment.

Cadden v. Meadowvale Protestant Public School, 3 Terr. L.R. 158.

—Personal property — When taxable — Meaning of "situated" as applied to personal property.]—Personal property brought into a school district for a mere temporary purpose is not "situated" within the district within the meaning of s. 98 of the School Ordinance, R. O. 1888, c. 59, so as to be liable for assessment.

McKenzie v. Little Cut Arm District, 3 Terr. L.R. 156.

—Assessor's power to alter assessment roll —Power of Judge on appeal.]—An assessment is complete quoad any particular pro-

perty as soon as the assessor has valued it and placed it on the assessment roll. A Judge, on appeal from the Court of Revision of a school district, has no power to arbitrarily amend mistakes or omissions in the assessment roll, but any such mistake or omission must be the subject of a specific appeal. No objections against an assessment can be entertained by a Judge on appeal, unless they were raised before the Court of Revision.

Bradshaw v. Riverdale Public School, 3 Terr. L.R. 164.

—Pre-emption — Occupancy.]—Any act of ordinary ownership, however slight, performed by the holder of a pre-emption entry upon his pre-emption, constitutes such person the occupant thereof so as to render him liable to assessment. Such occupancy will continue, without any interruption, as a constructive occupancy, so long as the right of entry lasts.

Cantelon v. Lorlie School, 3 Terr. L.R. 414.

—Validity of assessment—Ratification.]—The powers given to a Court of Revision under ss. 107 to 111 of the School Ordinance and to a Judge under s. 112, do not enable a Judge acting thereunder to inquire into the legality of the whole assessment, and a ratepayer who has resorted to the provisions of these sections is not thereby estopped from taking substantive proceedings to set the assessment aside as being invalid and contrary to law:—Held, further, that a Board of Trustees may by subsequent conduct, adopt an assessment made by a person not legally appointed, and thereby render such assessment invalid.

Bradshaw v. Riverdale School, 3 Terr. L. R. 276.

—Income—Omission to assess property of other persons—Property purchased at tax sale.]—An appellant from the Court of Revision to a Judge of the Supreme Court is limited to the grounds taken before the Court of Revision and such additional grounds as arise out of the decision of the Court of Revision in respect of such grounds. Wages earned as section-foreman of a railway company is "income," and as such liable to taxation, and it is immaterial that such wages have been invested in property which is also liable to taxation. The purchaser of lands at a tax sale, and who is not in occupation thereof, is not liable for assessment in respect thereof during the period allowed for redemption. Cattle are assessable in the district where they are usually kept, and the district in which the owner resides is prima facie the district in which they are properly assessable.

Graham v. Broadview School, 3 Terr. L.R. 200.

—Tax sale — Redemption — Tender —Sufficiency.]—Upon an application by A. to confirm the sale to him on the 20th March, 1909, of a quarter section of land offered for sale by the treasurer of the school district in which the land was situated, to pay the taxes assessed thereon, it appeared that the price paid by A. was $550; that since the sale he had been in continuous possession, and had made considerable improvements, and had paid school and local improvement rates, amounting to $13.39. The treasurer transferred the land to A. on the 22nd March, 1910. The summons to confirm was issued on the 19th July, 1910. On the 22nd September, 1910, M., the registered owner, tendered to A.'s solicitors $700 to redeem the land. Section 2 of the Tax Sale Ordinance, 1901, provides that the land may be redeemed by paying to the purchaser the amount of the purchase-money paid and any further sums charged against the land and lawfully paid, together with 20 per cent. thereon, and such costs as the Judge may allow:—Held, that "sums charged against the land and lawfully paid" did not include sums paid for improvements, and that, as the purchase-money and taxes, with 20 per cent. added, amounted only to $676.07, the tender of $700 was sufficient to satisfy A.'s claim, including costs.

Re Attrux Tax Sale, 15 W.L.R. 525 (Sask.).

—School Ordinance—Assessment and taxation—Debts—Situs—Domicil—Double domicil.]—The School Ordinance C.O., of N.W. T., 1898, c. 75, s. 131, sub-s. 2, interprets "personal estate" and "personal property" as including inter alia "accounts and debts contracted within the district"; and s. 132 provides that "All real and personal property situated within the limits of any school district . . shall be liable to taxation"—subject to certain exceptions and exemptions:—Held, that choses in action, including debts, have a situs; that debts contracted within a school district are, for the purposes of taxation, situate within the district, and are assessable by the district notwithstanding that the creditor, if a person, has not his domicile therein, or if a corporation has not its head office situated therein. Per Richardson, J., (adopting the opinion expressed in Dicey's Conflict of Laws). Debts, choses in action and claims of any kind must be held to be situate where the debtor or other person, against whom the claim exists, resides; or, in other words, debts and choses in action are generally to be looked upon as situate in the county where they are properly recoverable and can be enforced. Per Rouleau, McGuire and Scott, JJ. If the situs of a debt is the domicile of the creditor, a person as well as a corporation may have, if not for all, at all events, for some purposes, more than one domicile, namely: (1) At the head office of the corporation, and at the actual residence of the person; and also (2) where the business of

the corporation, or person, is actually carried on; and, therefore, where the Hudson's Bay Company, whose head office is in London, England, carried on at Battleford an ordinary merchants business, and MacDonald, whose actual residence was in Winnipeg, Manitoba, also did the same, debts contracted to them at the Battleford places of business were, for the purpose of taxation, situated in Battleford.

Hudson's Bay Company v. Battleford School District; MacDonald v. Battleford School District; Clinkskill v. Battleford School District, 4 Terr. L.R. 285.

—C. P. R. lands—Exemption from taxation —Sale—Proper authority to assess.]—Lands vested in the Canadian Pacific Railway Company subject to a provision that the same should "until they are sold or occupied, be free from taxation for 20 years," were by the company agreed to be sold and conveyed to the appellants as trustees, who were to sell them, accounting for an interest in the proceeds to the company. At the date of the assessment of the lands, the consideration owing by the trustees to the company had been paid: —Held, that the lands had ceased to be exempt from taxation. Held, also, Wetmore and McGuire, JJ., dissenting, that in view of the Ordinances relating to municipalities, and to schools, the lands being situated partly within and partly without the municipality, the school district was authorized to assess and need not make a demand upon the municipality to do so.

Angus v. School Trustees of Calgary, 1 Terr. L.R. 111.

—Tax sale—Injunction—Appeal to Court of Revision—Estoppel.]—An injunction may be granted to restrain a tax sale. It is not necessary that exemption from taxation should be raised before the Court of Revision, and a party, wrongfully assessed by reason of exemption, is not estopped by appealing to the Court of Revision.

Canadian Pacific Railway Co. v. The Town of Calgary, 1 Terr. L.R. 67.

—Income tax—N.W.T. Government official.—The income which a person receives as an employee of the Government of the North-West Territories is taxable by virtue of the Municipal Ordinance notwithstanding that the General Revenue Fund of the Territories from which income is paid, is formed in part of a grant from the Dominion Government made "for schools, official assistance, printing, etc."

Robson v. Town of Regina, 4 Terr. L.R. 80.

—Railway exemption from municipal rates —School taxes.]—By-Law No. 148 of the City of Winnipeg, passed in 1881, exempted for ever the C. P. R. Co. from "all municipal taxes, rates and levies and assessments of every nature and kind:"—Held, reversing the judgment of the Court of Queen's Bench (12 Man. L.R. 581, 1900 C.A. Dig. 326), that the exemption included school taxes. The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 and 47 Vict. c. 64, it was provided that by-law 148 authorizing the issue of debentures granting by way of bonus to the C.P.R. Co. the sum of $200,000 in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertaking . . . be and the same are hereby declared legal, binding and valid. . . . . Held, that notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures, the whole by-law including the exemption from taxation, was validated.

Canadian Pacific Railway v. City of Winnipeg, 30 Can., S.C.R. 558.

—Homestead — Taxes—Municipality.] — Where the fee still remains in the Crown, the interest of the holder of a homestead claim is not subject to taxation by a municipality, although the holder personally is.

G. C. King v. The Municipality of Matsqui, 8 B.C.R. 289.

—Land and improvements belonging to Dominion Government—Occupant of—Assessment—Municipal Clauses Act, s. 168, sub-s. 4 (a).]—Defendant was the occupier of one of several stores on the ground floor of a building belonging to the Dominion Government, and was assessed under s. 168, sub-s. 4 (a) of the Municipal Clauses Act, for taxes in respect of land and improvements. The assessment roll described the property as "parts of lots 1,605 and 1,607, block 1; measurement 23x66; Government St.; land $12,650.00; improvements, $920.00; total, $13,570.00:" —Held, by Drake, J., dismissing an action to recover taxes (1) That defendant was an occupant of part of the improvements only, and not of the land. (2) The assessment was invalid because the lands and improvements were insufficiently described. (3) The Act provides no procedure for such an assessment. (4) Where an assessment is illegal the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes.

Victoria v. Bowes, 8 B.C.R. 363 (Drake, J.).

—Standard of valuation—R S B.C. 1897, c. 144, s. 113.]—The measure of value for purposes of taxation prescribed by s. 113 of the Municipal Clauses Act is the actual cash selling value, and not the cost.

In Re Municipal Clauses Act and J. O. Dunsmuir, 8 B.C.R. 361 (Walkem, J.).

—Personal property—Chartered bank—Notes and cheques of other banks.]—The failure of an assessor to make "diligent enquiry" is not fatal to the validity of the assessment; the provision in the Municipal Ordinance in that respect being merely directory. Commercial paper (such as notes and cheques on other banks) held by a branch of a chartered bank are "personal property," and a branch bank holding such paper is liable to assessment in respect thereof.

The Union Bank of Canada v. The Municipality of the Town of Midland, 4 Terr. L.R. 407.

—Sale of land for taxes—Right to redeem—Retroactive legislation—Vested rights.]—S. 80 of the Charter of the City of Calgary (Ordinance 33 of 1893) provides that if land sold for taxes be not redeemed within one year after the date of sale, the purchaser shall be entitled to a transfer, which shall have the effect of vesting the land in him in fee simple or otherwise, according to the nature of the estate sold; and s. 81 provides that the transfer shall not only vest in the purchaser all rights of property which the original owner had therein, but shall purge and disencumber such land from all payments, lien charges, mortgages, and encumbrances whatever, other than existing liens of the city and the Crown. Certain lots in the city of Calgary were sold for taxes on 16th April, 1900, and a transfer was given to the purchaser on 8th May, 1901, the owners not having offered to redeem within the year: —Held, that s. 2 of Ordinance 12 of 1901, "an Ordinance Respecting the Confirmation of Sales of Land for Taxes," passed 12th June, 1901, giving a right to redeem at any time before the hearing of the application for confirmation, is not retrospective, and that the original owners could not take advantage of its provisions. Held, further, that ss. 80 and 81 of the Charter of the City of Calgary are not ultra vires as being in conflict with ss. 54 and 57 of the Land Titles Act, 1894.

In Re Kerr, 5 Terr. L.R. 297.

[Overruled by North British v. St. John, 35 Can. S.C.R. 461.]

—Sale for taxes—Liability of purchaser for taxes imposed in the year of sale—Construction of statutes.]—Certain lots in the city of Calgary were, on the 27th June, 1896, sold for arrears of taxes due thereon for certain years prior to 1896; the sales were duly confirmed by the Court, and on the 10th July, 1897, and 27th June, 1898, the purchaser received certificates of title in due form from the Registrar of Land Titles, and entered into and remained in possession of the lots as owner. The lots were duly assessed for taxes for the year 1896, but no rate was struck until after the sale. The said taxes for 1896 remained unpaid for two years. S. 81 of the Ordinance Incorporating the City of Calgary provides that the transfer from the treasurer to the purchaser shall vest in the purchaser all the rights of property of the original holder of the land and purge and disencumber it from all encumbrances of whatever nature, other than existing liens of the city and the Crown:—Held, that the lots in question were liable to be sold for taxes for the year 1896, and that, under s. 51 of the same Ordinance, the purchaser was personally liable to the city for the amount of the taxes. S. 81 was amended by Ordinance 1900, c. 39, s. 4, by the addition after the word "Crown" of the words "including all taxes unpaid upon such land at the day of the date of such transfer, and whether imposed before or after the day of the date of the tax sale at which said lands were sold." Held, that this amendment did not raise the presumption that the section as it originally stood had not the same meaning; that the amendment was probably made to remove doubts that may have existed.

In Re Lougheed and The City of Calgary, 5 Terr. L.R. 200.

—Income tax—Previous year's income as basis.]—Although a person was not during the previous year a resident of the municipality, the previous year's income, wherever earned, may be taken as a basis for determining his income assessment.

Lamontaigne v. Town of Macleod, 5 Terr. L.R. 199.

—Canadian Pacific Railway—Exemption from taxation—Crow's Nest Pass Railway—Branch lines—"Superstructure"—Value of round-houses, freight sheds and other buildings.]—Clause 16† (relating to exemption from taxation) of the agreement between the Canadian Pacific Railway Co. and the Government of Canada, as embodied in the Act, 44 Vict. (1881), c. 1, is not applicable to the Crow's Nest Pass Railway, but is applicable only to the main line of the Canadian Pacific Railway Co. and to such branches thereof as the company was authorized by clause 14§ of the agreement to construct from points on the main line, and does not extend to other distinct lines of railway which the company may have been subsequently authorized to construct. Under the Ordinance respecting the Assessment of Railways, C.O. 1898 c. 71, s. 3, the round-houses, station, or office buildings, section houses, employees' dwellings, freight sheds, and other buildings of like nature belonging to a railway company and situated upon it, are not included in the term "superstructure," but may be assessed separately as personal property under the Municipal Or-

dinance. Such buildings should not be valued as part of the railway as a going concern, and as having a special value as such, but merely at what they are worth separate and distinct from other portions of the railway. When only two and a half stalls of a round-house were situated within the municipality, and the round-house was shown to be worth $900 a stall, the assessment was fixed at $2,250.

In Re Canadian Pacific Railway Co. and Town of Macleod, 5 Terr. L.R. 192.

—Municipal assessment—Real estate and buildings thereon—Occupation of one storey by the Crown — Exemption.]—The fact that a portion of a building assessed for taxes under the Municipal Ordinance, is occupied by the Crown under lease, and is therefore exempt under s. 121, sub-s. 1 of that Ordinance, does not prevent the remaining portion being assessed for a proportionate part of the value of the whole.

The Macleod Improvement Co. v. Town of Macleod, 5 Terr. L.R. 190.

—Income of locomotive engineers—Taxation—R.S.B.C. 1897, c. 179.]—The earnings of railway locomotive engineers who receive pay according to the number of miles they run their locomotives, are not "income" within the meaning of that term as used in the Assessment Act prior to the amendment of 1901, and are therefore not liable to taxation Decision of Irving, J., 9 B.C.R. 60, reversed by the Full Court.

In Re the Assessment Act, 9 B.C.R. 209.

—Appeal from assessment—General plan—Onus of proof—Land and buildings.—Under ordinary circumstances it is incumbent upon an appellant who complains that he is assessed too high to show that the property is not worth the amount for which he is assessed, but where, although this is not shown, it appears that under the general scheme of assessment, lands of a particular description are assessed generally at a certain fixed sum per acre, and that the appellants' lands of that description, which are of no greater value either by reason of their situation or otherwise, are assessed at a larger amount, the assessment should be reduced to accord with the general scheme of assessment. A school district assessor assessed certain of the appellants' lands at $800, and the dwelling houses thereon at $2,000:—Held, that the assessment should stand, although the more correct course would have been to assess the whole as "land" and place a single value upon both soil and buildings as "land."

In Re Canadian Pacific Railway Co. and The Macleod Public School District, 5 Terr. L.R. 187.

—Local improvement ordinance—Lands held under lease but not enclosed—Assessment of occupant—Personal liability of person assessed.]—Where lands are held under lease from the Crown and, though they are not enclosed or fenced, the lessee uses them as pasturage for his sheep, the lessee is an "occupant" of the lands within the meaning of The Local Improvement Ordinance, C.O. 1898, c. 73, s. 15. Notwithstanding the wording of s. 16, sub-s. 2 of s. 17 of the said Ordinance, the effect of the provisions of ss. 15, 20 and 23 is to create a personal liability to pay, upon which the occupant may be sued.

Crosskill v. The Sarnia Ranching Co., 5 Terr. L.R. 181.

—Taxes illegally collected—Repayment of —Voluntary payment—Payment under protest—Mistake of law.]—Certain of the plaintiff's lots were by by-law of the defendant municipality "exempted from payment of taxes" for the year 1899 and other years. The said lots were assessed for taxes for the said year "for school purposes only." Thereafter the plaintiff received from the defendant a statement and demand for payment within 30 days of the taxes on the said lots for the said year, and "in consequence of the said demand" paid the same:—Held, that, assuming the plaintiff was entitled to exemption from taxation for school purposes, this did not amount to such an involuntary payment as would entitle the plaintiff to recover the amount so paid. Effect of decision of Court of Revision discussed.

Spring-Rice v. Town of Regina, 5 Terr. L.R. 171.

— Local improvement taxes — Local improvement district — Error in formation — Exceptional tax.]—Held, per Curiam, affirming the judgment of Richardson, J.—(1) That the designation of a local improvement district by an incorrect number, while its name was otherwise correctly stated in the notice in the Gazette constituting the district, did not invalidate the notice. (2) That the assessment of the defendants was not invalid by reason of their being assessed under the name of "The Hudson's Bay Co."—a name by which they were commonly designated by themselves and the public. (3) That, though the district in question was not constituted until July, 1899, and the defendants not assessed till August, 1899, they were liable for the whole amount for which they were assessed, the rate of assessment being a fixed rate per acre, irrespective of time, and the assessor being expressly authorized to assess at any time during the year. (4) That the assessment of the defendants under the Ordinances in question is not an exceptional tax upon them within the meaning of the Imperial

Order in Council of June 23rd, 1870, inasmuch as it was equal and uniform throughout the district.

McGowan v. Hudson's Bay Co., 5 Terr. L.R. 147.

—**Taxes.**]—

See SCHOOL LAW.

—**Fire insurance agents—City of Victoria.**]—

See INSURANCE.

Dowler v. Union Assurance, 9 B.C.R. 196.

—**Vancouver Incorporation Act, 1900, c. 54, ss. 38 and 56—Valuation of improvements—Mode of—Decision of Judge on appeal from Court of Revision.**]—No appeal lies from the decision of a Judge on an appeal from the Court of Revision, had under s. 56 of the Vancouver Incorporation Act. An objection to an appeal on the ground that the Court has no jurisdiction to hear it, is not a preliminary objection within s. 83 of the Supreme Court Act. Although the Full Court has no jurisdiction to hear an appeal, it has jurisdiction to award costs in dismissing it. Under s. 38 of the Vancouver Incorporation Act, 1900, all rateable property for assessment purposes shall be estimated at its actual cash value, as it would be appraised in payment of a just debt from a solvent debtor:—Held, per Irving, J., that in estimating the value of an expensive residence, built by its owner, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive.

In re Vancouver Incorporation Act, 1900, and B. T. Rogers, 9 B.C.R. 373.

—**Improvements—Valuation of—Vancouver Incorporation Act.**]—The measure of value of improvements for purposes of taxation prescribed by s. 38 of the Vancouver Incorporation Act, 1900, is the actual cash selling value and not the cost In re Municipal Clauses Act and J. O. Dunsmuir (1898), 8 B.C.R. 361, followed. In re Vancouver Incorporation Act, 1900, 9 B.C.R. 373, not followed.

In re Vancouver Incorporation Act, 9 B.C.R. 495, Drake, J.

—**Purchaser at tax sale—Fiduciary relationship.**]—The City of Nelson was incorporated in March, 1897, and in September 1898, land situated therein was sold by the Provincial Assessor for taxes for the years 1896 and 1897, levied under the provisions of the Assessment Act:—Held, setting aside the tax deed, that there was no authority to hold the tax sale, as the Assessment Act does not apply to municipalities. In July, 1897, a real estate agent on behalf of the owner, negotiated with a prospective purchaser, but the attempted sale fell through, and after that the agent and the owner ceased to have any dealings with each other. In September, 1898, the agent bought the property at a tax sale at a very low figure:—Held, that at the time of the sale the agent was not in a fiduciary relation to the owner.

McLeod v. Waterman (No. 2), 10 B.C.R. 42.

—**Tax sale—Regularity of sale proceedings—Onus of proof.**]—In an action for the recovery of land, a plaintiff who relies on a certificate of title based on a tax deed, is not called upon to prove the regularity of the tax sale proceedings until the defendants show some title to the land in question.

Carroll v. City of Vancouver, 10 B.C.R. 179.

—**Tax Sale—Order confirming.**]—An order of confirmation will not be made under the B.C. Municipal Clauses Act, without notice given to the owners.

Re South Vancouver, 9 B.C.R. 572, Irving, J.

—**B.C. Assessment Act, 1903—Wild Lands—Fixing of an average value.**]—In assessing 500,000 acres of wild land consisting largely of inaccessible mountains and valleys, the assessor acted on instructions received from the Provincial Assessment Department and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal, evidence was taken and an average value of 45 cents per acre was fixed. An appeal was taken to the Full Court on the grounds that the valuation was too high and that so far as some of the lands were concerned they were exempt from taxation under the company's Subsidy Act, and on the argument counsel for the company asked the Court to fix the assessable value of the lands at the specific sum of $47,980.23:—Held, per Drake, J., that as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with s. 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs. Per Irving, J.: The evidence did not enable the Court to form any opinion as to the value of the land within the meaning of s. 51, and as the assessment was improperly levied at the outset the Court should simply declare that there was no proper assessment in respect of which an appeal will lie. Held, per Drake and Irving, JJ. (Duff, J., dissenting), that by the operation of s. 3 of the Amending Act with respect to all lands granted to the company the exemption from taxation conferred by section 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with 8th April, 1893, and that therefore the lands claimed to be exempt were assessable.

Re the Assessment Act and the Nelson & Fort Sheppard Railway Company, 10 B.C.R. 519.

— Practice — Parties — Joinder of joint wrong-doers as defendants — Action to set aside tax sale deed and for damages against the municipality.]—In an action to set aside a tax sale deed obtained by defendant Tretheway and for an account and damages against the municipality, the tax sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessor's roll or collector's roll, and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed:— Held, by the Full Court, affirming an order of Irving, J., that the municipality was not improperly joined as a party defendant.

Lasher v. Tretheway, 10 B.C.R. 458.

—British Columbia Assessment Act, 1897—Construction — "Income."] — On the true construction of the British Columbia Assessment Act, R.S.B.C., c. 179, the word "income includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation.

Attorney-General (B.C.) v. Ostrum, [1904] A.C. 144.

—Land Titles Act—Confirmation of tax sale—Redemption of land sold for taxes —Vesting of title.]—The confirmation of a tax sale transfer by a judge of the Supreme Court of the North-West Territories, under section 97 of the "Land Titles Act, 1894," in a matter of proceeding originating in a court of superior jurisdiction and an appeal will lie to the Supreme Court of Canada from a final judgment of the full court affirming the same. City of Halifax v. Reeves (23 Can. S.C.R. 340) followed. Sedgewick and Killam JJ. contra. The provisions of the N.W.T. ordinance, c. 2, of 1896, vesting titles of land sold for taxes in the purchaser forthwith upon the execution of the transfer thereof free of all charges and incumbrances other than liens for existing taxes and Crown dues, are inconsistent with the provisions of the 54th, 59th and 97th sections of the "Land Titles Act, 1894," and, consequently, pro tanto, ultra vires of the Legislature of the North-West Territories. Sedgewick and Killam JJ. contra. The second section of the N.W.T. ordinance, v. 12 of 1901, providing for an extension of the time for redemption of lands sold for taxes, deals with procedure only and is retrospective and saves the rights of mortgagees prior to the tax sale so as to permit them to come in as interested persons and redeem the lands. Sedgewick and Killam JJ. contra. The Ydum (15 Times L.R. 361) referred to. In re Kerr (5 Ter. L.R. 297) overruled. Per Sedgewick and Killam JJ. The provisions of the said section 2 cannot operate retrospectively so as to affect cases in which the transfers had issued and the right of redemption was gone as in the present case.

North British Canadian Investment Company v. St. John School District, 35 Can. S.C.R. 461.

—Assessed value too high—Appeal—Onus of proof.]—In assessment appeals the onus is upon the appellants who claim their property is assessed too high, to prove it affirmatively.

Re McDougall and Edmonton; Re Carruthers and Edmonton, 5 Terr. L.R. 465.

—Appeal against whole assessment—Notice of.]—The provisions of the Municipal Ordinance respecting appeals against the assessment of third parties do not authorize a ratepayer to appeal generally against the assessment of every person on the assessment roll without designating the names of all the ratepayers in a written request to the secretary-treasurer to notify them of the appeal.

Re Heiminck v. Town of Edmonton, 5 Terr. L.R. 459, Scott, J.

—Assessment of vacant land—Exceptions —Onus of proof.]—The onus is on the appellant to show that vacant land in towns comes within the sections mentioned in sub-s. 1 of s. 127 of the Municipal Ordinance (C.O. 1898, cap. 70), otherwise it is properly assessed under sub-s. 2. Where vacant land is shown to be "bona fide enclosed," as mentioned in sub-s. 1, and used in connection with a residence as a garden, "position and local advantage" are to be considered in addition to an annual rental in fixing the value for assessment purposes, and persons making use of valuable lands for the purposes of a garden, park, etc., should be assessed for it in the same proportion of value as other lands in the vicinity

Re Heiminck and Town of Edmonton, 5 Terr. L.R. 462, Scott, J.

—Exemptions from taxation — Land subsidies of the Canadian Pacific Railway—Extension of boundaries of Manitoba.]—The land subsidy of the Canadian Pacific Railway Company authorized by the Act, 44 Vict. c. 1 (D.), is not a grant in proe senti and, consequently, the period of twenty years of exemption from taxation of such lands provided by the sixteenth section of the contract for the construction of the Canadian Pacific Railway begins from the date of the actual issue of letters patent of grant from the Crown, from time to time, after they have been earned, selected, surveyed, allotted and accepted by the Canadian Pacific Railway Company The exemption was from taxation "by the Dominion, or any province hereafter to be

established or any municipal corporation therein.'' Held, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba the latter was a province ''thereafter established'' and such added territory continued to be subject to the said exemption from taxation. The limitations in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act, 44 Vict. c. 14, upon the terms and conditions assented to by the Manitoban Acts, 44 Vict. (3rd. Sess.), cs. 1 and 6, are constitutional limitations of the powers of the Legislature of Manitoba in respect of such added territory and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of its construction. Taxation of any kind atempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly, or any municipal or school corporation therein is Dominion taxation within the meaning of the sixteenth clause of the Canadian Pacific Railway contract providing for exemption from taxation. Per Taschereau, C. J.—In the case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case and such want of jurisdiction could not be waived. Appeals by North Cypress and Argyle dismissed; appeal by the C.P.R. allowed; judgment of the King's Bench of Manitoba, 14 Man. R. 382, varied accordingly.

Municipality of North Cypress v. Canadian Pacific Railway Company, 35 Can. S.C.R. 550.

—Gas and water company—Mains and pipes—Real estate.]—Where a water works company was assessed for certain lots, and opposite the entry under the heading on the assessment roll: ''Value of lot in parcel without improvements'' was placed ''$315,'' and under the heading ''value of buildings or other improvements,'' was placed ''$100,000,'' and in this latter sum it was intended to include the company's water mains and pipes laid on the streets of the city:—Held, (1), reversing the decision of Rouleau, J., and following The Consumers' Gas Company of Toronto v. The City of Toronto, 27 S.C.R 453, that the company's water mains and pipes were assessable as ''land.'' (2) That, however, the form of the assessment did not include mains and pipes, and that the attempted assessment of them was ineffective, and that the roll could not be amended in view of the fact that the value of the mains and pipes had not been made a question in the proceedings. (3) That the fact that the city charter gave power to assess the shares of the company did not prevent the city from exercising the power also given thereby to assess any part of the company's real or personal property. (4) That the fact that the mains and pipes were laid under the authority of an agreement with the city in that behalf did not exempt them from assessment.

Calgary Gas and Water Works Co. v. City of Calgary, 2 Terr. L.R. 449.

—Taxes, distress for—Notice of sale—''At least ten days''—''Ten clear days.'']—The provision in section 88 of the Assessment Act directing that the collector of taxes shall give at least ten days' public notice of the time and place of sale of goods for delinquent taxes, means ''ten clear days,'' and the party making a distress on less notice becomes a trespasser ab initio. Section 87 does not create the relationship of landlord and tenant between the parties; nor does it give a lien upon goods such as the preferential charge upon lands under section 80.

Canadian Canning Company v. Fagan, 12 B.C.R. 23.

—Income, taxation of—What constitutes incomes—''Outgoings,'' meaning of—Interest paid by bank to depositors.]—By the Assessment Act (B.C. Stat. 1905, c. 2) it is provided that banks shall be taxed upon their actual gross income derived from business transacted within the Province, subject to certain deductions which are set out in Form 1 of the Act. Form 1 provides, inter alia, a deduction on account of outgoings or necessary expenses incurred and actually paid by the bank in the production of income. The Bank of Hamilton operates two branches in British Columbia, and there was charged as a deduction a certain sum which was ascertained by deducting four per cent. on the average of the weekly sums which, in the books of the head office, were debited to these branches. In ascertaining the profits made by the different branches, the practice of the head office was to charge against each branch this four per cent. The evidence did not show whether this sum (debited weekly against the branches in the books of the head office) in fact corresponded with the amountof money employed by the bank in its banking business in British Columbia in obtaining income. The charge of four per cent. was made up of two items: three per cent. was charged as representing the interest paid to depositors in Ontario on moneys borrowed from them by the bank, and one per cent. was a charge representing the general expenses of the bank in connection with deposit accounts, including, as appeared from the affidavit of the general manager, a certain allowance made for the loss arising from the fact that a consider-

able sum of money on which interest was paid by the bank remained unproductive. The principal question argued on the appeal was whether these deductions should have been allowed by the Court of Revision:—Held, that had there been proper evidence before the Court of Revision that the moneys debited by head office to the British Columbia agencies were moneys on which the head office paid depositors in Ontario three per cent., and that said moneys had actually been employed in the British Columbia business, then the said three per cent. should have been deducted from the gross income as an outgoing in the production of income, but that there was not sufficient evidence of these facts before the Court of Revision to warrant the allowance of this deduction. Held, also, that said deduction of one per cent. was rightly not allowed by the Court of Revision as it included elements which did not properly enter into the computation of the statutory deductions.

Re Bank of Hamilton, 12 B.C.R. 207.

—Meeting of trustees—Recording proceedings—Invalid assessment.]—A rate of taxation not struck at a regular or special meeting of a school board, but at an informal meeting of which no minutes were kept, was held to be invalid. Quaere, whether the rate would have been validly struck, even if the meeting had been a regular or special meeting, of a proper minute were not then made.

Vienna v. Roszkosz, 6 Terr L.R. 51.

—Land Titles Act, 1894—The Municipal Ordinance, secs. 201 and 202—Effect of transfer—Grounds of questioning sale.]—Under ss. 201 and 202 of the Municipal Ordinance (C.O. 1898, c. 70), a transfer of land, by secretary-treasurer of municipality, on sale for taxes, is conclusive after one year, and sale can only be questioned on grounds specified in s. 202. The Courts are bound to give effect to unequivocal language of a statute. Ord. c. 10 of 1900 does not affect proviso in s. 202 of the Municipal Ordinance.

Re Donnelly Tax Sale (No. 2), 6 Terr. L.R. 1.

— Municipal by-law — Alteration — Local improvement—Assessment — Extension of time, by resolution, for payment.]—A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they care to be bound by it or not. A resolution can no more alter a by-law than it can alter a statute.

City of Victoria v. Meston, 11 B.C.R. 241.

—Appeal from assessor to Court of Revision—Powers of Court of Revision.] — The jurisdiction of the Court of Revision is confined to the question whether the assessment was too high or too low.

Re Crow's Nest Pass Coal Company, 13 B.C.R. 55.

—Sale of land for taxes—Statutory effect of vesting certificate as evidence of regularity of tax sale proceedings.]—(1) Although by section 166 of the Assessment Act, R.S.M. 1892, c. 101, vesting certificates issued by a municipality in its own favor, upon sales of land for taxes bought in for the municipality, are to have the same effect in all respects as deeds of sale of land for taxes, and by section 191 of the same chapter, as re-enacted by 55 Vict. c. 26, s. 7, a tax deed is made conclusive evidence of the validity of the assessment of the land, the levy of the rate, the sale and all the other proceedings leading up to the execution of the deed, yet it does not follow that such vesting certificate should have the same effect as evidence as tax deeds would have, and the mere production and proof of the vesting certificate does not shift the onus, from the municipality claiming title under it, of furnishing proof of the validity of the tax sale. (2) The provisions of ss. 6 and 7 of 55 Vict. c. 26, as to the evidential value of a tax sale deed, do not apply to vesting certificates, and leave it open to the former owner to show, if he can, that there was no legal assessment or levy for the years in respect of which the land was sold for taxes. (3) A municipality is estopped from questioning the regularity of its own proceedings relating to a tax sale, or of the assessment upon which the same were founded, as against a purchaser in good faith who has paid the purchase money and obtained a deed under the corporate seal of the municipality. (4) The assessment of the land in question for the year 1891 was null and void because (a) the assessor had not signed the assessment roll as required by 53 Vict. c. 45, s. 42, although he had signed the certificate appended to the roll as required by section 43 of the same chapter, and (b) the land was only described as the "N.W. quarter 27," without any mention of the township or range.

Alloway v. Rural Municipality of St. Andrews, 16 Man. R. 255.

—Sale of land for taxes—Purchase by municipality—Authority for reeve to bid at sale.]—Under s. 176 of the Assessment Act, R.S.M. 1902, c. 117, which provides that a municipality may bid for lands within its boundaries which are being sold for arrears of taxes and become the purchaser through the mayor or reeve, or any member of the council duly authorized by the council so to bid, it is not sufficient that the council should authorize the reeve to attend the tax sale on behalf of the municipality, and a purchase by the reeve without express authority to bid is invalid and ineffectual to pass title to the

municipality, or to a purchaser from it. None of the curative clauses of the Act avail to support the claim of the purchaser in such a case.

Bannatyne v. Pritchard, 16 Man. R. 407.

—Confirmation of tax sale—Sale prior to Land Titles Act.]—An order permitting redemption by the original owners of land sold for taxes cannot be made under the provisions of s. 2 of c. 12 of the ordinances of 1901, as amended by s. 1 of c. 9 of 1903, unless it be proved affirmatively by the applicant for redemption on the hearing of the application for confirmation that, before the time of the actual hearing of the application the person entitled to redeem has endeavored to do so, but by reason of inability to ascertain the amount due has been unable to tender the necessary amount:—Held, also, that the decision of the Supreme Court of Canada in North British v. St. John School District, 35 S.C.R. 461, is applicable to sales held prior to the passing of the Land Titles Act, 1894.

Re John Baker, 1 Sask. R. 7.

—Tax sales—Purchase by corporation—Agreement to re-convey—Necessity of by-law.]—After the City of Winnipeg had become purchaser of lands within the city, sold for arrears of overdue taxes, and had obtained a certificate of title therefor under the Real Property Act, a resolution of the city council was passed agreeing that the lands should be re-conveyed to the former owner on payment of the taxes in arrears with interest and costs:—Held, that the corporation was not bound by the resolution as the re-conveyance of the lands could be made only under the authority of a by-law as provided by the city charter. Waterous Engine Works Co. v. The Town of Palmerston, 21 Can. S.C.R. 556, and District of North Vancouver v. Tracy, 34 Can. S.C.R. 132, followed. Judgment appealed from, 17 Man. R., 497, affirmed.

Ponton v. City of Winnipeg, 41 Can. S.C.R. 18.

—Local improvements—Special frontage assessment—"Abutting on the street."]—The special frontage assessment provided for in "the Medicine Hat Charter" (6 Edw. VII. (Alberta) c. 63, title 34 is governed by the number of lineal feet measured along the front, or other abutting portion of the land; and the fact that the abutting lots vary in depth does not render improper assessment by the frontage method proportionate to the benefits received. Consequently, where a lot was divided so that one-half fronts on the street, and the other half on another street:—Held, that each half is liable to the full assessment by the frontage method, but only in respect of improvements on that street upon which such half lot fronts, or "abuts."

Brotherton v. City of Medicine Hat, 1 Alta. R. 119.

—Assessment of railway—"Lands."]—Held, that the buildings of a railway company are assessable under s. 3 of the Ordinance respecting the assesment of railways, the word "lands" therein being properly interpreted as including the building:—Held, also, that the assessment must prima facie be taken as being correct in amount. Canadian Pacific Railway Co. v. Macleod School District (1901), 5 Terr. L.R. 187, followed.

Canadian Northern Railway Co. v. Omemee School District, 6 Terr. L.R. 281.

—Business assessed by floor space occupied—Edmonton city charter—Power to impose license fee.]—The Edmonton city charter provides, title 32, s. 3, sub-s. 2, the mode of assessing businesses shall be as follows: —"The assessor shall fix a rate per square foot of the floor space (irrespective of partitions, elevators, stairways or other obstructions), of each building or part thereof used for business purposes, and shall as far as they deem practicable, classify the various businesses, and may fix a different rate for each, and in doing so may place a wholesale business in a class distinct from a retail business of otherwise the same class, and may classify each building or part thereof, according to the class of business carried on therein, and may fix a different rate for different classes or business carried on under the came roof, and for storehouse and warehouse or other like appurtenant building than that fixed for the principal building, and may fix a different rate for different flats of buildings. Such rate shall not exceed $5 per square foot except in the case of banks, loan companies or other financial institutions, in which case such rate shall not exceed $10 per square foot. And the assessor shall submit to the council a statement showing all the various classifications and rating which he proposes to apply in the assessment of businesses, and the assessor shall make his assessment in accordance with the directions which the council shall make upon a consideration of such statement." Title 32, s. 3, sub-s. 4.—". . . No person who is assessed in respect of any business . . . shall be liable to pay a license fee in respect of the same business. . . ." By-law No. 187 provides:—"No person shall carry on the business of keeper of a feed stable until he shall have procured a license therefor, the fee for which is $25 per annum." The applicant carried on the business of a livery, feed and sale business on premises which comprised 1,500 square feet (after making all deductions provided for by the charter). They were assessed for 1,000 square feet in respect of their livery business, and were not assessed for any other

business. The appellants were convicted for conducting a feed stable without a license contrary to by-law 187 above set out:—Held, that the provisions of title 32, s. 3, sub-s. 4, did not apply to the business of the "feed stable;" that, under sub-s. 2 of the above section the assessor is authorized to allot a fair proportion of the floor space to each of the several businesses carried on thereon without specifying the different portions so allotted; that the appellants having been assessed for floor space only in respect of the "livery" business, were liable for the breach of the by-law above mentioned in respect of the "feed" stable.

Rex v. Larose, 1 Alta. R. 281.

—Meaning of posting—Time within which additions may be made to roll—Commutation of taxes by labor.]—The posting required by Local Improvement Ordinance (N.W.T. 1903, 2nd session, c. 24, s. 53), refers to the act of the secretary in depositing the roll on completion in his office (s. 51); and the limitation of two months contained in s. 53 for additions to the roll is "mandatory" or "imperative" and not merely "directory;"—Held, by Stuart, J., that the real effect of this resolution was to impose a rate of four cents per acre on all assessable land in the district; but with an option to the ratepayers to make a contract with the district to do work at a certain rate of pay, which would be accepted as payment of the tax; but if the option were not taken up according to the terms of the resolution, the obligation to pay in money would be final.

Local Improvement District v. Walters, 1 Alta. R. 188.

—Assessment for year made in the previous year.]—An assessment made by school trustees towards the close of one year, as an assessment for the next year, is not a compliance with s. 6 of the School Assessment Ordinance. And where the plaintiff had paid taxes under protest, to prevent the sale of goods seized for alleged arrears:—Held, that under the circumstances set out in the judgment, he could waive the tort, and recover the amount so paid.

Braatz v. White Whale Lake School District, 1 Alta. R. 14.

—License fees—Taxation of licensed business.]—By the Edmonton Charter, title XXXII., s. 3, sub-s. 4, it is provided: "No person who is assessed in respect of any business or special franchise shall be assessed in respect of the income derived therefrom, and no person who is assessed in respect of any business or special franchise, or of any income derived therefrom, shall be liable to pay a license fee in respect to the same business or special franchise:"—Held, that the word "license," as used in the Edmonton Charter, refers to a license issued by the municipal corporation, and has no reference to any license issued by any other authority.

York v. City of Edmonton, 2 Alta. R. 38.

—Chartered bank—Assessment of moneys held on deposit—Notes and specie.]—A school district assessed a branch of a chartered bank in respect of personal property including money held on deposit, notes and bills of exchange held by the bank, the notes of the bank, specie and Dominion bills. On an appeal from the assessment:—Held, that money held on deposit not being the property of the bank, notes and bills of exchange representing such moneys, and the bills of the bank representing no value until issued were not assessable, but that all fixtures, fittings, specie, bills of other banks, Dominion bills, notes and bills of exchange representing moneys held otherwise than on deposit were assessable.

In re Land School District Assessment, 2 Sask. R. 322.

—Occupant of Crown land—Value.]—Appellant was a lessee of Crown land and was assessed therefor by the respondent for the full cash value. He claimed to be liable for assessment only in respect of the value of his interest therein, and in any event that the assessment was excessive:—Held, that in view of the provisions of s. 26, sub-s. 2, of the Schools Assessment Ordinance of 1901, which directs that the occupant of Crown lands shall be assessed therefor and, as by the only provision respecting the basis of assessment, s. 30 of the same ordinance, it is directed that real property shall be assessed at the actual cash value thereof it must be held that the occupant must be assessed for the full cash value. (2) That the adoption of a flat assessment rate per acre throughout a district does not constitute an equitable assessment, unless it be shown that all the land is equally valuable, and that the rate adopted is the fair cash value of such land, and the land in question not being equally as valuable as are other lands assessed, it must be assessed at its actual cash value.

Re Wauchope School District Assessment, 2 Sask. R. 327.

—Arrears of taxes due school district—Unlawful and excessive distress.] — Plaintiff had been for a number of years an occupant of Crown lands for which he had been assessed by the school district. No taxes were paid by plaintiff, and other parties subsequently assessed for the same land paid none. In 1908, these taxes being unpaid and the plaintiff having 73 head of horses on the land, the defendant school district authorized the defendant Hopper to seize the goods of plaintiff and the other occupants for such arrears. In pursuance of such warrant Hopper seized 73

head of horses belonging to plaintiff and 2 belonging to the other occupants. At most there was only $200 due for taxes. The proceedings connected with the seizure appeared to be regular. It was objected, however, that the assessment was irregular, but it had not been appealed from, nor were any grounds laid which would invalidate all the assessment. In an action for trespass and excessive seizure:—Held, that while Crown lands cannot be assessed, yet the occupant thereof can be assessed in respect of his interest therein. (2) That even if certain of the assessments were irregular, some of the taxes were properly due, and distress for a greater amount than that actually due is not per se actionable. (3) That the seizure of 73 head of horses to satisfy a debt not exceeding $200 was an excessive distress for which the plaintiff was entitled to damages.

Robertson v. Hopper, 2 Sask. R. 365.

—Sale of land for taxes—Parcels advertised as "patented"—Warranty.]—When the secretary-treasurer of a municipality acting under s. 162 of the Assessment Act. R.S.M. (1902) c. 117, advertises lands to be sold for arrears of taxes as "patented," although in fact they are unpatented, and the purchaser, relying on that statement, buys without making any investigation of the title, he is entitled to recover from the municipality as damages for a breach of warranty the amount he paid for the lands, also all sums paid for subsequent taxes on them with interest. Such statement should be held to be a positive statement of fact made with the intention that it could be relied upon, and not merely an expression of opinion and, being untrue, amounts to a misrepresentation excluding the operation of the rule of caveat emptor. Austin v. Simcoe 1862), 22 U.C.R. 73, and McLellan v. Assiniboia (1888), 5 M.R. 265, distinguished on the ground of differences in statutory enactments:—Held, also, (1) That s. 166 of the Act does not prevent the plaintiff in such a case from recovering back his money. (2) That, notwithstanding s. 229 of the Act, the Court could add the subsequent taxes paid by the plaintiff to the amount paid by him for the land in the first place, and treat the whole as damages suffered by reason of the breach of warranty. (3) That the defendant municipality should be allowed one month within which to redeem the lands under s. 168 of the Act, as having been sold through error, and that, in case of redemption within that time, the judgment should be for costs only.

Alloway v. Morris, 18 Man. R. 363.

—Bank, income of—Deduction for losses written off during the year.]—Form 1 of the schedule of forms to the Assessment Act, as enacted by c. 50 of the statutes of 1905, provides among the deductions permited in making returns of incomes earned by banks: Losses written off during the year, such losses being written off within six months of the time they were ascertained, and not covering transactions antedating that date more than 18 months:—Held, on appeal, that, the enactment being doubtful as to whether the inception or completion of the transaction was meant, the doubt must be resolved in favor of the taxpayer.

Re Bank of Montreal Assessment, 14 B.C.R. 280.

—Business tax—Charge on goods in premises for business tax imposed.]—(1) A liquidator appointed to wind up a company under c. 144 of the R.S.C. (1906) is not an assignee for the benefit of creditors within the meaning of s. 382 of the Winnipeg Charter, 1 and 2 EDW. VII. c. 77, so that there is no priority under that section in favor of the city for the business tax imposed upon the company as against other debts. (2) Notwithstanding s. 378 of the Charter, taxes imposed by the city are not due and payable so as to entitle the city to sue for them until after the preparation of the tax roll. Chamberlain v. Turner (1881), 31 U.C.C.P. 460, followed. (3) The assessment for the business tax can be deemed to be made only after notice thereof has been given: Devanney v. Dorr (1883), 4 O.R. 206; and if, at that time, the company assessed is no longer in possession of the premises and the goods though still on the premises are in the hands of a purchaser from the liquidator, there is nothing in the Charter which preserves to the city the lien on the goods for the taxes created by s. 313, for that section only gives the city a first charge during the occupancy on all goods in the premises for which the occupant has been assessed. (4) The statutory right given to the city by s. 369 to distrain for such taxes upon any goods and chattels found on the premises in respect of which the taxes have been levied, although such goods and chattels may be the property, and in the possession, of any other occupant of the premises, is not equivalent to a lien or charge on the goods for such taxes; and, when the liquidator of a company assessed for business tax had, prior to the assessment, given up the occupancy of the premises and sold the goods therein, it was held that the city had no right to be paid the taxes in full out of the funds in the hands of the liquidator, but had the right to rank with other creditors of the company for the same under s. 228b added to the Charter by the Act of 1907. (5) Taxes imposed before the winding up of a company has commenced can only rank as ordinary debts in the absence of a statutory lien or charge, but taxes imposed after the commencement of the winding up must be paid in

full, as part of the expenses of the winding up, if the liquidator has remained in possession and such possession has been "a beneficial occupation:" In re National Arms Co. (1885), 28 Ch. D. 474. (6) The assessment of the company under the name "Ideal Furniture Company" instead of "Ideal House Furnishers, Limited," was sufficient under the circumstances.

Re Ideal House Furnishers and Winnipeg, 18 Man. R. 650.

—School taxes — Returns of treasurers of school districts—Confirmation.]—
Re Attorney-General for N. W. Territories and Canada Settlers' Loan and Trust Co., 1 W.L.R. 225 (N.W.T.).

—Tax sale—Refusal to confirm—Land vested in Crown—Recommendation of patent.]—
Re Cann, 1 W.L.R. 206 (N.W.T.).

—Ownership of property at time assessment made.]—
Re Bell Telephone Co. and Town of Indian Head, 11 W.L.R. 446 (Sask.).

—School taxes—Exemption—Canadian Pacific Ry. Co.—Lands in 24-mile belt granted to company.]—
Re Spruce Vale School District, No. 209, and Canadian Pacific Ry. Co., 6 W.L.R. 526 (N.W.T.).

—Exemption from municipal rates—School taxes.]—
Re Osment and Town of Indian Head, 6 W.L.R. 114 (N.W.T.).

—Business tax — Bank — Taxable property.]—
Re Union Bank of Canada and Lang Village School District, 11 W.L.R. 444 (Sask.).

—School taxes — Exemption—Crown lands —Homestead—Cancelled entries.]—
Osler v. Coltart, 6 W.L.R. 536 (N.W.T.).

—Application to confirm tax sale—Dispensing with service of summons on registered owner.]—
Re Allingham, 5 W.L.R. 441 (N.W.T.).

—Property purchased by railway company for right of way, but not used as such—Assessment as of lands of private owners.]—
Re City of Edmonton and Canadian Pacific Ry. Co., 6 W.L.R. 786 (Alta.).

—Discount allowed on taxes—Interest lost by receiver not depositing in bank.]—
Emerson (Town of) v. Wright, 5 W.L.R. 365 (Man.).

—Railway — Assessment on buildings — "Lands"—Valuation of buildings.]—
Re Canadian Northern Ry. Co. and Omemee School District, 4 W.L.R. 547 (Terr.).

—Tax sale—School taxes—Confirmation of sale—Time for redemption — Extension — Terms.]—
Re Lewis and Phalen, 1 W.L.R. 36 (N. W. T.).

—School assessment—Lands of the Crown—Occupation under grazing permit.]—
Re Cunningham and Wauchope Village School District, 11 W.L.R. 399 (Sask.).

ASSIGNMENT.

—Of debt.]
See CHOSE IN ACTION.

—Of interest in land.]—
See SALE OF LAND; REGISTRY LAWS; TITLE TO LAND.

—For benefit of creditors.]
See BANKRUPTCY.

ASSOCIATION.

Religious Society—Member of — Service in—Dismissal from—Disfranchisement—Damages.]—The defendant, the Society, was a religious Association, incorporated under the laws of France, having local Institutes in the United States, Ontario, Quebec and other countries, separately incorporated according to the laws of those countries, composed of two classes of women, those destined for teaching and lay sisters employed in household duties, with periods of probation, during the second of which they took vows of poverty, chastity and obedience and became "aspirants," before being permitted to take final vows up to which latter time, the Society, according to its rules, retained the right to dismiss them for grave causes; that right belonging to the Superior General in France who might communicate it to others. Plaintiff became a lay sister in the United States in 1884 and was admitted to the three vows of an "aspirant," but proceeded no further, remaining an "aspirant" only until dismissed. In February, 1901, she was transferred to an Institute in Ontario until the following June, when, in consequence of the great disturbance and destruction of property, ascribed to her, she was removed to an asylum on the certificate of two physicians, as insane, until the following September, when she was declared cured and discharged. The defendant, the Lady Superior of the local organization, reported the facts to the Superior General in France and asked for a discharge of the plaintiff from her vows; which was sent to the Lady Superior, to be used as she considered expedient, and she caused it to be delivered to the plaintiff after her release from the asylum;

and the plaintiff executed a release prepared by the Society of all causes of action, contracts, etc., in consideration of $300.00. Plaintiff brought an action against the Society, the Institute and the Lady Superior for compensation as on a quantum meruit in respect of her 17 years' services and damages for wrongful dismissal, false imprisonment and imputation of insanity, alleging the release was obtained from her by importunity and undue influence:—Held, that there was jurisdictioa to entertain the action in this Province against the Society, upon the ground that the Society "resides" in this Province and that the defence of the Statute of Frauds failed. Held also, that the action was properly dismissed as against the Institute, and should be dismissed as against the Lady Superior, with neither of whom was there any contract, and the jury had absolved the latter from all liability in tort. Held, also, that there was no liability of the Society for compensation for services or damages, and that the defence based upon the plaintiff's release should be sustained.

Archer v. Society of Sacred Heart, 9 O.L.R. 474, C.A.

Workmen's association — Irregularity in election.]—

Sutherland v. Grand Council, P.W.A., 7 E.L.R. 70 (N.S.).

—Barbers' Union—Contribution by member—Penalty—By-laws.]—G. took out a barber's license as provided by the charter of the Barbers' Association (62 Vict. c. 90 (Que.) and paid his annual dues up to 1903, but afterwards refused to pay, claiming: 1. That he is no longer a member of the Association. 2. That if liable at all he is only liable for the penalty of $10 imposed by the by-laws for their infraction.—Held, that having taken out a license he became a member of the Association and could not, at his own will, relieve himself from the obligations imposed upon him by the Association according to law. That the adoption of a by-law imposing a penalty is an additional mode of forcing payment from a delinquent member. In the present case the Association had the option either to take action under Art. 13 of its charter to recover the dues payable, or to claim the penalty under its by-law.

The Barbers' Association of Quebec v. Gagné, Q.R. 27 S.C. 47 (Cir. Ct.).

—Foreign benefit society—Lodge.]

See INSURANCE (LIFE).

—Police pension society—Judicial duties of directors — Rights of members — Claim by policemen obliged to resign—Procedure on inquiry.]—The rules of the respondent police society provided that every application for a pension should be fully gone into by the board of directors, and in particular that any member entitled thereto, who is dismissed from the police force or is obliged to resign, shall have his case considered by the board and his right thereto determined by a majority. On an application for a pension by the applicant, who had been obliged to resign, the board, without any judicial enquiry into the circumstances, resolved to refuse the claim, "seeing that he was obliged to tender his resignation:"—Held, in an action by the appellant in effect to compel a due administration of the pension fund, that this resolution was void and of no effect. The tender of resignation gave him the right to appeal to the board and to have his claim as affected thereby duly considered and determined. It did not by itself forfeit rights acquired by length of service and regular contribution to the pension fund. Case remitted to the Superior Court at Montreal, with declarations directed to secure to the appellant a due consideration and determination thereof by a differently constituted board.

Lapointe v. Montreal Police Benefit Association, [1906] A.C. 535, 16 Que. K.B. 36.

—Clubs—Meeting of shareholders—Voting by proxy—Informal meeting of directors.]—(1) When the general Act under which a Fish and Game Club is incorporated provides that, in so far as applicable, the clauses of the Joint Stock Companies' Act shall govern associations organized thereunder, section 10 of the last named Act (which provides that every shareholder may vote by proxy) applies and enables members of the club to vote in that manner at the election of its officers. (2) The president of a club is not estopped from challenging before the Courts the election of one of its officers (the secretary) because he called an informal meeting of the board immediately after the election, at which the officer in question was present, to discuss matters of detail.

Sanderson v. Henry, 16 Que. K.B. 78.

Administration of funds.]—A writ of injunction will not issue in respect of a matter that is past, its object is to prevent the commission of some act and not to obtain compensation to which one is entitled. All the funds received by a society go into the treasury and should be applied to meet its general obligations; no member can demand that they should be set apart to assure the performance of a special set of obligations or contracts. A member of a society cannot obtain an injunction to prevent it from exercising its charter powers and enforcing its by-laws.

Préfontaine v. Canadian Art Society, 11 Que. P.R. 109.

—Powers — Special assessment — Suspension.]—In addition to those specially con-

ferred upon it a public corporation has all the powers necessary to attain the objects of its creation, Art. 358 C. C., and among is the power of imposing an annual contribution upon its members on pain of suspension for non-payment. It cannot, however, exact from a suspended member, as a condition of re-instatement, a formal application therefor and payment of an additional fee. When a suspended member resorts to a writ of mandamus to compel the corporation to reinstate him on the ground that the by-law imposing the contribution is ultra vires and the corporation sets up, not only the validity of the by-law, but an alleged obligation for a formal application and payment of a fee, the Court, holding the suspension valid, but the conditions for reinstatement illegal, has a "special reason" sufficient under Art. 549 C.P.Q., to condemn each party to pay his own costs.

Lavery v. Bailiffs' Assoc. for the district of Montreal, Q.R. 38, S.C. 236.

ATTACHMENT.

Ontario.

Issue—Amount in controversy—County Court — Jurisdiction — Residence of garnishee.]—Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work:—Held, that the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor; to entitle the creditor to an issue, it was not necessary to bring home a case of fraud to the persons against whom it was charged; it was sufficient to show unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised. Held, also, that the Judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a County Court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county. Semble, that the proper construction of Rules 917, 918 and 919 is, that the Judge of a County Court in which a judgment has been recovered has power, when the amount claimed to be due from a garnishee residing in another county is within the jurisdiction of the County Court or the Division Court, to order the garnishee to attend before the Judge of the County Court or the clerk of the Division within which he lives. Held, also, that an order for a receiver should not be made in respect of a fund which may be reached by garnishing process.

Millar v. Thompson, 19 Ont. Pr. 294.

—Salary of municipal officer—Payment in advance—Set-off——Equitable Assignment —Premature service of attaching order—Misconduct—Costs.]—Upon an application to garnish the salary of an officer of a municipal corporation, it appeared that by virtue of a by-law his salary was payable monthly, and that the practice of the corporation was to pay all salaries on the first day of the month, or, if that day were a holiday, on the previous day. It was also shown that a number of officers received payments on account of their salary before it came due. The attaching order was served on the 30th April between ten o'clock in the morning and one o'clock in the afternoon. The judgment debtor, before the service of the order, had been paid in full all his salary for the month of April, under an arrangement between him and the treasurer of the corporation that advances should be made on account of salary and stopped from the debtor's cheque at the end of the month. The debtor in each case of an advance gave an I.O.U. to the cashier (the treasurer's clerk), who would thereupon advance the debtor the amount out of the corporation's funds, and at the beginning of the month the debtor would endorse his cheque and receive from the cashier his acknowledgements and the balance (if any) in cash, and the cheque would be deposited to the credit of the corporation:—Held, that nothing was due to the debtor by the corporation at the time of the service of the attaching order, for there had been actual payment of the salary by the corporation; or, if not payment, an advance by the corporation which they could set off against a claim for salary; or, if the moneys advanced were to be regarded as misappropriated by the treasurer or the clerk and advanced personally by him to the debtor there was a good (though verbal) equitable assignment of the salary by the debtor to the treasurer or clerk; and, per the Master in Chambers, a debt irrespective of the salary, in any event, would not have accrued due until after the service of the attaching order. Held, also, per Meredith, C.J., in Chambers, that the judgment debtor and the corporation, by its responsible officers, had so misconducted themselves that they should be deprived of costs, although the order of the Master in their favour was in other respects affirmed.

Wilson v. Fleming, 1 O.L.R. 599.

—Surplus in hands of bailiff—Attachment by mortgagee.]—Motion by defendant for

prohibition to the 1st Division Court in the County of Carleton. Plaintiff held a chattel mortgage dated 6th January, 1903, for $1,105.31 made by defendant, payable on 31st March, 1903. Default was made in payment, and on 6th April plaintiff authorized one McDermott as bailiff to seize and sell the chattels covered by the mortgage. This was done, and enough was realized to satisfy the mortgage and all costs, and leave a surplus of $81.84 in the bailiff's hands. The plaintiff alleged that defendant was indebted to him for rent and upon other claims outside of the chattel mortgage, and on 30th April he began this action in the Division Court against defendant for the amount of the debt, joining the bailiff as garnishee:—Held, that as the garnishee had not paid over the money to plaintiff (for payment to defendant), and as defendant had taken no steps against either plaintiff or garnishee for an account, defendant could have an action against the garnishee, and, therefore, the claim is a debt and can be attached under s. 179 of the Division Courts Act.

Re Tomlinson v. Hunter, November 6th, 1903, per Britton, J. (not reported.)

—Garnishment of married men's wages—Exemption — Evidence of marriage — Repute.]—In a Division Court action the Judge held that evidence of repute was not sufficient to prove that a primary debtor was a married man and so entitled to the $25 exemption provided for by R.S.O. 1897, c. 60, ss. 180 and 181:—Held, that he had not decided upon a state of conflicting facts but upon a theory that the best evidence must be given, which was a wrong assumption in point of law, and prohibition was granted. Elston v. Rose (1868), L.R. 4 Q.B. 4, followed.

Re Rochon v. Wellington, 5 O.L.R. 102, Boyd, C.

—Of Debts—Rent Payable under lease to administratrix for benefit of others.]—Plaintiffs, claiming as heirs at law of their father and owners of a lot of land, brought an action for specific performance, which was dismissed with costs. After the trial one of the plaintiffs, G.R., died, and probate of his will was granted to a sister and co-plaintiff, and the action was revived in the names of the remaining plaintiffs and the executrix, and an appeal against the judgment was dismissed with costs. It appeared G.R. owned one-half of the lot and the father of the plaintiffs the other half, and that the lot had been leased to a tenant by one of the plaintiffs as administratrix of the father, who died in or before 1896, and by the executrix of G.R. No caution was registered under the Devolution of Estates Act: Held, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs. Macaulay v. Rumball (1869), 19 U.C.C.P. 284, commented on. Judgment of Street, J., reversed, and judgment of the Master in Chambers restored.

McDonald v. Sullivan, 5 O.L.R. 87 (D.C.).

—Interest of residuary legatee—Division Court process.]—A primary creditor in a Division Court, by a garnishee summons served on the executors, attached the interest of a residuary legatee in the estate of a testator, who had died within a year of the attachment. A receiver was subsequently appointed in a High Court action to receive his interest. The Division Court Judge gave judgment against the garnishees. An appeal to a Divisional Court was allowed on the ground that such interest was not attachable under section 179 of the Division Courts Act, R.S.O. 1897, c. 60.

Hunsberry v. Kratz, 5 O.L.R. 635.

—Life Insurance—Assignment of policy—Declaration in wife's favor—Attachment for husband's debts.]—The assured assigned shortly before its maturity an endowment policy to a creditor by an assignment absolute in form, there being an agreement however, that the creditor should apply to the company for the cash surrender value and should pay the surplus thereof over his indebtedness to the assured's wife. The assignee after the time limited by the policy for the purpose elected to take the cash surrender value. After this a judgment creditor of the assured obtained an attaching order against the company. The assignee then before any action had been taken by the company in respect of the election made by him revoked it and the husband executed a declaration that the policy was to be held, subject to the assignment, for the benefit of his wife:—Held, that the assignee's election not having been made within the time limited was a mere proposal to the company; that his revocation before action taken by the company put an end to it; and that the cash surrender value was not payable by the company. Held, also, that in any event, notwithstanding the attaching order, the assured's declaration in his wife's favor took effect and defeated the attaching creditor's claim. The principle of Weeks v. Frawley (1893), 23 O.R. 235, approved and applied.

Fisken v. Marshall, 10 O.L.R. 552, D.C.

—Attachment of debts—Moneys of Union—Representative action—Judgment for costs against representatives—Effect of.]—In an action against a union, in which certain members of it had been by an order of the Court authorized, besides representing themselves, to defend the action on behalf of and for the benefit of all other persons constituting the union, and were to be bound by the judgment and proceedings therein, certain costs were ordered by the Court of Appeal to be paid by the

respondents to the appellants," the respondents being the representative members:—Held, that although all the members of the union might possibly be bound by the judgment to be ultimately pronounced, an order that defendants, respondents, should pay money whether for damages or costs, without more, could not be enforced by execution or process against the property of the union or members thereof not named as defendants, and that moneys in a bank to the credit of the union and three of its officers could not be garnished.

Metallic Roofing Company v. Amalgamated Sheet Metal Workers, 10 O.L.R. 108, D.C.

[Same case José v. Metallic [1908] A.C. 514].

—Attachment of debts—Police constable's pay—Service on treasurer—Payment to agent—Payment in advance.]—On a motion to make absolute an order attaching all debts due by a municipal corporation to the defendant, a police constable, which was issued on the 27th of February, and served on the treasurer of the corporation on the afternoon of the same day, it appeared the defendant's salary was $900 a year, payable monthly at the end of each month:—Held, that although the defendant was not a servant of the corporation the treasurer was the proper person to serve. Held, also, that the cheque for the defendant's salary for the month of February, which according to custom, had been delivered to a messenger to leave at the police station for the defendant, but on service of the order, had been stopped by telephone and brought back to the treasurer had not come into the hands of the defendant's agent before service of the order; but held, also, that there was no debt due as the month's salary was not payable until the end of the month, and that there is no law which forbids an employer to pay his servants' wages in advance.

Fallis v. Wilson, 13 O.L.R. 595 (M.C.).

—Division Court—Action on foreign note—Made and held out of jurisdiction—Place of residence of garnishee.]—An action on a promissory note within Division Court competency, and which at the time the action is commenced is within the Province, may be brought in the Division Court in which is situate the place of residence of the garnishee, under s. 190 of the Division Courts Act, R.S.O. 1897, c. 60, when the maker resides in another division in the same county, although the note may have been made and the holder may reside out of the Province.

Hopper v. Willison, 16 O.L.R. 452.

Quebec.

Conservatory attachment—Quebec practice.]—Conservatory attachment can only issue in virtue of an express provision of law.

Papin v. Long, 4 Que. P.R. 141, Archibald, J.

—Conservatory attachment—Subsequent insolvency.]—The plaintiff took out a writ of conservatory attachment against the defendant. After the execution of the writ, the defendant made an abandonment of her property, and a provisional guardian was appointed to her estate. The defendant contested the conservatory attachment by an exception to the form:—Held, that after the abandonment the defendant ceased to have any interest in prosecuting the exception to the form.

Ledoux v. Simpson, 4 Que. P.R. 57.

Conservatory attachment — Commission on sales.]—An agent who is to be paid his commission on sales by his principal as the latter might make deliveries and obtain payments, is an ordinary creditor; he has no right to seize by conservatory attachment whatever particular moneys may remain due for the goods delivered and the work done by him in connection therewith.

Gourdeau v. Lyon, 12 Que. P.R. 89.

—Conservatory attachment — Goods sold and partly paid for.]—The purchaser who has not yet received the goods sold to him, and on account of which he paid certain sums, cannot seize, by way of conservatory attachment, goods of the same nature and quality owned by the defendant, and which plaintiff alleges to be defendant's only asset.

Papin v. Long, 4 Que. P.R. 140, Archibald, J.

—Conservatory seizure—Writ of possession—Breaking open with violence.]—1. An action of conservatory seizure is subject to the same rules and delays as summary matters and attachments before judgment. Arts. 956, 939, 922, C.C.P. 2. A judgment maintaining a conservatory seizure and ordering that the plaintiff be put in possession of the effects seized "under the authority of this Court," without fixing any delay for the delivery of the effects, is not executory until after the lapse of eight days from its date, and a writ of possession issued before the expiration of that time, without service of the judgment, and without a further order of the court, is premature and illegal. 3. If the debtor be absent, or if there be no one to open the doors of the house, the seizing officer must draw up a minute of the fact, and obtain judicial authority to use all necessary force, but only in the presence of two witnesses. 4. It is a breaking in for an officer, by a false pretence, to procure a person within the house to open the door, and then, without permission, to rush in with violence. He

must notify the inmates of his business and demand admittance.

Kaufman v. Campeau, 19 Que. S.C. 479. Davidson, J.

—Attachment for rent—Desistment from damages claimed.]—Nothing prevents the plaintiff, in an attachment for rent, from abandoning his claim for damages, and such desistment will not be rejected on motion.

Gariepy v. Poulin, 4 Que. P.R. 105.

—Seizure of salaries and wages—Default of stating the nature and place of debtor's occupation — Arts. 678, 697, C.P.] — A creditor cannot seize his debtor's salary, wages or commissions without stating in the writ of attachment the nature and place of the debtor's occupation, and consequently he cannot contest the garnishee's declaration, alleging that commissions have become due to his debtor if the writ of attachment does not meet the requirements of law regarding seizures of salaries and wages.

De Sieyes v. Painchaud, 3 Que. P.R. 552.

—Saisie-arret—Deposit—Art. 698 C.P.Q.] —If one member of a partnership tierce-saisie claims that defendant is drawing a weekly salary from the firm the partnership cannot be compelled to deposit any sum in court to its prejudice, but the saisie-arrêt will be declared binding.

De Claude v. Hemond, 4 Que. P.R. 71 (S.C.).

—Insolvency—Curator's fees—Seizure.]—The curator appointed to liquidate the estate of an insolvent is a public functionary whose fees, under the terms of Art. 599 C.P.Q., are not seizable.

In re Synder, 3 Que. P.R. 271 (S.C.).

— Saisie-arret after judgment — Prescription.]—The rule in Art. 673 C.P.Q. applies, in case of alleged insolvency of the debtor, to the distribution of all monies not representing immoveables and of which no account has been rendered en justice. When a saisie-arrêt has been declared binding, a subsequent judgment ordering the tiers-saisie to pay the monies seized has no raison d'etre; the amount subject to the allegation of insolvency should be distributed according to Art. 697 C.P.Q., and especially if there exists a seizure after a prior judgment. A tierce-opposition is not prescribed, whatever is the date of the judgment attacked, if the tiers-opposant has only had knowledge of it during the year preceding it.

Royal Electric Co. v. Palliser, 3 Que., P.R. 340 (S.C.).

Seizure of salary—Lacombe law.]—Article 1147a of the Code of Civil Procedure being contained in that part thereof which applies to the Circuit Court, is limited to cases in that Court, and does not stay the proceedings under a writ of garnishment of wages issued out of the Superior Court.

Lemieux v. St. Laurent, 11 Que. P.R. 281.

—Conservatory attachment — Separation.] —In an action in separation from bed and board, a conservatory attachment may issue for the purpose of securing to the wife her eventual rights in the community. It is not necessary to allege and to establish by affidavit for the purpose of obtaining said conservatory seizure that the defendant is immediately about to leave the province of Quebec, or that he is secreting his property with intent to defraud.

Lefebvre v. Denault, 12 Que. P.R. 45.

—Omission to serve copy of affidavit—Signature of affidavit.]—1. In an attachment before judgment the omission to serve a copy of the affidavit within three days from the seizure, if subsequently remedied, is not fatal to the writ. 2. An affidavit given by one N. Allard and signed N. Allard et fils is legal; the addition of the words "et fils" is not sufficient to nullify the effect of said affidavit or to make it insufficient.

Allard v. Fisher, 12 Que. P.R. 31.

—Seizure of salary—Lacombe law.]—1. Although Article 1147a of the Code of Civil Procedure is contained in that part thereof which applies to the Circuit Court, it is not limited to cases in that Court, said Article being general in its prohibition of any saisie-arret against defendant. 2. The clerk of the Circuit Court being bound to keep a list of the parties who comply with the dispositions of Article 1147a C.P., the debtor is not bound to give notice to his creditors that his name appears on that list.

Neven v. Allard, 11 Que, P.R. 107.

—Conservatory attachment.]—A plaintiff who claims a right in, or to, specific movable property, e.g., as one of several lawful heirs of the owner deceased, may cause it to be attached by conservatory process. He is not bound to disclose in his affidavit special or extraordinary circumstances, involving danger of loss.

Hoffman v. Baynes, 37 Que. S.C. 435.

—Attachment after judgment—Alimony—Lacombe law, C.P. 1147a.]—An order for aliment is not subject to the provisions of the Lacombe law.

Désormeau v. Legault, 11 Que. P.R. 328.

—Conservatory attachment—Privilege of workman.]—A plaintiff who has a legal privilege on a property in connection with the work by him done thereon, cannot, in the event of a fire, claim by a conservatory attachment the proceeds of policy covering the building, because these proceeds do not

represent the property, but represent a debt resulting from a contract of insurance.

Isaacs v. Tafler, 11 Que. P.R. 359.

—Saisie-arret—Unliquidated damages—Requisites for affidavit.]—When a saisie-arret after judgment is issued, with judicial authority, for unliquidated damages the amount of the security is fixed by law and need not be indorsed on the writ. The following allegations in an affidavit for the issue of a saisie-arret before judgment:—"5. I am credibly informed by a reliable person and believe that the defendant is about to get rid of the property he sold to me and to transfer his interest in the lease of the house he occupies to another who offers him a better price for it, to my prejudice and to be relieved unlawfully of his obligations to me. 6. I am credibly informed by a reliable person and believe because of declaration made by the defendant himself that he intends, after selling his property and transferring interest in the lease, to leave the province, and that I will lose my recourse against him for the reason above stated," are insufficient and a saisie-arret based thereon will be set aside on application therefor.

Paquin v. Chalifoux, 11 Que. P.R. 129.

—Garnishment — Liquidation—Garnishee]—A company garnished money of its debtor in the hands of a third party who deposited the amount in Court; the company having gone into liquidation:—Held, that the liquidator, who was not made a party to the garnishee proceedings could not, by application therefor, withdraw the money so deposited in Court.

Imperial Breweries Co. v. Prevost, 11 Que. P.R. 150.

—Tiers-saisi—Declaration.]—The tiers-saisi being under no obligation, when he makes his declaration to produce a document referred to therein, he is not obliged to furnish the party who receives the declaration with a copy of such document.

Savoie v. Drainville, 11 Que. P.R. 430.

—Exception to form—Delay.]—A party who has obtained leave from the Court to appear and contest a writ of saisie-arret after judgment, has a right to file, within the usual delays, an exception to the form even when the writ has been returned for several days. A saisie-arret after judgment by a party to the action for costs will be dismissed on exception to the form if it does not appear by the fiat that the writ issued with the consent of the attorney who was given distraction of such costs.

Penfold Advertising Agency v. Wilks, 11 Que. P.R. 182.

—Garnishee in possession of movables belonging to the judgment debtor.]—A garnishee who, upon a contestation of his declaration, is proved to have had in his possession, at the time of the attachment, movables, the property of the judgment debtor, can only be condemned to surrender them to the officer of the court for execution, and, in default to do so within a prescribed delay, to pay their value, or satisfy the judgment. A condemnation to deposit a sum of money, or to pay it to the seizing creditor, as the value of the movables, without the option of surrendering them, is illegal.

Fontaine v. Lamoureux, 19 Que. K.B. 421.

—Daily wages—Arts. 599, 678, 697 C.P.Q. Art. 1196 C.C.]—On declaration of the tiers-saisis that defendant is in their employ as driver; that his wages depend on his daily earnings with their wagons and horses of which he renders them an account and which he pays over to them less a moiety which he retains; that they have paid him $11.54, a moiety of such receipts since service of the seizure at which time he owed them, and still owes, $43:—Held, that the moiety of such receipts represents daily wages the seizable portion of which may be attached and the saisie-arrêt as to it will be declared binding; that compensation cannot operate, to the prejudice of the seizing creditors, between such wages of the defendant and the arrears of receipts due by him to the tiers-saisis before the saisie-arrêt.

Payfer v. Beauchamp, 3 Que. P.R. 347 (C.C.).

—Saisie-arret—Rights of prior creditors—Fraud—Collusion.]—Though the judgment maintaining a saisie-arrêt constitutes a judicial transfer of the sum seized, the tiers-saisi (in this case defendant's wife) who after signification of the judgment has settled with the seizing creditor by means of an exchange of properties and a money payment (dation en paiement), will be condemned, on proceedings by a creditor prior to the seizing creditor, and on proof that said seizure and the judgment authorizing it were the result of collusion to defraud defendant's creditors and that to the knowledge of the tiers-saisi and the seizing creditor, to deposit with the prothonotary, for distribution, the sum he owed defendant, and the exchange of properties and dation en paiement will be set aside.

Leroux v. Prefontaine, 19 Que. S.C. 315 (S.C.).

—Seizure of money in debtor's hands—Duty of debtor.]—The debtor of a sum of money seized in his hands cannot be condemned to pay it to another person claiming it as long as the seizure stands in force. Therefore, he can plead to such action the fact of the seizure and ask the court to decide to whom the amount should be paid and condemn the plaintiff to the costs of the action.

Shannon v. North American Life Assur. Co., 19 Que. S.C. 321 (S.C.).

—Sheriff's salary—Seizure.] — The salary of a sheriff is non-seizable, and even when the Government has paid instalments of the salary to the seizing creditor the sheriff, even if the saisie-arrêt has been maintained on failure to appear, can, by opposition to the judgment, have it annulled.

Mongeau v. Arpin, 18 Que. S.C. 395 (C.C.).

—Affidavit for—Article 901 C.C.P.—The affidavit for attachment en mains tierces, when founded upon information or belief, must state the grounds of such belief and the sources of such information, and in the absence of such statement the seizure will be quashed on petition.

Duclos v. Beaumier, 20 Que. S.C. 237.

—Conservatory attachment—Affidavit for.] —An affidavit for conservatory attachment, founded upon belief, must state the grounds of such belief.

Lefebvre v. Castonguay, 4 Que. P.R. 431.

—In revendication—Affidavit.]—The omission to describe the person making the affidavit for a fiat for a writ of revendication and the failure to serve a copy of the affidavit on the defendant or leave it for him at the office of the Court within three days, do not constitute fatal irregularities in the procedure.

Haddad v. Marcotte, 4 Que. P.R. 313.

—Conservatory attachment—Donation.]— On proceedings for conservatory attachment based upon a donation, the affidavit as to the donation must set forth that the debt is due and exigible, and that the deed of donation has been registered, and must also state that a demand of payment has been made.

Lefebvre v. Castonguay, 4 Que. P.R. 431.

—Contestation of saisie-arret — Conclusions against the tiers-saisi—Inscription-in-law—Arts. 693, 191 C.P.]—When a tiers-saisi has declared that he owes nothing, it is not sufficient, to allege in contestation thereof, that it is false: a contestation of a declaration of a tiers-saisi has, for its object, a different basis of facts whereon to determine the liability of the garnishee from that furnished by his declaration: it must, if for less than the amount of the judgment, set forth the exact amount of the alleged indebtedness; it must be as specific and proved like the contents of the declaration in an ordinary suit, and it creates a real instance in which the tiers-saisi is a defendant.

The Canada Congregational Missionary Society v. Lariviere, 4 Que. P.R. 290.

—Wages—Garnishment—Art. 678 C.C.P.] —In a seizure of salary and wages by garnishment, where the writ does not state either the nature or place of the defendant's occupation as required by Art. 678 C.C.P., the seizure is without effect.

DeSieyes v. Painchaud, 20 Que. S.C. 230 (Doherty, J.).

—Saisie-arret—Moneys due by the Government—Art. 599 C.C.P.]—Held, (affirming the judgment of Pagnuelo, J., as to its dispositif, but for different reasons):—A sum of money due to a school teacher, as a subsidy, payable out of the fund appropriated by the Legislative as allowance to institutions and superior schools, being money due by the Government of the province, and not money due as the salary of a public officer, is not seizable in the hands of the Government under a writ of atachment by garnishment.

Beauchemin v. Fournier, 20 Que. S.C. 272 (C.R.).

—Saisie-arret—Insolvency of debtor—Decree against tiers-saisi.]—After the creditor who has procured the issue of saisie-arret has obtained, without fraud, a judgment ordering the tiers-saisi to pay the sum which he has admitted that he owes the debtor, another creditor of the latter cannot, by tierce-opposition, have the judgment set aside on account of the insolvency of the debtor the allegation of insolvency must be made prior to the entry of judgment confirming the saisie-arret.

Manslau v. Bruyere, 11 Que. K.B. 16.

—Saisie-conservatoire—Inland navigation —Art. 955 C.C.P.—Art. 2383 C.C.]—Except in the case provided for by par. 2 of Art. 955 C.C.P., the saisie-conservatoire cannot issue for the wages of sailors or payment for services rendered on board ships employed in inland navigation.

Bertrand v. Anderson, 4 Que. P.R. 387 (Cir. Ct.).

—Insurance—Indemnity——Art. 955 C. C. P.]—The indemnity due by an insurance company in case of loss is a simple debt arising under a contingent contract, and, except in the case of the transfer anticipated by the indemnity the hypothecary creditor has no right of preference to exercise upon it, and therefore he is not entitled to the exercise of a saisie-conservatoire of the money in the hands of the company.

Leroux v. Cholette, 4 Que. P.R. 193 (Sup. Ct.).

—Saisie-arret—Motion to dismiss—Art. 154 C.C.P.]—A motion by defendant for dismissal of a saisie-arret on the ground that it was neither served nor returned will be dismissed with costs as the defendant can-

not demand the rejection of a saisie-arrêt which has no existence.

Devlin v. Charlebois, 4 Que. P.R. 281 (Sup. Ct.).

—Saisie-arret—Deposit in bank—Intervention—Art. 220 C.C.P.]—The deposit of money in a bank in the depositor's name does not deprive the real owner of his right to claim such money. The third party entitled to the money may establish his rights by intervention and cause to be annulled the saisie-arrêt of the sums which constitute the gage of the seizing creditor.

Stephens v. Higgins, 5 Que. P.R. 1 (Sup. Ct.).

—Saisie-arret before judgment—Affidavit—Arts. 901, 931b, 939 C.C.P.]—An affidavit in support of a saisie-arrêt before judgment, based merely on the belief of the deponent as to the plaintiff's loss of recourse instead of positively affirming this fact, is insufficient, and the saisie-arrêt will be quashed on application therefor.

Michaud v. Clement, 5 Que. P.R. 25 (Sup. Ct.).

—Judicial sale—Return of proceeds—Bailiff's fees—Arts. 670, 676 C.C.P.]—Whether or not there has been an opposition àfin de conserver the bailiff who has made a judicial sale has a right to retain his costs out of the moneys he returns, provided that said costs have been taxed

Turgeon v. Shannon, 4 Que. P.R. 274.

—Service under Art. 135 C.P.C.—Saisie-arret issued on judgment against person deceased.]—Held, (confirming the disposition of the judgment of the Superior Court, Archibald, J., but varying the reasons): (1) Article 135 of the Code of Procedure, which authorizes service upon the heirs of a person deceased within the previous six months, at the former domicile of deceased, applies to proceedings against the heirs, and not to the service of a saisie-arrêt issued against the deceased himself, on a judgment obtained against him, the fact of his death, at the time of the service of the saisie-arrêt, being known to the plaintiff. (2) A collocation founded on the first sale of an immovable by the sheriff ceases to have effect when the same immovable is resold at folle-enchère, and a saisie-arrêt in the hands of the sheriff for the amount of such first collocation cannot be maintained.

Demers v. Gaudet, 23 Que. S.C. 276 (C.R.).

—Seizure after judgment—Salaries and wages—Failure to declare the nature of debtor's employ.]—(1) If the writ of attachment after judgment does not state the nature and place of the debtor's occupation, it does not constitute a seizure of salary which can be declared tenante, and a motion to that effect will be dismissed. De Sievès v. Painchaud, 3 Q.P.R. 552. (2) However, if the garnishee by his declaration, has set forth the fact that the defendant was in his employ on salary, a motion to have seizure declared binding will be dismissed without costs as the seizing creditor had some reason to believe that the seizure was recognized as one of salary.

N. Drouin v. Brunelle, 5 Que. P.R. 371 (Doherty, J.).

—Conservatory attachment — Vendor's privilege.]—When a conservatory attachment is issued and the property of a person who is not shown to be a trader is seized by the unpaid vendor thereof, the attachment will not be quashed upon petition on the ground that the seizure was not made within thirty days of the delivery of the goods.

Swaeschnikoff's Sons v. Breitman, 6 Que. P.R. 30 (Doherty, J.).

—After judgment—Seizure binding—Motion for new declaration.]—In order that an attachment after judgment in the hands of a third party be binding, it must be so declared by judgment; in the absence of a contestation of the garnishee's declaration within the legal delays, and of a demand within the same delay, to have the seizure declared binding, a writ of attachment is without effect against the garnishee as regards the sums which may eventually become due, and a motion then made to make him declare de novo will be rejected.

Decelles v. Lafleur, 5 Que. P.R. 439 (Davidson, J.).

—Attachment of debt—Saisie-arret—Service—Art. 679 C.P.Q.]—It is the service of the writ of saisie-arrêt which establishes the legal right between the seizing creditor and the tiers-saisi. From the moment the saisie-arrêt is regularly served, the tiers-saisi cannot make a payment to the debtor (saisi) without running the risk of having to pay twice, and that whether or not he was aware of such service It is the judicial result of the change made by Art. 679 C.P.Q., in Art. 615 of the former Code. Whenever a tiers-saisi begins his declaration by denying that he is indebted to the saisi, and he afterwards makes acknowledgment clearly showing that he had been indebted and had made payment after the saisi-arrêt was served, it is not necessary to contest this declaration; the Court may condemn the tiers-saisi to pay over again.

Montambault v. Lapointe, Q.R. 23 S.C. 413 (Cir. Ct.).

—Attachment after judgment—Conditional debt—Motion to discharge attachment.]—(1) Where a garnishee declares that he owes nothing to an execution debtor, but that there is an existing contract between

them by which the execution debtor is permitted to solicit risks in the garnishee's company upon commission, the garnishee and execution debtor are not entitled to have the attachment discharged as in a case where the garnishee had declared that there was nothing owing by him. (2) Quære, In the case of conditional liability, could the discharge of the attachment be required if the execution creditor failed to have the attachment declared binding?

Lamothe v. Piché & Fayette Brown, garnishee, 5 Que. P.R. 180.

—Discharge granted to defendant and garnishee—Inscription in review—Deposit.]—Held, by Langelier, J.:—In a summary matter the time for the contestation of the declaration of the garnishee is two days. By the Court of Review:—1, The plaintiff, complaining of judgments discharging the defendant and garnishee on two different motions, should inscribe separately in review from each of the judgments, and make a deposit in each case, in default of which his inscription will be rejected. 2. The inscription in review being thus rejected, the Court of Review has no further jurisdiction to adjudicate upon the validity of the disclaimer of the judgment in question, which ought to be decided by the Court of first instance.

Lamothe v. Piché & Brown, 5 Que. P.R. 164.

—Conservatory seizure—Irregularities in the writ and in the return of the seizing bailiff.]—(1) The writ of conservatory attachment should be accompanied with a declaration or contain a sufficient statement of the causes of action. (2) If the subject of the seizure are not goods, but sums of money in the possession of a bank, the proper procedure is by garnishment and not by a conservatory attachment. (3) A conservatory seizure for the purpose of attaching sums of money, and not accompanied by a declaration, will be dismissed upon exception to the form.

Leith v. Hall and The Molsons Bank, 5 Que. P.R. 155.

—Attachment before judgment—Secretion—Application to quash.]—The following allegation in the affidavit for an attachment before judgment is sufficient, i.e., "That the said P.R. said and declared to the deponent that he intended to sell everything and get out of the country to avoid payment of his debts; and the said deponent is otherwise credibly informed and believes that the said P.R. secretes and sells, and is about to secrete and sell, his goods with the intention to defraud his creditors and particularly the deponent, and the sources of my information are that one B., milkman of Amherst Park, affirms that the said R. told him and declared that he was selling all his property to avoid paying the deponent what he owed him as aforesaid," and an attachment before judgment, which appears to have issued upon such an affidavit, will not be quashed.

Lefebvre v. Rochon & Caron, garnishee, 5 Que. P.R. 443.

—Conservatory seizure—Annulment of attachment—Secretion of goods of succession.]—(1) A conservatory attachment does not lie except in the three cases mentioned in Art. 955 C.C.P. (2) A conservatory attachment cannot be made in the case of an action against the administrator of a succession except of personal property and debts upon which there is a privilege, that is to say, the personal property and debts of the succession and not upon those of the defendant. (3) The right of attachment before judgment does not exist where the defendant secretes or makes away with, not his own goods, but with those of the succession of which he is administrator, even on the allegation that the goods of the defendant are for the greater part, if not altogether, the goods of the succession.

Turcotte v. Dumoulin, 5 Que. P.R. 206.

—Personal condemnation against garnishee—Motion for leave to declare.]—A garnishee who has appealed unsuccessfully from a judgment condemning him personally may still be relieved from his default to make a declaration upon payment of all costs incurred, including the costs of appeal.

Saunders v. Boeckh & United Factories, Limited, 5 Que. P.R. 416.

—Attachment after judgment—Garnishee condemned for damages to the defendant—Compensation.]—A garnishee who declares that he has been condemned to pay the defendant $100 damages by a judgment from which he appealed, after the condemnation has been reduced on revision by $50 with costs of review against the defendant, cannot then pay his own solicitor the $50 awarded to him by the latter judgment and which had been seized before that decision.

Pieffer v. Campeau & Monette, 5 Que. P.R. 135.

—Personal injuries—Bodily wounds—Right of action for damages—Exemption from seizure—Art. 599 C.C.P.]—A debt resulting from damages for personal injuries, bodily wounds and medical expense, is alimentary in its nature and is not subject to attachment.

Lafond v. Marsan, 5 Que. P.R. 326.

—Attachment after judgment—Want of service on debtor—Discharge.]—An execution debtor who has not been summoned on

an attachment after judgment cannot appear and ask that the attachment should be discharged.

Fafard v. Marsan, 5 Que. P.R. 438.

—Seizure in revendication—Res judicata.] —(1) In a winding-up action, if a person who has applied to be put in possession of certain effects of which he claims to be owner and his application has been granted by the Court as to some of such effects without adjudicating as to others, he may subsequently revendicate the other effects, even when they have been sold by the liquidator to a third person, and such third person cannot set up the plea of res judicata as resulting in virtue of the judgment upon the former application against the claimant. (2) The attachment in revendication may be instituted against the person who is in possession of the effects even when he holds them under uncertain temporary and conditional title.

United Shoe Machinery Co. of Canada v. Flibotte, 5 Que. P.R. 337.

—Petition to quash by mis en cause—Action sounding in fraud.]—(1) In an attachment before judgment the garnishee cannot be ordered to abstain from paying certain sums to his creditor, party called into the action, but against whom no condemnation has been made. (2) An application to quash an attachment, on the part of such party called into the action, is the proper procedure in such a case.

Duckett v. Bayard, 5 Que. P.R. 281.

—Seizure in revendication—Possession of goods seized—Application of plaintiff for possession—Art. 949 C.C.P.]—In case of a seizure in revendication, the plaintiff will not be put in possession of the goods seized when it appears that they are in the possession of an intervening party, his wife, whom he has deserted, and that the place where the goods are situated is the domicile of the consorts and the intervening party resides there with her children.

Beauchamp v. Beauchamp, 5 Que. P.R. 307.

—Attachment after judgment—Amendment —Insolvency of defendant.]—(1) In a contestation of an attachment by the defendant, it is immaterial to the issue whether the original debtor, whose heirs have been condemned by judgment on the principal action, was solvent or not. (2) A paragraph struck out from a pleading upon an inscription in law, will not be reinstated by amendment at the trial. (3) A writ of attachment after judgment cannot be issued for costs without the consent of the attorneys in whose favor distraction of costs was granted. (4) The costs awarded upon a contestation of attachment maintained as far as costs are concerned, will be governed by the amount of the costs for which attachment was improperly issued.

Montreal Loan and Mortgage Co. v. Mathieu, 6 Que. P.R. 329 (Lynch, J.).

—Attachment before judgment—Petition to quash.]—The defendant's remedy by petition to quash is collateral to the regular methods of defence and must be strictly confined to the grounds permitted by Art. 919 C.P. The petition to quash cannot allege irregularities in the writ and endorsement, default to leave copy of affidavit and declaration, or the quality of the deponent, which are properly matters for exception to the form.

Canadian Pacific Railway v. Frappier, 6 Que. P.R. 186.

—Saisie-arrêt after judgment — Objection to seizure—Collusion—Prête-nom.]—Plaintiff, a creditor of the defendant against whom she had obtained a judgment issued under a writ of saisie-arrêt thereunder and seized property in possession of M. et al. making C. F. B. et al. parties. By the writ the tiers-saisie and mis-en-cause were directed to appear and disclose "what movable property was in possession of the tiers-saisie belonging to the defendant and what sum of money or other consideration she owed or would be obliged to pay to him." In a declaration attached to the writ, but not referred to therein, the plaintiff alleged that the mis-en-cause C. F. B. had acted in collusion with the defendant and as his prête-nom in certain transactions carried on by C. F. B. with some of the tiers-saisis in connection with which a sum of money had been placed in the hands of McL. et al., the other tiers-saisis. The conclusions of this declaration asked that the tiers-saisis be called upon to disclose "what amount they had or would have to pay in consequence of such transaction to the defendant really, but nominally to his son C. F. B.," and that the latter should be required to appear in order to admit that the debt was really due F. B. (defendant), of whom C. F. B. was only the prête-nom. C. F. B., by petition, moved to have the saisie-arrêt quashed as against him:—Held, that the plaintiff could not, through a writ of saisie-arrêt prevent the payment to the mis-en-cause C. F. B. of the amount which appeared due under the transactions set out by the plaintiff herself, but she should have proceeded against the said mis-en-cause either by action paulienne directe or by making him a party to the contestation on the declaration of the tiers-saisie. Held, also, that the mis-en-cause could, by petition only, demand that the writ of saisie-arrêt be quashed as against him.

Duckett v. Bayard, Q.R. 25 S.C. 150 (Sup. Ct.).

—Public officer — Salary—Exemption.]—The harbour master of Montreal, whose functions comprise the administration of a part of the public domain of the Crown and who acts in the general interest of commerce and navigation, should be considered a public official whose salary is non-seizable.

Cochrane v. McShane, Q.R. 24 S.C. 283 (Sup. Ct.).

—Seizure before judgment — Revendication.]—The owner of property seized before judgment as belonging to third parties can regain possession, by means of a saisie-revendication, from the claimant, the bailiff or the caretaker.

Corriveau v. Bosight, 6 Que. P.R. 136 (Lynch, J.).

—Action for wages—Arts. 6 and 29, C.C.] —Art. 955 C.P.Q.]—The right of saisie-conservatoire is governed by the law of the place where the seizure is made. It is not permitted to accompany a saisie-conservatoire with an action for wages by alleging that the defendant has ceased to do business in Ontario and Quebec, and withdrawn all his effects thereby depriving the plaintiff of his recourse.

Sexton v. Violett, 6 Que. P.R. 325 (Sup. Ct.).

—Seizure—Contestation.]—If a saisie-arrêt is taken in the name of the attorney distrazant of one of the parties to the action, it cannot be contested by the party himself.

Topley v. Irving, 6 Que. P.R. 223 (Mathieu, J.).

—Damages for personal injuries—Seizability of amounts awarded.]—Held (reversing the Court of Review and restoring Fortin, J.):—(1) That a claim for damages caused by an accident is not in the nature of an alimentary allowance. (2) Although such claim is undoubtedly a right exclusively attached to the person aggrieved, if said party chooses to institute suit to recover the same, the amount of the judgment obtained may be seized, even pendente lite.

Cochrane v. McShane, 6 Que. P.R. 465, 13 Que. K.B. 505.

—Alimony—Conservatory attachment.]—In an action in separation from bed and board, an affidavit of the wife who is separate as to property that without the benefit of a conservatory attachment she will lose her recourse in respect of alimony and of the donations made by the marriage contract, is insufficient under C.P. 955.

Gratton v. Desormiers, 7 Que. P.R. 86 (Davidson, J.).

—Dissolution of partnership—Conservatory attachment.] — Conservatory attachment does not lie in favor of a partner against his former partner, the partnership having been liquidated and bought by the latter.

Brunet v. Keegan, 7 Que. P. R. 75 (Curran, J.).

—Conservatory attachment—Wood cutter —C.C., 1994 c.]—The persons mentioned in the Article 1994 c. C.C., are not confined to these whose remuneration is fixed according to the time they work, but also includes all persons who engage to cut wood for so much a cord.

St. Onge v. Ross, 7 Que. P.R. 108 (Sir M. Tait, A.C.J.).

—After judgment—Default to contest—Discharge.]—The fact that the party seized has, since the declaration of the garnishee, taken suit against him, does not interrupt the latter's right to be discharged from seizure after lapse of the delay.

In re Banque Ville-Marie and Lemieux, 7 Que. P.R. 169 (Davidson, J.).

—Saisie conservatoire — Affidavit.] — The affidavit made on applying for a writ of saisie-conservatoire should be made by a party who would be entitled to make the like affidavit in the case of saisie-arrêt before judgment. The affidavit should be complete in itself and cannot be made so by the aid of the fiat (præcipe), writ or declaration.

Marchand v. Globensky, 7 Que. P.R. 94 (Sup. Ct.).

—Seizure of salaries of provincial officers —Insolvency—Distribution of moneys.]—If an employee of the Province of Quebec is insolvent, a seizing creditor will be allowed to have the other creditors called in and notified to file their claims.

Gagnon v. Rowan, 7 Que. P.R. 52 (Davidson, J.).

—Garnishment—New declaration—Denial of indebtedness—Inscription.] — Although the seizure may have been declared tenante, plaintiff is not entitled to inscribe for judgment on the garnishee's declaration where T.-S. states that he owes defendant nothing and is not ready to say what amount of certain monies in his first declaration stated to have been received from defendant's attorneys, is returnable to said attorneys

Baumar v. Carbonneau, 7 Que. P.R. 213, Davidson, J.

—Corporation—garnishee—Banking — C.P. 686.]—When in answer to an attachment in the hands of an incorporated bank, the bank makes its declaration by attorney, the attorney is not compelled to answer under Art. 686 C.P. as to whether the bank has certain shares in its possession in the name of a trustee, the revenue of which is payable to the debtor.

Brodeur v. MacTavish and Bank of Montreal, 7 Que. P.R. 235, Davidson, J.

—After judgment—Declaration of garnishee—Contestation—Delay.]—The seizing creditor will not be allowed to contest after the delays the declaration of a garnishee if he has shown no diligence in the proceeding.

Meloche v. Lalonde, 7 Que. P.R. 161 (Davidson, J.).

—Conservatory attachment—Absence of defendant—Insolvency—Sale of movables.]—A right of conservatory attachment arises when the defendant insolvent has left the country, and his wife has offered his goods for sale and claims a title thereupon.

Lefebvre v. Picard, 7 Que. P.R. 233 (Davidson, J.).

—Seizure after judgment—Salary—Insolvency.]—The creditor who has obtained judgment on a saisie-arrêt after judgment on the declaration of the tiers-saisi has a right, in preference to all other creditors, to the amount secured thereby, the judgment effecting a transfer and subrogation in his favor.—The allegation of insolvency of the defendant to be effective should be made in the cause before judgment even when it affects the salaries mentioned in pars. 10 and 11 of Art. 599 C.P.Q.

Mailloux v. Blackburn, Q.R. 27, S.C. 91 (Cir. Ct.).

—Saisie-arrêt—Summons—Jurisdiction of prothonotary.]—A tiers-saisi against whom judgment by default is improperly pronounced may demand, by means of an opposition to judgment that the judgment against him be quashed.—A tiers-saisi summoned to make his declaration by a writ which indicates neither the day nor the hour for making it should be deemed not to have been summoned, no default can be recorded against him and no condemnation for failure to declare can be pronounced.—Per Langelier, J.—The prothonotary has no jurisdiction to condemn a tiers-saisi against whom a default to declare has been established, and the Court itself cannot pronounce such condemnation during the long vacation.

Crépeau v. Tremblay, Q.R. 27 S.C. 99 (Ct. Rev.), affirming 27 S.C. 156.

—Saisie-arrêt before judgment—Affidavit.]—In an affidavit made on applying for a writ of saisie-arrêt before judgment the allegation that "the plaintiff really believes that without the benefit of a writ of saise-arrêt before judgment in the hands of third parties he will lose his debt" is sufficient and equivalent to the form given in Art. 895 C.P.Q., which says "that the plaintiff will thus be deprived of his recourse against the defendant." The affidavit need enunciate the reasons for the belief and the sources of information of the deponent only when such belief and information relate to the allegations of the departure and concealment of the defendant.

Bois v. Fels, Q.R. 27 S.C. 34 (Sup. Ct.).

—Tiers-saisi—Declaration—Costs—Art. 683 C.P.Q.]—When the tiers-saisi lives in another district from that in which the writ of saisie-arrêt he may go to the clerk of the Court of the latter district to make his declaration and he then has a right to include in his charge for expenses, his traveling and hotel fees and $1 for each day of his absence from his home—and this notwithstanding that if he made his declaration before the prothonotary of the Court where he lives the costs would be considerably less.

Blouin v. Perrault, Q.R. 25 S.C. 439 (Cir. Ct.).

—Saisie-arrêt after judgment—Declaration of tiers-saisi—Motion to reject.]—The debtor saisi is not in a position to demand that the declaration of a tiers-saisi be rejected on the ground that the necessary stamps have not been placed on it or that the tiers-saisi is not qualified to make it.

Montreal Loan & Mortgage Co. v. Heirs of Adolphe Mathieu, 7 Que. P.R. 84 (Sup. Ct.).

—Saisie-arrêt after judgment—Deposit—Stay of proceedings.]—The deposit by the party whose salary may be attached under 3 Ed. 7 c. 57, s. 1, prevents the issue of the writ of saisie-arrêt without the necessity of his giving notice of the deposit to his creditors.

Godin v. Hanagan, 7 Que. P.R. 6 (Sup. Ct.).

—Parties—Minor—Amendment.]—A trustee suing as such will not be allowed to amend by substituting himself personally as plaintiff, which would be opposed to the allegations in the affidavit on which the saisie-revendication had been issued and security for costs had been furnished. There can be no adjudication as to the ownership and possession of shares in a company which were seized in revendication when the shares were, at the time of the seizure, in possession of a third party.

Binmore v. Sovereign Bank of Canada, 7 Que. P.R. 171 (Sup. Ct.).

—Saisie-gagerié—Filing declaration—Preliminary exception.]—In a case of saisie-gagerié it is sufficient that the declaration is filed within three days from the date of service even if the writ is returnable and has been returned within two days from the time it was executed. The delay for the service of a preliminary ex-

ception where the plaintiff is described in the writ as separée de biens runs only from the date on which she filed her marriage contract establishing her right to sue in that capacity.

Burgess v. Bulletin du Travail, 6 Que. P.R. 442 (Sup. Ct.).

—**Execution of judgment—Attachment of wages—Art. 1147a C.P.Q.**]—Article 1147a of the Code of Civil Procedure has application only to attachments issued in the Circuit Court and cannot be invoked in respect of attachments in execution of Superior Court judgments.

Larochelle v. Lavoie et al., Q.R. 27 S.C. 534 (Sup. Ct.).

—**Saisie gagerie—Motion to dismiss—Sale—New proprietor.**]—A motion to dismiss the action and declare the saisie gagerie illegal because the plaintiff is no longer proprietor of the premises, will be rejected; even if the plaintiff has no lien on the furniture, it is no ground for dismissing the action.

Shippel v. Sayan, 7 Que. P.R. 429 (Pagnuelo, J.).

—**Execution—Attachment after judgment.**]—A defendant cannot oppose the execution of a judgment rendered against him by setting forth an attachment after judgment issued in his hands by a creditor of the plaintiff.

Warin v. de Werthemer, 7 Que. P.R. 433 (Doherty, J.).

—**Attachment before judgment—Exemption from seizure—Carter.**]—When a horse, carriage and harness, are the only ones of their several kinds which defendant, who is a carter, has for earning his livelihood, they will be exempt from attachment.

Butler v. Prevost, 7 Que. P.R. 465 (Davidson, J.).

—**Attachment before judgment—Affidavit—Reasons—Foreign domicile.**]—The mere fact of a person domiciled in a foreign country leaving the limits of this country does not indicate of itself an intention to defraud, even although said person may owe debts within this country.

Lemieux v. Le Cirque, 7 Que. P.R. 456 (C.R.).

—**Conservatory attachment — Foreclosure from pleading—Affidavit—Insufficiency of allegations.**]—Notwithstanding foreclosure from pleading to the merits having been obtained against him, a defendant has the right to demand that a conservatory attachment issued at the time of the institution of the action should be set aside. (2) A conservatory attachment can be taken only in the three cases mentioned in Art. 955 of the Code of Civil Procedure, and a creditor who has no special privilege upon any of the goods of the debtor cannot exercise such recourse.

Melancon v. Archambault, 7 Que. P.R. 474 (Robidoux, J.).

—**Attachment of debt—Declaration by garnishee—Contestation in forma pauperis—Exemptions from seizure.**]—A wife may be autnorized to contest the declaration of a garnishee, in forma pauperis, when the latter has declared that he has moneys in his hands for an alimentary pension.

Clermont v. Charest, 7 Que. P.R. 468 (Lavergne, J.).

— **Saisie-arrêt — Art. 1166 C. C. P.**] — The words "before the sale" in Article 1166 C.C.P. refer to the sale of all the goods seized and not to that of a single article seized elsewhere than at defendant's domicile.

Jarry v. Décarie, 8 Que. P.R. 370 (Fortin, J.).

—**Conveyance to son—Prohibition against alienation.**]—Property conveyed by parents to their son with a condition that it shall not be alienated is not subject to seizure.

Roberts v. Bergevin, Q.R. 16 K.B. 104.

—**Refusal to assign—Arts. 859, 931 (c) C.C.P.**]—A saisie-arrêt based on the fact that the defendant is a trader who has suspended payments and who has refused, although requested to make an assignment for benefit of his creditors, cannot be issued before the expiration of the second day following the demand for assignment.

Davies v. Deslongchamps, 8 Que. P.R. 387 (Mathieu, J.).

—**Saisie-arrêt—Judgment—Motion.**]—It is not by means of a motion that judgment is obtained on a contestation of saisie-arrêt after judgment, but by inscription according to the rules and delays of summary cases.

Beauchemin and Sons Co. v. Girouard, 8 Que. P.R. 294 (Bruneau, J.).

—**Saisie-arrêt—Issue of second writ—Costs of first—Rights of third party.**]—If a second saisie-arrêt, after judgment has been issued and served before the first has been set aside or any costs awarded thereon the defendant cannot obtain dismissal of such second writ because the costs of the first have not been paid to him. The right to the amount in the hands of the garnishee or its value can only be disputed on the contestation of his declaration; the defendant cannot set up the rights of a third party not in the cause to have the saisie-arrêt dismissed on the ground that he had transferred to such third party his right to the amount which the garnishee has declared he owes.

Coulombe v. Lavallée, 8 Que. P.R. 214 (Charbonneau, J.).

—Saisie-gagerie—Application to quash—Deposit.]—An application to quash a saisie-gagerie need not be accompanied by a deposit. To support objections to the seizure for irregularities it is necessary, not only to allege, but to prove, prejudice.

Coristine v. Dominion De Forest Wireless Telegraph Co., 8 Que. P.R. 428 (Fortin, J.).

—Saisie-arrêt.]—Article 1147a, C.C.P., contains a general provision and, notwithstanding the place given to it in the Code under the heading "Procedure before the Circuit Court" it applies to saisies-arrêts issued in execution of judgments of the Superior Court. Compare in the contrary sense Larochelle v. Lavoie, Q.R. 27 S.C. 534.

Levinoff v. Fournier, Q.R. 30 S.C. 416 (Sup. Ct.).

—Garnishment—Service—Foreign corporation.]—If at the time of issue of the writ of saisie-arrêt and service on the tierce saisie (a foreign company) the latter has property in the Province of Quebec and also an agent and an office where its principal books are kept, it can be properly served there.

William Skinner Mfg. Co. v. Vineberg, 8 Que. P.R. 107 (Pagnuelo, J.).

—Saisie-gagerie conservatoire—Service of affidavit.]—The saisie-gagerie conservatoire taken by a wife common as to property on property of the community is governed by the ordinary procedure in the matter of saisie-gagerie and the plaintiff is not bound to have service made within three days after service of the writ and declaration, of a copy of the affidavit fyled by her to procure the issue of the writ of saisie-gagerie conservatoire

Chartier v. Larivière, 8 Que. P.R. 131 (De Lorimier, J.).

—Saisie-arrêt—Service—Foreign corporation.]—If service of a writ of saisie-arrêt for seizure of property in possession of a foreign corporation which has no place of business and no agent is irregular and illegal the tierce-saisi has an interest sufficient to entitle it to take proceedings to set aside such service by exception to the form.

Lachapelle v. Gagné, 8 Que. P.R. 163 (Lafontaine, J.).

—Salary—Seizure—Choir master.]—The salary of a choir master is not subject to seizure.

Lefebvre v. Drolet, 8 Que. P.R. 209 (Fortin, J.).

—Life rent.]—Every life rent provided for by onerous contract is subject to the rights of creditors. When a father in a deed of sale to his son imposes on the latter the obligation to pay a fixed sum annually the parties cannot afterwards agree that such payment may be made in kind instead of in specie. The son who is served with a saisie-arrêt after judgment on moneys of his father in his hands will be condemned to pay to the plaintiff the amount due and representing such total annual payment, but such payment can only be enforced at the date mentioned in the said deed of sale.

Lamoureux v. Blanchard, 8 Que. P.R 317 (Demers, J.).

—Attachment after judgment—Declaration de novo.]—When a corporation garnishee has made declaration that it is not aware that it has any money belonging to the debtor, and this declaration having been contested the testamentary executor has intervened therein, the garnishee cannot be called upon to declare de novo while the contestation is pending.

Brodeur v. McTavish, 8 Que. P.R. 219.

—Affidavit by plaintiff's agent.]—An attachment upon an affidavit stating that the deponent is the plaintiffs' agent will not be set aside because deponent is not styled the "legal attorney" of plaintiff in the words of Art. 933 C.P.

Skinner Mfg. Co. v. Vineberg, 8 Que. P.R. 201.

—Attachment after judgment—Production of books, etc., by garnishee.]—The seizing creditor cannot obtain an order compelling a garnishee, especially when the latter declares that he does not owe, to produce books or prepare statements; the creditor's recourse is by way of contestation.

Baumar v. Charbonneau, 8 Que. P.R. 333.

—Attachment before judgment—Grounds of recourse to the process.]—A statement made ab irato by a party of affluent means that he will within twenty-four hours sell all the property he has and go to the States affords of itself no sufficient ground for proceeding against him by attachment before judgment.

Daigle v. Dussault, 30 Que. S.C. 215 (McCorkill, J.).

—Attachment after judgment—Service of contestation to attorneys—Married woman a trader—Authorization.]—(1) When a garnishee has appeared by attorney, a contestation of his declaration is regularly served upon the said attorney. (2) When the wife garnishee is separate as to property, is a public trader and the matters in dispute are those of her business, she does not require the authorization of her husband to appear in judicial proceedings.

Frank v. Lafrance, 8 Que. P.R. 305.

—Seizure of salaries and wages—Default to state the nature and place of debtor's occupation.]—The writ of saisie-arrêt must state the nature and place of defendant's occupation; these formalities with respect to the seizure of salaries and wages are imperative.

Mason v. Armstrong, 8 Que. P.R. 351.

—Attachment before judgment—Affidavit —Foreign residence.]—(1) The departure, from the Province of Quebec, of a person domiciled and resident in the United States and who has contracted a debt in the province, does not, in the absence of evidence of special intention to defraud, constitute a departure with intent to defraud. (2) The departure, from the province, of the actors and travelling manager of a theatrical organization, with the scenery, etc., of the company, cannot be said to be a departure of the company.

Boulet v. Mittenthal Bros. Amusement Company, 8 Que. P.R. 286.

—Attachment before judgment.]—If a defendant has been discharged by judgment from an attachment before judgment, the tiers-saisi is at the same time time relieved from the seizure made in his hands; a motion by the tiers-saisi for a discharge will consequently be dismissed, but without costs, if plaintiff did not appear to contest the same.

Holmes v. Woodworth, 9 Que. P.R. 327.

—Attachment before judgment—Affidavit —Sufficiency.]—A writ of attachment before judgment will be quashed if the affidavit does not disclose, (1) that the indebtedness is personal, (2) that the acts complained of were committed with the intent to defraud defendant's creditors in general and plaintiff in particular, (3) that a demand of assignment was ever served upon defendant, or that he refused to make such assignment,—even if said affidavit sufficiently discloses the fact that defendant is a trader

Gagnon v. The Penticost Lumber Co., 10 Que. P.R. 29.

—Attachment before judgment—Petition to quash—Sale of movables.] — An attachment before judgment will not lie for the balance due on a sale of movables, because defendant had re-sold these effects to a third party, if said re-sale was cancelled long before the taking of the writ of attachment, if the defendant has offered to cancel the purchase and to restore the effects to plaintiff, and if the plaintiff who is separated from bed and board from her husband has not been authorized for the purposes of said sale

Tetreault v. Bazinet, 9 Que. P.R. 293.

—Garnishment—Declaration of non indebitatus by garnishee.]—When a garnishee declares that he is not indebted to the judgment debtor, although questions may be put to him tending to prove the contrary, he is not to be considered as an ordinary witness, or as a party examined on discovery. The Court will not therefore order him to produce accounts, books of account and correspondence. The proper course for the seizing creditor is to contest the declaration and to proceed to trial upon an issue joined.

Baumar v. Charbonneau, 32 Que. S.C. 219.

—Debtor's privilege—Personal right.]—The privilege given to a debtor by Art. 1147a C.P.C. is a right exclusively attached to his person and his creditors cannot exercise it for him. This privilege can only be exercised by a judgment debtor under a judgment of the Circuit Court and the creditor who has obtained judgment in the Superior Court may proceed by saisie-arrêt although the debtor has complied with the provisions of Art. 1147a C.P.C.

Larochelle v. Lavoie, Q.R. 31 S.C. 317 (Sup. Ct.).

—Exemption from seizure—Damages when not alimentary.]—Exemption from seizure is a law of exception since at common law the property of the debtor is the security of his creditors. Laws of exception cannot be extended. Therefore, a sum awarded as damages but not for maintenance (à titre d'aliments) may be seized and the Courts cannot give it an immunity which the law does not accord.

Dorval v. Corporation of Levis, Q.R. 33 S.C. 184 (Sup. Ct.).

—Garnishment—Attachment of wages.]—Art. 147a C.P. which forbids further attachment of wages when a declaration and deposit are made as therein provided, applies to attachments by garnishment in the Superior Court, as well as in the Circuit Court.

Mace v. Gardner, 30 Que. S.C. 520.

—Conservatory attachment—Affidavit stating grounds of belief.]—An affidavit founded upon belief to support a conservatory seizure is insufficient if it does not state the deponent's grounds of belief.

Robinson v. Gore, 9 Que. P.R. 344.

— Saisie-arret after judgment — Irregular discharge by plaintiff.]—(1) A tiers-saisi is entitled to be discharged from a saisie-arret on lapse of the delays for contestation of his declaration, even if a discharge of said seizure was put of record by plaintiff, and which did not include costs and was not served on said tiers-saisi. (2) A defendant is similarly entitled to be discharged from a saisie-arret, although a discharge was put on record by plaintiff, but

did not include costs and was served on defendant on the same day and between the same hours as defendant's motion to be relieved from said seizure.

Robertson v. Honan, 9 Que. P.R. 283.

—Declaration—Fraudulent deed—Deposit.] —When a party in contesting the declaration of a tiers-saisi asks that a deed of sale between the defendant and the tiers-saisi be declared fraudulent and be set aside, and that the tiers-saisi be ordered to deposit in Court the amount which represents the value of the property sold, the Court should not only declare the contestation well-founded but should, moreover, order such deposit to be made, or, in default thereof, that the tiers-saisi be personally condemned to pay such sum.

Beaudry v. Fontaine, 9 Que. P.R. 47 (Ct. Rev.).

Dies non.—Declaration of a tiers-saisi.] —A declaration of a tiers-saisi which is made and sworn on a legal holiday is null and void and will be rejected from the record on motion to that effect.

Rattray v. Arthur, 9 Que. P.R. 239.

—Conservatory attachment—Dissolution of partnership—Right of survivor to purchase stock.]—A conservatory attachment will lie in favour of the surviving partner when he has the first option of purchasing the stock of his deceased partner, such covenant vesting in each of the contracting parties a contingent residuary interest in the said stock.

Kuppenheimer v. MacGowan, 9 Que. P.R. 251.

—Saisie-arrêt after judgment—Waiver of declaration.]—If the tiers-saisi has not made the declaration required by law because it was dispensed with by the plaintiff the defendant, nevertheless, has a right to demand that the saisie-arret be dismissed with costs against the plaintiff.

Robertson v. Honan, 9 Que. P.R. 353.

—Purchase price—Delay to pay—Saisie-arret.]—(1) A defendant is entitled to plead any payment made before the transfer of his debt and which would tend to diminish his original indebtedness in respect of the plaintiff. (2) The delay given to the purchaser to pay the balance of the price of sale does not run, if this amount is seized by a third party and the seizure is still pending. If sued he is entitled to plead these special facts.

Tammaro v. Red Cross Macaroni Co., 11 Que. P.R. 71.

—Saisie-arrêt after judgment.]—The inscription en droit is a defence on the merits to a proceeding based on certain facts when such facts are insufficient in law to justify the proceeding. The affidavit for saisie-arrêt after judgment is not a proceeding which can be attached by inscription en droit; it is only a formality required by law to justify the exercise of an exceptional remedy and the matters alleged in it cannot be contended by a plea en droit.

Prévost v. Canadian Society of Arts, 10 Que. P.R. 379.

—Attachment and sale of hypothecary debts.]—(1) A creditor, who causes an hypothecary debt due to his debtor to be seized by writ of attachment, is a third party, within the meaning of Art. 1571 C.C., as regards the buyer or assignee of the debt seized. (2) Property under seizure, whether corporeal or incorporeal, is unassignable or inalienable, as regards the seizing creditor and hence, the assignee of a debt before seizure thereof, cannot, after it has been made, perfect his title by signification and become "a subsequent transferee who has conformed to the requirements of Art. 2127 C.C." (3) The words "every conveyance, or transfer, whether voluntary or judicial," in Art. 2127 C.C., do not apply to the seizure of debts by writ of attachment. To make them do so would be in direct violation of Art. 1147 C.C. (4) As a consequence of the above rulings, the assignment of a debt which has not been signified to the debtor, is of no effect and cannot be set up against a creditor who causes the debt to be seized by writ of attachment.

Pinsonnault v. Coursol, 18 Que. K.B. 200, affirming Coursol v. Dubé, 33 Que. S.C. 429.

—Saisie-conservatoire—Deposit of money—Affidavit.]—One who regularly deposits sums of money with a financial company should, in his affidavit for a saisie-conservatorie, show an obligation on the part of the company to preserve it in specie, otherwise he has no right which can be conserved by a saisie-conservatorie.

Prévost v. Canadian Society of Arts, 10 Que. P.R. 349.

—Saisie-conservatoire—Affidavit.] — When the plaintiff in his affidavit for a saisie-conservatoire alleges that the defendant is indebted to him in a certain amount for balance of salary, and that he had a lien therefor on moveables of the defendant of which he had been deprived by the latter's act, an exception to the form alleging irregularities in the writ and declaration will be dismissed.

Gladu v. Hurtubise, 10 Que. P.R. 123.

— Registrar — Seizure of salary — Exemption.]—The expression "every such registrar" in Art. 565b R.S.Q. (57 Vict. c. 41) includes the deputy registrar and, therefore, the salary of the latter as well as that

of the registrar, cannot be attached under execution.

Garand v. Mancotel, Q.R. 18 K.B. 325.

—Attachment for rent—Delays—Holidays.] —(1) In a case of attachment for rent, if no attachment is made because the defendant has paid the amount due between the issue and service of the writ, plaintiff is not deprived of his right to have the copy of the declaration served upon the defendant, or deposited in the prothonotary's office, within the three days which follow the service of the writ. (2) In an action in ejectment, if the second day following the service of the writ is a Saturday, the writ may be returned into Court, and the copy of declaration deposited, on the following Monday.

Lebeuf v. McGlynn, 10 Que. P.R. 380.

—Seizure before judgment—Petition to Quash.]—A petition to quash a seizure before judgment, en mains tierces founded on the falsity of the allegation of secretion, need not be made with the delay to plead.

Dubuc v. Delisle, 10 Que. P.R. 382.

— Conservatory attachment — Seizure of movables — Liability of guardian — Discharge of guardian.]—A guardian to a seizure of movables is discharged only by the judicial sale consequent upon the seizure, by the consent of all the seizing parties, or by a judicial order. Lapse of time no longer affords relief from liability for the things in his custody.

Howard v. Hefferman, 34 Que. S.C. 524.

—Saisie-arrêt before judgment—Petition to set aside.]—It is not necessary for the petition to set aside a saisie-arrêt before judgment to be supported by affidavit, such petition being in the nature of a defence.

Union Brewery v. Christin, 10 Que. P.R. 537.

—Saisie-arrêt after judgment.]—When the tiers-saisi deposits in Court a certain sum declaring that he did so pursuant to an agreement with the plaintiff the latter who denies the making of such agreement cannot compel the tiers-saisi to make a fresh declaration, but can only contest the one already made.

McNally v. Harcourt, 10 Que. P.R. 434.

—Of person.]—See ARREST.

Eastern Provinces.

Income from trust fund—Assignment of fund and income—N.B. Garnishee Act, 45 Vict. c. 17.]—An attaching order under the Act, 45 Vict., c. 17, will not lie against the income of a trust fund, unless there are trust moneys actually in the hands of the trustees at the time the order is served; nor will an attaching order operate upon debts of which the judgment debtor has divested himself by assignment, even though the assignment may be void as against creditors under the statute of 13 Eliz., c. 5.

Ex parte Black, 34 N.B.R. 638.

—Garnishee process—Money held for a specific purpose—Trust.]—A sum of $800 was deposited in a bank by T. G. to the credit of A. G. for the specific purpose of satisfying a distress warrant for $750 levied against A. G. by S. which warrant T. G. had agreed with S. to pay:—Held, the $800 was held by A. G. in trust and that no part of that sum was liable to attachment by his judgment creditor.

The King v. McLatchy; Ex parte Gorman, 39 N.B.R. 374.

—Attachment of debts—Bank Official—Service — Priority — Order IX., rule 8.] —A garnishing summons had been served on the Bank of Nova Scotia by two creditors of an absconding debtor. One was served on the president and secretary of the bank at the head office; the other had previously served a summons on the manager of the branch of the bank in which the money of the absconding debtor was deposited, and he subsequently served the president:—Held, that the first service on the president at the head office must have priority.

Kinsman v. Onderdonk, 38 C.L.J. 692, Townshend, J. (N.S.).

—Interest in mines—Unregistered transfer before attachment.]—

Clish v. Baltimore-Nova Scotia Mining Co., 1 E.L.R. 235 (N.S.).

—Absent Debtor Act, P.E.I.—Practice.]—

Hewitt v. Gray, 7 E.L.R. 355.

Western Provinces.

Issue—Onus of proof—Transfer under seal—Estoppel—Fraudulent conveyance—Vendor's lien—Execution—Priorities—Subrogation.]—A transfer of land had been made by the judgment debtor to the garnishee, and the consideration expressed being a certain sum, the receipt whereof was thereby acknowledged; the transfer was under seal; the oral testimony—that only of the parties to the transfer—was to the effect that the transfer was in fact made in settlement of a debt owing by the transferror to the transferree. A certificate of ownership had issued, pursuant to the transfer, which, however, was marked subject to an execution issued and registered after the execution of the transfer. The transferee afterwards paid the amount of this execution. On an issue, in which the

judgment creditor affirmed, and the garnishee denied, that at the date of the service of the garnishee summons there was a debt due or accruing due from the garnishee to the judgment debtor:—Held, per Richardson, Rouleau and McGuire, JJ., (1) that the onus was on the judgment creditor to prove the existence of the indebtedness and the evidence failed to prove it. (2) Had the evidence established that the transfer was really voluntary, or made for the purpose of defeating creditors, it would at most, result in setting aside the sale, and so defeat the claim that a debt existed from the transferree to the transferror.

Genge v. Wachter, 4 Terr. L.R. 122.

—Money in Court—Setting aside garnishee.] —Money in the hands of the Clerk of the Court is not attachable by garnishee process.

McMillan v. Kaake, 6 Terr. L.R. 448.

—Money placed with returning officer as deposit.]—The defendant was a candidate for election as a member of the Legislative Assembly, and under the election laws in force the sum of $100 had to be deposited with the returning officer to be forfeited under certain conditions, but to be returned in the event of the candidate's election. The garnishee was the returning officer, and one McDonald on the defendant's behalf advanced the required deposit from his own funds. Upon the defendant being declared elected, the plaintiff garnisheed the deposit:—Held, that service of a garnishee summons will bind only so much as the defendant can honestly deal with without prejudicing the rights of third parties, and that consequently the money in the hands of the garnishee, not being such as the defendant could honestly deal with, was not attachable.

Creagh v. Sutherland, 3 Terr. L.R. 303.

—Promissory note given by garnishee to defendant—Whether attached.]—The plaintiff sought by means of garnishee process to attach the moneys payable under an undue promissory note given by the garnishee to the defendant:—Held, that inasmuch as it was open to the plaintiff to seize the note under execution, and as the remedy provided by garnishee process was intended to secure to judgment creditors what could not be reached by execution, the promissory note was not garnishable.

Simpson v. Phillips, 3 Terr. L.R. 385.

—Attachment of debts—Garnishee paying into Court.]—A garnishee who pays money into Court must pay in the amount of his whole indebtedness to the defendant. The form of judgment and execution against a garnishee who does not admit the amount of his liability is to levy the debt due from the garnishee to the principal debtor or so much thereof as will satisfy the judgment against the principal debtor.

Calder v. Mieklejohn, 3 Terr. L.R. 407.

—Attachment of debts—Garnishee summons —Affidavit sworn before action begun.]—Although, under Rule 384, a garnishee summons cannot issue until after an action has been begun, the affidavit upon which the summons is based may be sworn before the commencement of the action. Marcy v. Pierce, 4 Terr. L.R. 186, followed. The affidavit need not state the grounds of the deponent's belief; it is sufficient if it follows the Rule—the deponent swearing that, to the best of his information and belief, the proposed garnishee is indebted to the defendant. Salander v. Jensen, 6 W.L.R. 401, not followed.

Stewart and Matthews Co. v. Ross, 15 W.L.R. 425 (Sask.).

—Attachment of goods—Affidavit to obtain order—Disclosure of relevant facts—Application to set aside order—Additional evidence to support order—King's Bench Act, Rules 811, 813.]—Application to set aside an order for attachment of defendant's personal property granted ex parte under Rule 811 of The King's Bench Act. The affidavit on which the order had been obtained showed as the grounds of the plaintiff's belief in the fraudulent intent of defendant to delay, defeat or defraud her creditors only, (1) that the defendant had sold her real estate and that the plaintiff was informed of such sale by a person who was present at the sale, and (2) that the plaintiff had good reason to believe and verily believed that defendant was about to assign, transfer and dispose of her personal property, effects and credits with intent to delay, defeat or defraud her creditors, and that he was so informed by an auctioneer to whom the defendant applied to purchase the said goods and to pay her the proceeds over and above a certain chattel mortgage, and to whom the defendant had stated that it was her intention to leave the province as soon as the said goods should be disposed of:—Held, that these statements in themselves did not show sufficient grounds from which to infer fraudulent intent on defendant's part. On the application to set aside the order plaintiff filed a new affidavit setting forth a number of additional facts which, together with what had been shown before, would have been sufficient in the opinion of the Judge to found an order for an attachment, but at the same time disclosing that he held security from defendant for part of his claim and that defendant, prior to the issue of the attachment, had offered to pay a part of the debt for a release of the security. Held, (1) that the new evidence given by plaintiff could not be considered with the view of strengthening his case; (2) that, following the practice on motions for injunctions, the non-disclosure by plaintiff of material facts suppressed or omitted either intentionally or by mistake is good cause for setting aside an order for attachment, even though

the plaintiff would have been entitled to the order on a full statement of the facts.

Newton v. Bergman, 13 Man. R. 563, Richards, J. (Affirmed by the Full Court.)

— Garnishee — Money paid into Court — Charging order — Priorities.] — Priorities amongst claimants to moneys paid into a County Court under garnishee process settled by Henderson, C.J., in favour of parties who obtained first charging order.

Wilson Bros. v. Robertson and Rolston, 9 B.C.R. 26.

—Garnishee order—Claimant—Garnishee proceedings—Practice.]—Where the interested parties in garnishee proceedings agree that a County Judge may decide the matter in a summary way, he is in effect an arbitrator, and no appeal lies from his decision. Eade v. Winser & Son (1878), 47 L.J., C.P. 584, followed. Per Drake, J., on appeal: (1) The affidavit leading to a garnishee summons must verify the plaintiff's cause of action and a garnishee is entitled to question the validity of the proceedings at the hearing. (2) The defect in the affidavit was an irregularity only, and payment into Court by the garnishees was a waiver by them of their right to object. (3) The plaintiff may specify in one affidavit several debts proposed to be garnished.

Harris v. Harris, 8 B.C.R. 307.

—Garnishee summons—Salary — "Due or accruing due."]—Where the salary of an employee was a fixed amount per month, payable at the end of the month, Held, that a garnishee summons served on the last day of the month did not bind the current month's salary, inasmuch as no part of the amount was due, that is, recoverable by the employee, till the last day of the month had expired, nor was any part accruing due, inasmuch as the liability of the employer to pay was contingent upon the completion of the month's service by the employee.

Main Bros. v. McInnes, 4 Terr. L.R. 517.

—Garnishee summons based on default summons.]—A garnishee summons in a B.C. County Court may be issued based on a default summons as well as on an ordinary summons.

Jowett v. Watts, 10 B.C.R. 172.

— "Debt or liquidated demand."] — A claim upon a covenant in a mortgage given to secure the proceeds of the sale of horses less a fixed commission is a "debt or liquidated demand," under Terr. Rule 384, although an inquiry may be necessary to ascertain the amount.

Stimson v. Hamilton, 1 W.L.R. 20, Scott, J.

—Attachment of debts — Garnishee — Exemptions—Proceeds of exempted property —Voluntary sale by debtor.]—The proceeds of chattels, exempt from seizure and sale under execution, voluntarily sold by a debtor, are attachable.

Slater v. Rodgers, 2 Terr. L.R. 310, Richardson, J.

—Attachment of Debts Act, 1904—"District Registrar."]—In an action in the Supreme Court for an account of certain rents and profits, plaintiff obtained an order attaching all debts, obligations and liabilities payable or accruing due from the garnishee to the defendant, to answer a judgment to be recovered by the plaintiff against the defendant up to the amount of $6,245. The order was made and issued by the Deputy District Registrar at Vancouver, acting under the provisions of section 3 of the Attachment of Debts Act, 1904. Defendant applied to Morrison, J., in Chambers, to set aside this order, but the summons was dismissed, and defendant appealed:—Held, by the Full Court, that as the term "District Registrar" is expressly defined by the Attachment of Debts Act, 1904, to mean District Registrar of the Supreme Court, therefore District Registrars are personae designatae, and it was not intended to confer on their deputies the power to make attaching orders; that the provisions of the Interpretation Act do not apply, as a general interpretation statute cannot be invoked to control the plain intendment of a special statute. Per Irving, J. The Attachment of Debts Act, 1904, contemplates the attachment of a definite, ascertained amount, and a mortgagor suing for an account of moneys received by a mortgagee in possession cannot make the affidavit required by the statute as to the "actual amount of the debt."

Richards v. Wood, 12 B.C.R. 182.

—Attachment of debts—Judgment creditor —Judgment obtained in Supreme Court, sought to be attached in County Court—Jurisdiction.]—On proceedings under the Attachment of Debts Act in the County Court, to attach a debt due on a judgment obtained in the Supreme Court, an order absolute attaching the said debt was made. On an application for a writ of prohibition to the County Court Judge, prohibiting him from dealing with said Supreme Court judgment:—Held, that where the claim sought to be attached is not one upon which the County Court would have jurisdiction to adjudicate in a suit brought to enforce it, the machinery of the Attachment of Debts Act cannot be applied.

Belyea v. Williams, 12 B.C.R. 226 (Duff, J.).

—Garnishee summons—Defect in affidavit —Irregularity.]—Held (1) that the affidavit of an advocate, which on its face showed that he had no personal knowledge of the facts, and which did not contain a

positive statement of an indebtedness by defendant to plaintiff, is not a sufficient affidavit upon which to issue a garnishee summons under Rule 384, and a garnishee summons so issued was set aside. (2) That a garnishee summons so issued cannot be treated as a mere irregularity so as to be waived under Rule 539 by taking fresh steps.

Rumley v. Saxauer, 6 Terr. L.R. 63.

—Absconding debtor — "Trader" and "manufacturer."]—(1) The provisions of sections 200 to 206 of the County Courts Act, R.S.M. 1902, c. 38, respecting the ratable distribution of the proceeds of the sale of the goods of a trader amongst all his execution creditors, do not repeal by implication the earlier legislation to be found in sections 252 and 253 of the same Act, and do not apply to the case of the goods of an absconding debtor seized under a writ of atachment and afterwards sold under execution, so that in the latter case, although the debtor may be a trader, no creditor can share in the proceeds of the sale of the goods who has not sued out an attachment within the time allowed. (2) A general statute does not repeal an earlier special enactment by mere implication. Quaere: Whether a baker is a manufacturer within the meaning of sub-s. (c) of s. 200. Semble: A baker would not be deemed to be a trader within s. 200 (a) merely because, as incidental to his baking business, he bought and sold candies, cakes and confectionery to a small extent.

Robinson v. Graham, 16 Man. R. 69 (Dubue, C.J., and Mathers, J.).

—Garnishment—Purchaser of land under contract—Subsequent assignment of agreement to third party—Order as to payments still to fall due.]—(1) A purchaser of land from a defendant, under an agreement providing for payment by successive annual instalments, cannot escape liability under a garnishing order, served upon him in a suit by a creditor of the defendant, by subsequently assigning his interest in the land to another person and procuring the latter to assume liability for the remaining instalments; and, although none of the instalments are due when the order is served, yet they are all covered by it to the extent necessary to satisfy the plaintiff's claim. (2) After the maturity of one of the instalments, the plaintiff is entitled, under Rule 764 of the King's Bench Act, to an order for payment not only of the overdue instalment, but also, when due, of those still to fall due, until the judgment is satisfied.

Smith v. Van Buren, 17 Man. R. 49.

—Garnishee summons—Affidavit—Irregularity.]—A garnishee summons and subsequent proceedings founded thereon were set aside because the affidavits on which the summons was granted did not comply with the provisions of Rule 384.

Imperial Bank v. Miller, 13 W.L.R. 260.

—Attachment of debts—Purchase money of land.]—The defendants purchased land from R., and owed him $1,000 on the purchase, for which sum they had given a cheque to a bank manager, to hold at their order until they ascertained that R. had a good title to the land. On the 24th March, 1909, the plaintiff, a creditor of R., served on the defendants an order attaching the sum of $1,000 as due from them to R. At this date the cheque was still in the hands of the bank manager, and was subject to the defendants' order, and the sum of $1,000, though due to R., was not yet payable by him:—Held, that the debt was garnishable, and was attached by the service on the 24th March.

Gross v. Mihm, 15 W.L.R. 172 (Sask.)

—Attachment of debts—Garnishee summons—Affidavit—Defective summons.]—Rule 384 provides that a garnishee summons "may be issued by the clerk, upon the plaintiff or judgment creditor, his advocate or agent, filing an affidavit" proving the nature of the claim, the indebtedness of the garnishee, etc.:—Held, that to comply with the Rule the affidavit must be made by the plaintiff or his advocate or agent, and the affidavit of a student-at-law in the office of the plaintiff's solicitor is not a foundation for a summons. Held, also, that this is not a defect which can be cured under Rule 538. Semble, that another defect in the affidavit, viz., that it was not intituled in the cause, as required by Rule 294, might be cured under 538. Held, also, that the defendant was entitled to have the garnishee summons set aside, upon the first objection, although he himself, in his summons to set aside the garnishee summons, had not set out his objections, as required by Rule 540. That Rule refers only to motions to set aside for irregularity; and it is doubtful whether it applies to a defect which is more than an irregularity; but, in any event, the purpose of the Rule is simply to give notice to the opposite party, and it is within the terms of Rule 538; and, if no prejudice has been caused by the failure to comply with the Rule, the motion should not be defeated thereby; and in this case there was no suggestion that the plaintiff had been in any way prejudiced by the defendant not having set out the objections in the summons, or that he was unaware of what the objections were. Anlaby v. Prœtorius, 20 Q.B.D. 764, and Saskatchewan Land and Homestead Co. v. Leadlay, 6 Terr. L.R. 18, 82, followed.

Mohr v. Parks, 15 W.L.R. 250 (Alta.).

—Attachment of property—Criminal conversation—Claim for damages.]—In an action for $5,000 damages for enticing away the plaintiff's wife and for criminal con-

versation, the plaintiff obtained an order directing the attachment of certain property of the defendant. By the group of rules governing attachment proceedings, Rules 813-858 of the King's Bench Act, the process is not declared to be available in every case where money is demanded. By Rule 815 property "may be attached for the payment of a debt or the satisfaction of a cause of action arising from legal liability:" and Rule 817 requires an affidavit stating, inter alia, that the defendant is legally liable to the plaintiff in damages in the sum claimed in the action, "after making all proper and just set-offs, allowances, and discounts:"—Held, that the procedure, if applicable at all to an action of tort, was not applicable to an action such as this, where the damages are not given merely by way of restitution, but may be of an exemplary or punitive nature; and the attaching order was set aside.

Hime v. Coulthard, 15 W.L.R. 288 (Man.).

—South African land warrant—Attachment.]—1. A warrant or certificate granted under 7 and 8 Edw. VII. c. 67 (D.) to a volunteer as a reward for services in the South African war and entitling him to select and obtain a grant of land from the Dominion Government, is in the nature of a document of title to land, and cannot therefore, be seized under a writ of attachment from a County Court.

Inter-Ocean Real Estate Company v. White, 20 Man. R. 67.

—Attachment of debts—Garnishee summons before judgment—Affidavit.]—Before judgment, the affidavit of one of the plaintiff's solicitors was filed, in which he swore that he had a full and personal knowledge of the matters deposed to, and that the two defendants, and each of them, were justly and truly indebted to the plaintiff in a named sum, being the amount due to the plaintiff for principal money and interest on a chattel mortgage, and that he (the deponent) was informed and verily believed that each of the proposed garnishees (named persons) was justly and truly indebted to the defendant M., and that each was within the jurisdiction of the Court. By the statement of claim the plaintiff alleged that each of the defendants covenanted to pay the plaintiff, under a certain chattel mortgage, the amount mentioned in the affidavit:—Held, that the affidavit was sufficient in point of form to sustain garnishee summonses issued thereon; there was nothing in the Rules which required a præcipe to be filed; the requirements of Rule 384 were sufficiently complied with; Rule 295, which requires the grounds of belief to be stated in affidavits used on interlocutory motions, could have no application, because the affidavit was not for use on such a motion, and because Rule 384 itself only requires it to be "to the best of the deponent's belief," without more; and the words used expressed all that is expressed in those words. Held, also, assuming that the liability of the defendants upon the covenant in a chattel mortgage was a joint one, that there was no reason why a debt due to one of two joint debtors might not be attached.

Nohren v. Auten, 15 W.L.R. 417 (Alta.).

—Attaching fund in Court—Stop order.]—In Alberta, where execution creditors seek to realize from a fund in Court a charging order is unnecessary and inappropriate. The proper practice is to obtain a stop order and then to apply for transfer of the fund to the sheriff to be distributed by him under the Creditors' Relief Ordinance. The plaintiffs applied for and obtained an order charging the defendants interested in the fund in Court to the credit of the cause of York v. Inglis with payment of the plaintiffs' claim. Subsequently an order was made in another action, McGibbon v. Inglis, charging the same fund with payment of the other claim:—Held, that the charging orders under the circumstances had the same effect as stop orders, and need not be made absolute. Directions were given for taxation and payment of the costs of both applicants out of the fund in Court to the credit of York v. Inglis after York's claim had been fully satisfied and for transfer of the balance to the sheriff for distribution under the Creditors' Relief Ordinance.

McDougall v. Inglis, 2 Alta. R. 342.

—Jurisdiction—Situs of debt—"Assets in the Territories."]—"Assets in the Territories," used in s.-s. 9 of Rule 18 of the Judicature Ordinance, in order to confer jurisdiction on the Court, must be such class or nature of assets as to which a real locality can be assigned, and should not be extended to include assets which have a mere theoretical or conventional locality. A debt owing by a person residing and domiciled in Alberta, to a person residing and domiciled in Ontario, has not any real situs in Alberta, and is not such "asset in the Territories."

Love v. Bell Furniture Co., 2 Alta. R. 209.

—Judgment against garnishee—Summons to set aside.]—The garnishee not having, so far as the record shewed, disputed his liability to the defendant, an order was made ex parte giving leave to the plaintiff to enter judgment and issue execution against the garnishee, which was done. The garnishee then moved to set aside the order on the ground that it was made ex parte, and also on the ground that he had a good defence on the merits. These grounds were not, however, set out in the summons:—Held, that an order for judgment against the garnishee in default of appearance may be made ex parte. 2. The grounds of the alleged irregularity not having been stated in the summons, the application should not be granted on that ground. 3. The garnishee

having shown that he had what might be good ground for disputing his indebtedness, and having accounted for his apparent default, should be allowed to dispute his liability. 4. The plaintiff should not be prejudiced by reason of the mistake of the clerk of the Court in omitting to file with the record a letter written by the garnishee disputing his liability, and that the garnishee must therefore pay the costs of the judgment and of the application to secure the same.

Hunter v. Collings, 2 Sask. R. 207.

—Attachments of debts—Building contract —Failure of contractor to complete work—Debt.]—Defendant had a contract for the erection of a school building for the garnishees, but abandoned the work before completion. The contract provided that the proprietor might in such a case take possession of the premises and complete the work and charge cost against amount due the contractor. It was also provided that the final estimate of 20 per cent. should not be payable until all liens had been paid and defective work remedied. The plaintiff, after the defendant abandoned the work, garnisheed the balance due him under the contract. After the garnishees had paid all liens and completed the building, most of which payments were made after service of the garnishee, there was no surplus remaining:—Held, that the true test as to whether or not there is an attachable debt is to ascertain whether anything has to be done by the judgment debtor as a condition precedent to payment, and as the condition precedent to the payment of the amount due when the garnishee was served was the completion of the building, which was never completed by the contractor, there was not any attachable debt due from the garnishee to the judgment debtor.

Heward Milling Co. v. Barrett, 2 Sask. R. 210.

—Garnishee proceedings — Fire insurance money—When "debt" attachable.]—(1) The liability of a fire insurance company to indemnify the assured against loss by fire is not a debt attachable by garnishee within the meaning of Rule 385, at least until after the fact of liability and the amount of same are ascertained or agreed. (2) The non-appearance of a fire insurance company to a garnishee summons is not such an admission of liability as will convert the claim into a debt. (3) The liquidator of a company defendant is a person "claiming to be interested in the moneys attached" within the meaning of Rule 386 of the Judicature Ordinance, and as such may apply to set aside a garnishee summons.

Hartt v. Edmonton Steam Laundry Co., 2 Alta. R. 130.

—Monies accruing due—Re-adjustment of payments after service.]—The garnishee purchased certain lands from the judgment debtor on deferred payments. After the purchase the judgment creditor caused a garnishee summons to be served on the garnishee. After service of the summons the judgment debtor and garnishee effected a re-arrangement of the payments due whereby they were reduced and terms for payment extended. The garnishee then entered an appearance admitting liability in accordance with the new arrangement without any deductions. On a motion to enter judgment against the garnishee she pleaded the right to deduct certain monies payable for taxes prior to the purchase of the land:—Held, that the parties could not after service of the garnishee summons make any arrangement whereby the liability of the garnishee was affected. (2) That while the garnishee might be entitled to deduct monies paid for taxes from the monies due to the judgment debtor, yet having appeared and admitted liability without deductions, she was estopped from showing that she was not liable.

Beauchamp v. Messer, 3 Sask. R. 59, 1 W.L.R. 404.

—Garnishment—Form prescribed for affidavit.]—The substitution, though by an error in type-writing, of the word "jointly" for the word "justly" in an affidavit to lead a garnishee order is not cured by Rule 760 of the King's Bench Act, permitting the use of language "to the like effect" of the forms prescribed, and is such a defect as cannot be amended; but the use of the word "deductions" instead of "discounts" in such affidavit is permissible under the Rule, as the two words mean practically the same thing in that connection.

Johnson v. Chalmers, 19 Man. R. 255.

—Garnishment—Attachment of money in hands of County Court clerk to which debtor entitled.] — Money paid into a County Court for the benefit of one of the parties to a suit in that Court is not attachable in the hands of the clerk of the Court by garnishee process at the suit of a creditor of such party.—Quaere, whether the money could not be reached by way of charging order or equitable execution as by the appointment of a receiver.

Otto v. Connery, 16 Man. R. 532.

—Garnishing order before judgment in action of tort.]—The words "claim or demand" used in rule 759 of the King's Bench Act, R.S.M. 1902, c. 40, are limited by the following words, "due and owing" and do not extend a claim in tort for unascertained damages before judgment recovered therefor, so that a plaintiff having only such a claim is not entitled under that rule to an order attaching moneys due by a third party to the defendant to answer the judgment of the plaintiff to be recovered. Grant v. West (1896), 23 A.R. 533, followed.

McIntyre v. Gibson, 17 Man. R. 423.

—Jurisdiction of County Court — Alleged trust for debtor.] — Under the County Courts Act, R.S.M., 1902, c. 38, a County Court has no jurisdiction to make an order in garnishee proceeding attaching and prohibiting the payment over of moneys owing or accruing due from the garnishee to a person other than the primary debtor, upon the allegation that such moneys would, when paid over, be held by such other person in trust for the debtor in consequence of some transaction alleged to be fraudulent and void as against the creditors of the debtor, or to make an order for the trial of an issue to determine whether such moneys were an asset of the debtor or not. Donohoe v. Hull (1895), 24 Can. S.C.R. 683, followed.

Adams v. Montgomery, 18 Man. R. 22.

— Attachment of debts — Garnishee summons—Novation—"Due or accruing due" —Legal or equitable debt.]—A firm composed of A. & B. were indebted to the extent of $500 to another firm composed of X. and Y. By mutual arrangement between the two firms, A., one of the partners, made his promissory note for $500, payable to Mrs. X., wife of one of the partners in "X. & Y. " in payment of the debt from "A. & B." to "X. & Y." D. recovered a judgment against X. for $378; and issued and served a garnishee summons upon A. alone. E. recovered a judgment for $95, against X. & Y., and issued and served a garnishee summons upon A. alone. F. recovered a judgment against X. & Y. for $30.50, and issued and served a garnishee summons upon A. alone. G. recovered a judgment against X. & Y., and issued and served a garnishee summons upon A. & B.: —Held, that the garnishee summonses were all ineffective: (a) Assuming the bona fides of the transaction whereby Mrs. X. became holder of the note, because there was nothing due or accruing due from A. & B. or either of them, to X. & Y. or either of them. (b) If the transaction in question were alleged to be fraudulent, on the ground that under the garnishee issue, as directed, the question of fraud could not be tried. Held, in any event, that the garnishee summons issued by D. was ineffective, because:—(1) A debt owing to a firm cannot be attached in an action against an individual member of a firm. (2) An attachment against an individual who is a member of a firm cannot affect a debt owing by the firm; and, for the second reason, the garnishee summonses issued by E. & F. were alike ineffective. Semble, that but for the debt having by reason of the note ceased to be a debt from A. & B. to Z. & Y. the garnishee summons issued by G. would have been effective; and that a garnishee summons can be issued against a firm in the firm name.

Minger v. Anderson, 1 Alta. R. 400.

—Writ of attachment—Non-resident foreigner—Detention of goods—Substitutional service.]—Appeals from two decisions of Mathers, J., upon an application to set aside an order of the referee allowing substitutional service of the statement of claim and an application to set aside an order of attachment under which certain goods said to belong to the male defendant had been seized by the sheriff. The statement of claim alleged that the male defendand had, while in the position of treasurer of one of the departments of the Government of Russia, stolen a large amount of moneys of the plaintiff which had come to his hands and had brought the money into Manitoba, where he had bought certain lands with it and had also the goods seized under the attachment. Amongst other things, the plaintiff asked for payment of the moneys stolen, an order for the delivery or sale of the goods, a declaration that the defendants had no claim to the said lands as against the plaintiff, and an order for the sale of them. It appeared that the defendants had left the Province about a month before the commencement of the action and their whereabouts were unknown to the plaintiff. On the hearing of the appeals evidence was allowed in to show that the defendants had, about two weeks before the commencement of the action, executed powers of attorney to one Popoff of Winnipeg, in which each was described as "of Winnipeg, Man., Canada, who was in Chicago, Ill., on this date" and in which Popoff was authorized to sell and dispose of the defendants' property in Winnipeg. Shortly after the defendants came to Manitoba the male defendant bought and furnished a house as a residence, rented a store and bought goods with which to carry on business and the defendants, up to the time of their leaving the Province, were probably domiciled or ordinarily resident within Manitoba; but it appeared from the material used by the plaintiff on the application that the Russian Government had discovered that the defendants were in Canada and was taking steps, in the month preceding their departure, to extradite Proskouriakoff, and that it was probable the defendants had heard of this and left the Province in consequence:—Held, per Mathers, J. (1)—That the facts did not bring the case within rule 201 of the King's Bench Act, R.S.M. 1902, c. 40, or any of its subrules, so that it was not a case in which the statement of claim could be served out of the jurisdiction. (2) It could not be said that the defendants had committed a tort in Manitoba within the meaning of paragraph (e) of rule 201. Anderson v. Nobels (1906) 12. O.L.R. 644, followed. (3) A Court has no right to enforce a personal money claim against a person who is neither domiciled nor resident within its jurisdiction unless he has appeared to the

process or has expressly agreed to submit to the jurisdiction of such Court; and, therefore, apart from rule 202 of the King's Bench Act, the possession by the defendants of property in Manitoba gave the Court no jurisdiction over the defendants in an action in personam. (4) If evidence had been given that the defendants were possessed of property in Manitoba to the value of $200, it would have been necessary to consider whether, under rule 202, the statement of claim could be served out of the jurisdiction without previously obtaining leave to serve it, and also whether the plaintiff's cause of action against the defendants was upon a contract within the meaning of that rule. (5) The writ of attachment should be set aside with costs as having been issued without jurisdiction; but, as there was a possibility that the plaintiff might succeed in establishing a claim to the specific chattels seized, an order should be made for the detention of them by the sheriff until further order on condition that the plaintiff should always keep the cost of detaining, storing and insuring the goods paid in advance so as to protect defendants against loss in case the plaintiff should fail to establish his claim, with leave to either party to apply at any time to vary or rescind the order. (6) That substitutional service of the statement of claim should not be allowed in a case like the present when personal service out of the jurisdiction was not authorized. Per Howell, C.J.A., and Perdue, J.A.—The evidence showed that the defendants were not, at the time of the commencement of the action, domiciled or ordinarily resident within Manitoba, and the case was, therefore, not within paragraph (c) of rule 201, and, not being within any of the other paragraphs of that rule or rule 202, the Court had no jurisdiction and the appeals should be dismissed. Per Richards and Phippen, JJ.A.—The defendants being shown to have acquired a domicile in Manitoba or to have been ordinarily resident here up to within about a month before the commencement of the action and having described themselves as of Winnipeg only two weeks before, the onus was upon them to show that they had ceased to be so ordinarily resident and had, at the time of the commencement of the action, no intention of returning, and they had not satisfied that onus, and the appeals should be allowed. The Court being equally divided, the appeals were dismissed without costs. [An appeal from this judgment to the Supreme Court of Canada was quashed.]

Emperor of Russia v. Proskouriakoff, 18 Man. R. 56.

—Attachment of debts—Priority of attaching creditors.]—In a dispute between a number of attaching creditors for the moneys paid into Court by garnishees:—Held, that such moneys should be paid to the sheriff for distribution under the provisions of the Creditors' Relief Act.

Robert Ward & Co. v. Wilson, 13 B.C.R. 273.

—Moneys due to judgment debtor under mining contract—Attachment by judgment creditors.]—On service of garnishee orders under the Attachment of Debts Act, 1904, c. 7, the garnishees admitted a debt owing to the judgment debtor, but asked the protection of the Court as against mechanics lien-holders claiming the fund. Thereupon an order was made directing the garnishee to pay the fund into Court to abide the determination of an issue between the attaching creditors and the lien-holders. In this issue the lien-holders failed, and proceeded upon their liens against the property:—Held, by the Full Court, that the garnishees were not estopped from requiring an issue between themselves and the attaching creditors to ascertain what, if any thing, was owing by the garnishees to the judgment debtor at the time of the service of the garnishee orders.

Power v. Jackson Mines, 13 B.C.R. 202.

—Stop order—Application before judgment—Funds in Court.]—A stop order cannot issue before the recovery of judgment and the provisions of the Judicature Ordinance for the attachment of debts are not applicable to stop a fund in Court. Dawson v. Moffatt, 11 Ont. R. 484, commented on; Steckles v. Byers, 10 C.L.T. 41, not followed.

Canadian Moline Plow Co. v. Clement, 6 Terr. L.R. 252.

—Contempt of Court—Purging contempt—Release on payment of costs.]—A prisoner committed to jail for contempt of Court in not producing a book which he had been ordered to produce cannot purge his contempt by showing either that the book has been burnt by some other person without his knowledge or connivance, or that he left it in a certain place and was afterwards unable to find or trace it. Under such circumstances a prisoner should not be released unless he pays all the costs occasioned by his misconduct in connection with the lost book, although an application for release without such payment might be entertained if it were shown that, by reason of poverty, such costs could not be paid.

Cotter v. Osborne, 17 Man. R. 248.

—Interpleader by garnishee — Moneys claimed by third parties.]—Held, that a garnishee who admits liability to the defendant in respect of a sum of money, which is also claimed by parties other than the plaintiff, is not entitled to apply for an interpleader summons in the action in which the garnishee summons issued, to determine the rights of all claimants; but

must pay the money into Court with a suggestion that there are other claimants, as provided by rule 392 of the Judicature Ordinance.

Mears v. Arcola Woodworking Co., 1 Sask. R. 191.

—Of person.]—

See ARREST.

—Amount due under building contract—Failure of contractor to complete.]—Defendant had a contract for the erection of a school building for the garnishees, but abandoned the work before completion. The contract provided that the proprietor might in such a case take possession of the premises and complete the work and charge cost against amount due the contractor. It was also provided that the final estimate of 20 per cent. should not be payable until all liens had been paid and defective work remedied. The plaintiff after the defendant abandoned the work garnisheed the balance due him under the contract. After the garnishees had paid all liens and completed the building, most of which payments were made after service of the garnishee, there was no surplus remaining:—Held, that the true test as to whether or not there is an attachable debt is to ascertain whether anything has to be done by the judgment debtor as a condition precedent to payment, and as the condition precedent to the payment of the amount due when the garnishee was served was the completion of the building, which was never completed by the contractor, there was not any attachable debt due from the garnishee to the judgment debtor.

Heward Milling Co. v. Barrett, 2 Sask. R. 210.

—Judgment against garnishee — Application to set aside.] — The garnishee not having so far as the record showed, disputed his liability to the defendant, an order was made ex parte giving leave to the plaintiff to enter judgment and issue execution against the garnishee, which was done. The garnishee then moved to set aside the order on the ground that it was made ex parte, and also on the ground that he had a good defence on the merits. These grounds were not, however, set out in the summons:—Held, (1) that an order for judgment against the garnishee in default of appearance may be made ex parte. (2) The grounds of the alleged irregularity not having been stated in the summons, the application should not be granted on that ground. (3) The garnishee having shown that he had what might be good ground for disputing his indebtedness, and having accounted for his apparent default, should be allowed to dispute his liability. (4) The plaintiff should not be prejudiced by reason of the mistake of the clerk of the Court in omitting to file with the record a letter written by the garnishee disputing his liability, and that the garnishee must therefore pay the costs of the judgment and of the application to secure the same.

Hunter v. Collins, 2 Sask. R. 207.

—"Debt or liquidated demand"—Action between partners—Accounts.]—Where one partner sues another for a specific sum, although an account may be necessary to determine the exact sum due, the action is for "a debt or liquidated demand," within the meaning of Rule 384, and, consequently, a garnishee summons can issue to attach a debt due or accruing due from a third person to the defendant; and, semble, that the same principle would apply to an action for an account, and payment of the amount found due:—Semble, that in all cases where the plaintiff takes advantage of an extraordinary interlocutory remedy, e.g., caveat, injunction, or garnishee summons, he may be put on terms to prosecute the action with special diligence.

Alexander v. Thompson, 1 Alta. R. 501.

— Garnishee proceedings — Rights as between claimant and plaintiff.]—The plaintiff attached certain moneys due the defendant and the garnishees admitted liability and paid the money into Court. The money was claimed by a third party:—Held, that in determining the rights of the plaintiff and claimant to the fund in question, the garnishees having admitted liability, it was not open to the plaintiff to raise as against the claimant a defence which could only be pleaded by the garnishees.

Beaver Lumber Co. v. Northern Construction Co., 1 Sask. R. 264.

— Garnishee proceedings — Assignment of future salary—Equitable assignment—Civil servants—Public policy.]—(1) The salary of a civil servant whose appointment is "during pleasure" accrues from day to day, irrespective of when the salary may have been made payable by Order-in-Council, Departmental Regulation or otherwise. (2) A power-of-attorney authorizing the attorney to collect a sum of money does not per se operate as an equitable assignment of the fund. If, however, it appears from all the surrounding circumstances that it was the intention of the parties that the fund should be assigned, an equitable assignment is established. (3) The rule of law that the salaries of public officers cannot be assigned as being contrary to public policy does not extend to the case of a junior clerk. (4) Salary to be earned in the future is assignable.

Traders Bank v. McKay, 2 Alta. R. 31.

—Attachment of debt—Equitable assignment—Assignment of future debts.]—Defendant purchased certain machinery from the Waterous Engine Works, and, on the

purchase, executed a document by which he assigned to the Waterous Engine Works "all moneys owing or earned by the purchaser (the defendant) for work done either wholly or partially with or by the aid of said machinery, or any part thereof." The plaintiff attached certain moneys earned by the defendant in threshing with a portion of such machinery, and the Waterous Engine Works claimed such moneys under the assignment. It was agreed that the issue should be determined in a summary way upon affidavits:—Held, (1) That the claimant, being really the plaintiff in an issue, was entitled to file affidavits in reply to those filed by the plaintiff in the action. (2) That the intention of the parties in stating the moneys earned by part of the machinery should be assigned was not to limit the amount to the part of the moneys that might be earned by the machinery used, but to describe the debt and all moneys earned, whether with the whole or a part of the machinery, were by the assignment assigned to the claimant. (3) That an equitable assignment may be made of a mere possibility or expectancy of future property.

Lynberg v. Tarbox, 1 Sask. R. 492.

—Application to set aside—No appearance by applicant—Locus standi.]—Defendant moved to set aside a writ of attachment against personal property on the ground that it had been obtained on affidavits which were false. No appearance had been entered by the defendant, and it was objected that until an appearance had been entered had no locus standi:—Held, that the issue of a writ of attachment is not a step in the cause, but is entirely incidental thereto, and a motion may be made to set it aside on the ground of irregularity before appearance.

Sawyer Massey v. Carter, 2 Sask. R. 148.

—Instalments falling due after service of garnishee summons—Priorities.]—

Macpherson Fruit Co. v. Hayden, 2 W. L. R. 427 (N.W.T.).

—Exemption—Wages of mariner—Master of boat plying on inland waters.]—

N. A. T. & T. Co. v. Seaton, 2 W.L.R. 559 (Y.T.).

—Wages—Exemptions.]—

Meacham v. Nugent, 2 W.L.R. 301 (Y.T.).

— Wages — Exemption — Board money—Deductions.]—

Gordon v. Seabrooke, 2 W.L.R. 105 (Y. T.).

—Writ of attachment—Setting aside—Absence of fraud.]—

Fey v. Seimer, 2 W.L.R. 566 (Y.T.).

—Judgment in action for debt or liquidated demand—Claim for proceeds of sales by agent.]—

Stimson v. Hamilton, 3 W.L.R. 72 (Terr.).

—Garnishee disputing liability—Status of defendant.]—

Woodley v. Harker, 6 W.L.R. 102 (N. W. T.).

—Garnishee summons—Affidavit to lead—Date of making—Information and belief—Grounds.]—

Addison v. Dickson, 7 W.L.R. 291 (Alta.).

—Proof of debt due by garnishee—Accounting by garnishee.]—

Adolph v. Hilten, 6 W.L.R. 119 (N.W.T.).

—Affidavit to lead attaching order—Affidavit on information and belief.]—

Salander v. Jensen, 6 W.L.R. 401 (Y.T.).

—Garnishee summons — Affidavit of judgment creditor—Information and belief.]—

Sellander v. Jensen, 5 W.L.R. 91 (Y.T.).

—Moneys paid to clerk of County Court in another action.]—

Ross v. Goodier, 5 W.L.R. 393 (Man.).

—Moneys attached claimed under assignment—Order directing trial of issue—Parties.]—

Toseo v. Campbell, 8 W.L.R. 719 (Y.T.).

—Gold dust delivered to garnishee in parcel to be handed to judgment debtor—Whether garnishable under rule of Court.]—

Barnard v. Freeman, 8 W.L.R 721 (Y.T.).

—Garnishee summons—Application by defendants to set aside—Claim to insurance moneys—Unliquidated damages not attachable.]—

Hartt v. Edmonton Steam Laundry Co., 10 W.L.R. 664 (Alta.).

—Garnishee summons — Affidavit of plaintiff—Nature of claim not shown.]—

Richardson v. Roberts, 10 W.L.R. 497 (Sask.).

Canada.

Garnishee process—Crown information—English Order 45, Rule 1—Practice.]—Order 45 of the English Rules respecting garnishee process is not applicable to a proceeding by information by the Crown. The Crown's remedy is by writ of extent.

The Queen ex. rel. Attorney-General of Canada v. Connolly, 7 Can. Exch. R. 32.

ATTORNEY.

See SOLICITOR.

ATTORNEY-GENERAL.

Intervention — Death of relator — Arts. 978 et seq C.P.Q.]—In actions brought under the provisions of Arts. 978 et seq C.P.Q. by the Attorney-General in the name of the Sovereign the proceedings cannot be abated by a plea puis d'arrein continuance because the person who procured the intervention of the Attorney-General has ceased, since the institution of the suit, to be a member of the defendant company and has no longer an interest in the cause, the Attorney-General being dominus litis and his authority to continue the proceedings not being affected by such abandonment or cessation of interest.

Archambault v. St. Lawrence Investment Society, 17 Que. S.C. 451 (S.C.).

—Criminal Prosecutions.]—
See CRIMINAL LAW.

AUTHOR.

Author and publisher—Refusal to publish —Payment of price—Right to manuscript.] —The defendants, the publishers of a series of biographies called "Makers of Canada," employed the plaintiff, an author, to write one of the biographies, the Life of M. The contract was made by letters and in conversations between the parties, but the plaintiff had written an earlier book in the series, in regard to which there was a formal contract. In the letters referred to there was no mention of publication, but the price was agreed on, and was paid to the plaintiff, who wrote the biography and delivered the manuscript to the defendants. They declined to publish it, on the ground that it was unsuitable for the series, whereupon the plaintiff offered to return the money paid, and demanded the manuscript, which the defendants refused to deliver:— Held, that the plaintiff was entitled to the manuscript. Per Garrow, J.A., that the written evidence must be considered in the light of the surrounding circumstances; that both parties intended when the contract was made that the proposed book should be published as one of the series, and such publication formed a material part of the consideration to the plaintiff in undertaking the work; and the inference was, that if, when the book was written, it was considered by the defendants unfitted for the series, they would return the manuscript and thus enable the plaintiff to secure publication elsewhere; they had no right, under any view of the agreement, to keep it, and also refuse to publish; or, in another view, that there was a complete rejection of the book, which the plaintiff accepted as final, whereupon the contract was at an end, and the defendants entitled to get back their money and the plaintiff his manuscript. Per Maclaren, J.A., that the whole contract was not in the letters, and it was impossible to find what the contract was without importing into it the facts and circumstances under which it was made; and the surrounding circumstances all pointed to the conclusion that publication of the work was an implied term of the contract. Per Meredith, J.A., that the terms of the contract were to be gathered from what passed between the parties upon the subject and the surrounding material circumstances; the plaintiff was selling the offspring of his intelligence and education, a thing the chief value of which was in its intangible properties; he was selling it for a specific purpose, publication in the series called "Makers of Canada;" in all the circumstances, there was no reasonable doubt that there were the two corresponding and depending tacit, if not expressed, obligations: (1) that the book would be reasonably fit for the purposes for which it was written; and (2) that, if so fit, it would be published. Per Moss, C.J.O., that there was nothing in the circumstances of this case to take it out of the ordinary rule, or to import into the agreement between the parties the element of obligation to publish, and, in case of failure to do so for any reason, to return the manuscript.

Le Sueur v. Morang, 20 O.L.R. 594.

AUTOMOBILES.

Negligence.]—The chauffeur of an automobile is guilty of negligence if seeing that the horse in a carriage encountered was frightened, he merely stops the automobile, but does not turn off the motor, the noise of which causes the horse's fright to continue, and the owners of the automobile are jointly and severally liable with him for the consequences of a resulting accident. The lack of fencing or other protection along the road is no defence to an action against them.

Lubier v. Michaud, Q.R. 38 S.C. 190.

By-law regulating speed of automobiles.] —The Quebec statute 6 Edw. XII. c. 13, having provided that no municipal by-law to regulate the speed of automobiles shall have any force or effect, an allegation in the declaration of an action (damages caused by collision) against the owner of such a vehicle, that he was unlawfully driving it at a speed "far in excess of that permitted by the by-laws of the locality," is irrelevant and will be struck out on demurrer.

Peck v. Ogilvie, 31 Que. S.C. 227.

Liability of owner—Negligence of bailee's chauffeur.]—Two essential conditions must exist to make the owner of a thing liable, as such, for damages from an injury, 1st, the injury must have been caused by the

thing, and, 2nd, the thing must have been in his care at the time. Hence, when the owner of an automobile sends it for repairs to a company that carries on the business, and the company, after doing the work, sends out the machine, in the care of one of its own chauffeurs, to test it, and an accident occurs through the fault of the chauffeur, the owner is not liable for the consequences. The fact that his own chauffeur was in the automobile at the time is immaterial.

McCabe v. Allan, 39 Que. S.C. 29.

—Prohibiting on roads in P.E.I.]—
Re Rogers, 7 E.L.R. 212 (P.E.I.).

— Negligence — Onus — Responsibility of owner—Chauffeur on errand of his own.]— A chauffeur, having received permission to have his master's motor for a few minutes, in order to take some things to the house of a fellow servant, at the request of the daughters of the latter, took them for a ride, and, on returning with them to their father's house, injured the plaintiff. The jury held that the defendant had not proved that the accident did not arise through the chauffeur's negligence, and, also, that the latter was acting within the general scope of his employment at the time of the accident:—Held, that, having regard to the terms of 6 Edw. VII., c. 46 (O.) (an Act to regulate the speed and operation of motor vehicles on highways), which casts the onus on the defendant when his motor has occasioned an accident, and makes him responsible for any violation of the Act, there was enough evidence to support the findings. Semble, that under the Act the chauffeur is to be regarded as the alter ego of the proprietor, and the latter is liable for his negligence in all cases when the use of the vehicle is with permission, though he may be out on an errand of his own. Semble, also, that under s. 13 the owner of a motor vehicle for whom a permit is issued is responsible not only in regard to fines and penalties imposed by the Act, but also in damages, for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in Council.

Mattei v. Gillies, 16 O.L.R. 558.

—Automobile left standing on side of road —Horse shying—Motor Vehicles Act.]— Under s. 18 of the Motor Vehicles Act, 6 Edw. VII. c. 46 (O.), where any loss or damage is incurred or sustained by a person by reason of a motor vehicle on a highway, the onus is imposed on the owner or driver of proving that the loss or damage did not arise through his negligence. The owner of an automobile—a bright red one—was driving to a village, intending to stop at an hotel there and have dinner. On arriving at the foot of a hill, the road over which led to the hotel, he found that, owing to the condition of the road, it was impracticable to drive the car up the hill, so he drew it up at the side of the road about two feet from the travelled part, locking it, as required by the Act, and taking the key with his, and then went to the hotel and had dinner, remaining there some three hours. While the car was in this position, the plaintiff was in the act of driving down the hill, and, when he was about twenty rods from the car, his horse caught sight of it and showed signs of fright. The plaintiff, notwithstanding, drove him on about a rod, when he again showed fright; the plaintiff still urged him on, and when within a rod and a half of the car he showed an inclination to leave the road, and, on the plaintiff pulling him back, he wheeled round and upset the carriage, whereby the plaintiff and the horse and carriage were injured. It appeared that the car could have been driven to a yard of another hotel some 600 feet away:—Held, that there was evidence of negligence to submit to the jury as to there being an unreasonable user of the highway, and an authorized obstruction thereof, and therefore, a finding in favour of the plaintiff should not be disturbed.

McIntyre v. Coote, 19 O.L.R. 9.

AWARD.

See ARBITRATION.

BAIL.

Recognizance on remand.]—On a motion to vacate an estreat of bail, the Court should not interfere on matters extrinsic to the record as to which the affidavits filed on the motion are conflicting.

The King v. Bole, (Ont.), 9 Can. Cr. Cas. 500.

—Order for—In criminal matter.]—
See CRIMINAL LAW.

—Estreat—Notice to surety to perform condition — Criminal law — Adjournment at accused's request for more than eight days.]—
Rex v. Burns, 2 E.L.R. 167 (N.S.).

— Estreat — Conditions of recognizance — "Next Court of competent jurisdiction" — Notice to estreat — Discretion to allow short notice — Notice to parties to recognizance to perform conditions.]—
Rex v. Bailly's Sureties, 3 E.L.R. 74 (N. S.).

—Recognizance on remand.]—The use of Code form R. in endorsing a certificate of non-appearance upon a recognizance of bail

is not imperative, and where an estreat had been directed upon an informal certificate initialed but not more fully signed by the magistrate, a motion made after a long delay to vacate the estreat for irregularity should be refused.

The King v. May, (Ont.), 9 Can. Cr. Cas. 529.

—In extradition.]—See EXTRADITION.

—In civil actions.]—See ARREST.

BAILIFF.

Liability for bailiff's fees—Bailiff's association—Arts. 1716, 1722 C.C.]—In the absence of agreement to the contrary the attorney who employs a bailiff is personally liable to him for his fees in serving papers. Per Archibald, J., Though bailiffs cannot form an association for the exercise of their profession itself nothing prevents them doing so for the purpose of dividing their fees; such an association not being mentioned in Art. 1835 C.C., the date of its formation may be proved independently of registration.

Decelles v. Bazin, 4 Que. P.R. 92 (C.R.).

—Bailiff's fees—Partnership of bailiffs—Registration—Arts. 1834, 1835, C.C.]—1. Advocates are personally responsible for the fees of bailiffs in the Province of Quebec employed by them in connection with the cases which they are conducting before the Courts. Such liability, where a partnership of advocates exists, is joint and not joint and several. 2. A partnership of bailiffs does not fall under Arts. 1834 and 1835 of the civil code, and registration of such partnership, not being required or authorized by law, is without effect. Therefore the provisions of Art. 1835, as to disproof of the allegations of the declaration of partnership, do not apply to a declaration of partnership made by a firm of bailiffs, so far as their business as bailiffs is concerned. 3. Although bailiffs cannot act, in the performance of their duties, under a partnership name, they are not precluded from forming a partnership as regards the financial returns from their individual work, nor from contracting, as a partnership, for the payment of individual services rendered by one or several of them.

Decelles v. Bazin, 19 Que. S.C. 309 (Archibald, J.).

—Bailiff's fees—Recovery from client—Payment to attorney—Art. 1145 C.C.]—A bailiff has no recourse against the client who has paid to his attorney the bill of costs taxed by the latter, which included the fees of said bailiff.

Decelles v. Paquette, 18 Que. S.C. 124 (C.C.).

—Bailiff's corporation.]—It is only the board of examiners of the Bailiffs' Society of the District of Montreal who can investigate in the first instance a charge against a member for violation of the rules and in such a matter the Superior Court has jurisdiction only in appeal.

Bailiffs' Society v. Proulx, Q.R. 24 S.C. 244 (Sup. Ct.).

—Seizure of bailiff's fees — Liability of attorney.]—Any of the fees payable to a bailiff may be seized, such fees not being comprised in the exceptions enumerated in Art. 5, 99 C.P.Q.—Except where prior stipulations to the contrary are made an attorney is personally liable to the bailiffs whom they employ for payment of the fees of the latter even in cases in which they have received no retainer from their clients.

Lachance v. Casault, Q.R. 26 S.C. 90 (Sup. Ct.).

—Corporation of bailiffs—Board of examiners.]—No appeal lies to the Superior Court by petition only from a decision of the Board of Examiners of the Corporation of Bailiffs for the District of Montreal refusing a certificate of competence to a candidate whose examination was not considered satisfactory.

Lalonde v. Corporation of Bailiffs for the District of Montreal, Q.R. 26 S.C. 426 (Ct. Rev.).

—Extra-judicial seizure—Lien note.]—A seizure under a conditional sale agreement is an extra-judicial seizure, within s. 2 of c. 34, C.O., which provides that "no person whomsoever making any seizure under the authority of any chattel mortgage, bill of sale, or any other extra-judicial process," shall charge more for services than the fees therein specified. The words "other extra-judicial processes" are intended to embrace any other security under which personal property may be seized, except processes of the Courts.

Pease v. Johnston, 1 W.L.R. 208 (Wetmore, J.).

—Powers of the Superior Court—Art. 50 C.P.]—Bailiffs, notwithstanding the by-law of their corporation, continue to be officers of the Court, subject to its jurisdiction, and liable to be removed from their position by the Court or a judge thereof.

Beaulin v. Decelles, 7 Que. P.R. 323 (Doherty, J.).

—Official return—Quebec practice.]—A bailiff has no quality as such to signify transfers of debts and prove such signification by a mere return under his official oath.

Dagneau v. Decarie, 8 Que. P.R. 141.

BAILMENT.

Acceptance of goods under agreement to sell and account.]—A company in Halifax, of which defendant was president, was engaged in the business of selling gasoline engines and supplies, and in connection with their business acted as agents for the Toronto Gas and Gasoline Engine Co. An engine belonging to the latter company had been placed on board a boat belonging to the Halifax company for the purpose of testing it and exhibiting its capacity. An agent of the Toronto company was about taking possession of the engine for the purpose of returning it to Toronto, but, after conferring with defendant, agreed to allow it to remain on the boat for a time on the understanding that defendant would endeavour to sell the boat and engine together, in which case the sum of $350 was to go to the Toronto company for the engine and the balance to the Halifax company for the boat. Defendant carried on business as a ship-broker, and the boat while lying at his wharf was damaged in a storm and partly filled with water. Defendant had insured the boat and made a claim upon the insurance company as for a total loss, which the company declined to recognize, and beyond this he took no steps for the protection of the boat or engine, both of which were eventually lost, and he gave no notice to the company of the risk to which their property was exposed:—Held, that defendant was not a gratuitous bailee, and that when the owners of the engine entrusted their property to defendant's care they had a right to expect that he would hold it with the skill which his profession or occupation implied, and, as he had neglected to use such skill, he was responsible in damages for the consequences. The action was brought in the name of plaintiff company, to whom the Toronto company has assigned, but it appeared at the trial that the transactions between the parties upon which the action was based occurred prior to the assignment. Held, that the trial judge had jurisdiction to order an amendment making the Toronto company co-plaintiffs, and that his direction that they be so joined was sufficient, and that the Court on appeal had jurisdiction to amend the order to make it conform to the directions so given, the order having been taken out in a different form, viz., substituting the Toronto company as plaintiff, instead of making it a co-plaintiff as directed.

Canadian Gas Power & Launches v. Crosby, 44 N.S.R. 192.

—Negligence of bailee's servant—Certificated engineer.]—A bailee for hire is liable for the negligence of his servant. The engagement of an engineer certificated under the Steam Boilers Act, will not, in the absence of evidence of the competency of the engineer, relieve the employer (bailiee) from liability for injury to a steam boiler the subject of the bailment, occasioned by the negligence of the engineer. The operation of a steam boiler by a bailee for hire after he has discovered defects in the boiler which might probably result in more extended injury, and without notice of such defects being given to the bailor, is negligence for which the bailee is liable; and the implied warranty of the bailor that the boiler is reasonably fit for the purpose for which it was hired is no answer to such a charge of negligence. A bailee for hire must return the subject of the bailment in like good order as he received it, reasonable wear and tear excepted; and if the article is returned with defects not occasioned by such reasonable wear and tear, the onus is upon the bailee to disprove negligence.

Taylor v. Carnell, 2 Alta. R. 237.

Fire—Damages—Sale of goods.]—The defendants agreed to make the plaintiff certain tools used in manufacturing hubs of a special kind, and, in consideration of being allowed to use the tools, to manufacture also a number of the hubs:—Held, that the use of the tools was an unconditional appropriation thereof to the contract, so that the property in them had passed to the plaintiff; that while using them the defendants were bailees thereof for hire, and after ceasing to use them, gratuitous bailees; that the defendants having neglected to send the tools to the plaintiff after repeated requests were liable to him in damages; but that these damages were nominal only, and that the plaintiff could not, upon the destruction of the tools by an accidental fire while retained by the defendants, recover from them their value, that destruction not being damage such as might fairly and reasonably be considered as arising from the breach, or in contemplation of the parties. Judgment of MacMahon, J., affirmed.

Leggo v. Welland Vale Manufacturing Company, 2 O.L.R. 45 (C.A.).

—Borrowed horse — Negligence — Parent and child.]—A lad borrowed a horse from a person from whom his father had forbidden him to borrow horses. On the son reaching home with the horse, his father told him to tie it up, with the intention that his son should, when through his work, return it. On his father attempting to untie the horse for the purpose of his son returning it, it broke away and was lost, and the father made no effort to find it:—Held, the father was not liable to detinue or trover, or in an action for negligence.

Kirkland v. Rendernecht, 4 Terr. L.R. 195 (Wetmore, J.).

—Warehousemen—Grain elevator—Negligence—Fermentation.]—The defendants,

the keepers of an elevator, stored corn belonging to the plaintiffs in their bins. About a month afterwards, in removing the corn out of one of the bins they discovered that it had become heated, of which they notified the plaintiffs, but made no examination of the rest of the corn, nor did the plaintiffs ask them to do so. When, shortly after, the corn was run out to be shipped, a quantity of it was found to be in an advanced state of fermentation:—Held, that the defendants had been guilty of negligence and were liable to the plaintiffs for the loss sustained by them.

Dunn v. Prescott Elevator Co., Ltd., 4 O.L.R. 103 (Div. Ct.).

—Deposit of share certificates.]—

See COMPANY.

Elgin Loan Co. v. National Trust Co., 10 O.L.R. 41 C.A.

—Obligations of depositary—Damages—Loss of thing deposited.]—A depositary who, on account of the loss of the article deposited, is unable to return it to the owner, is obliged to pay the value thereof, but is not liable for the loss which the owner may have sustained indirectly on account of being deprived of its use. The owner of a sketch, deposited with an engraver to be reproduced as an engraving in the form of an advertisement, has a right of action to recover its value in default of its being returned, but he cannot recover damages for the loss of advantages that he might have gained through the publication and distribution of the engraving ordered to be made.

Gignac v. Woodburn, Q.R. 29 S.C. 431.

—Negligence—Liability for spoiling of meat placed in cold storage.]—The defendants received at different times in their cold storage warehouse fresh meat, to be frozen and kept frozen for the plaintiffs until called for. After a few months the meat was found so spoilt that it had to be destroyed. This action was brought to recover damages for the loss, claimed to have been caused by the negligence of the defendants. When delivered to the defendants the meat was enclosed in wrappers which, according to the evidence, necessitated one or two more degrees of frost to freeze the meat than if there had been no wrapping, and the defendants attributed the damage to this fact and relied on a provision in the receipts given that they were not to be "responsible for any loss or damage caused . . . from any defects in the packages, barrels, wrappers or coverings in which the said goods are contained." The trial Judge made the following findings of fact: (1) The meat was in good and sound condition when delivered at the defendants' warehouse (2) The warehouse was properly constructed for the purpose of cold storage; the plant was a first-class cold storage plant of modern type and sufficient power; that it was operated with the ordinary and reasonable care which might have been expected in the carrying out of the business, and that the men in charge of the plant, while not having that higher and special knowledge which a man of scientific attainment might possess on the subject, yet had such practical and even technical knowledge as might be reasonably expected in conducting such a business in an ordinary satisfactory manner. (3) The real cause of the spoiling of the meat had not been disclosed by the evidence. On these findings, the trial Judge held that the plaintiffs had failed to establish negligence on the defendants' part, and he dismissed the action with costs:—Held, on appeal, that the condition in the receipt above quoted did not relieve the defendants from the consequences of negligence, if proved; but, that the plaintiffs had failed to prove negligence and that the appeal should be dismissed.

Charrest v. Manitoba Cold Storage Co., 17 Man. R. 539, affirmed by Supreme Court of Canada, 42 Can. S.C.R. 253.

—Bailee returning article in damaged condition — Absence of explanation.] — A bailee for hire who returns the property bailed in a damaged condition, and who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of the same, is presumed to have been negligent. This applies to the hirer of a horse and carriage from a livery stable keeper.

Gremley v. Stubbs, 39 N.B.R. 21.

—Warehousing—Proviso as to special care —Liability for loss of goods from frost.] —A warehouseman is bound, as a depositary, to apply, in the keeping of goods warehoused with him, the care of a prudent administrator, the proviso in a warehouse receipt, "but without responsibility for any loss or damage caused . . . for want of any special care or precaution," does not relieve him from that obligation. Hence, a warehouseman who receives boxes of lemons during the winter and allows them to freeze, is liable for the loss.

Vipond v. The Canada Cold Storage Co., 35 Que. S.C. 144.

—Storage of wheat to be specially binned —Storage tickets issued — Delivery of wheat—Amount to which bailor entitled.] —Plaintiff delivered a quantity of wheat to defendants' elevators at Saskatoon and Osler, receiving tickets or receipts therefor in the form of storage tickets mentioned in the Manitoba Grain Act. The agent marked the words "specially binned" on these tickets; but it was shown he had express instructions not to

accept any wheat to be specially binned The amount of wheat shipped from the bins in which plaintiff's wheat was stored was greater than that mentioned in the tickets, and he claimed this wheat. The plaintiff also claimed damages by reason of the defendants' failure to deliver the wheat to him at Palmerston, Ont., the wheat being in fact delivered at Fort William:—Held, that the plaintiff having accepted ordinary storage receipts under the Manitoba Grain Act calling for the delivery to him of the "above quantity, grade, and kind of wheat," could not claim that the wheat was specially binned under the provisions of the Act, and was entitled only to delivery in accordance with the provisions of the Act when the grain is stored under storage tickets. (2) That the indorsement of the words "specially binned" on the ordinary storage receipt would not give any greater privilege than those to which the plaintiff was entitled under storage tickets. (3) That the contract between the parties being for delivery of the wheat in car lots at any terminal elevator in the district, the delivery of the wheat at Fort William was sufficient compliance with the contract.

Caswell v. Western Elevator Co., 2 Sask. R. 153.

Loan of chattel—Detention after demand for return.]—

Corbin v. Stephen, 6 E.L.R. 585 (N.S.).

—Hire of horses.]—

See ANIMALS.

—Gratuitous bailee—Loss or theft of bank notes — Liability — Negligence — Notes contained in registered dead letter — Notice — Inquiry.]—

Corsentino v. Dominion Express Co., 4 W.L.R. 498 (Man.).

—Storage of goods—Advances—Failure to repay—Sale of goods—Purchase by warehousemen—Acquiescence.]—

Palmer v. Christie, 2 W.L.R. 561 (Y.T.).

—Storage of wheat — Conversion — Dispute as to quantity redelivered—Evidence—Certificate of weigh-master.]—

Seeley v. Imperial Elevator Co., 2 W.L.R. 273 (Terr.).

— Storage of wheat — Increase of bailor's wheat by leakage from neighbouring bins—Damage to bailor's wheat by reducing grade.]—

Welwyn Farmers' Elevator Co. v. Byrne, 2 W.L.R. 333 (Terr.).

—Innkeeper — Lost luggage — Liability — Authority of clerk or manager.]—

Delagorgendiere v. Acaster, 7 W.L.R. 467 (Sask.).

—Storage of wheat for shipment—Shortage in quantity shipped — Liability of warehousemen.]—

Brentwell v. Western Elevator Co., 11 W.L.R. 372 (Sask.).

—Conditional sale of goods.]—

See SALE OF GOODS.

—By pledge.]—

See PLEDGE.

BALLOT.

See ELECTION LAW; MUNICIPAL LAW I.

BANKING.

Bills for discount and collection—Bankers' lien.]—When a customer hands over notes and bills to a bank for discount, and part of them only is discounted, the rest being held for collection, the bank acquires no lien on the latter for the customer's indebtedness to it.

Freedman v. The Dominion Bank, 37 Que. S.C. 535.

—Contract between banks — Advances — Pledge or sale of assets—Powers of directors.]—By an agreement made between the Ontario Bank and the Bank of Montreal on the 13th October, 1906, it was recited that, owing to recently discovered misconduct of an officer of the Ontario Bank, the directors of that bank deemed it necessary and expedient to make immediate provision for payment or taking up of its debts and liabilities, and had applied to the Bank of Montreal for that purpose, and had exhibited to the Bank of Montreal a statement of its assets and liabilities as of the 29th September, 1906, as summarized in the recital, and that the Ontario Bank had since continued to carry on its business in the ordinary course. The agreement then provided (clause 1) that the Ontario Bank warranted the assets and liabilities to be as set out; (clause 2), that, "in consideration of the premises, the Bank of Montreal hereby agrees to purchase by way of discount and of rediscount at the rate of six per cent. all the call and current loans and overdue debts of the Ontario Bank," etc. This clause and clauses 3 to 8 provided for advances to be made by the Bank of Montreal and the security it was to receive therefor. By clause 9, the Ontario Bank "agrees that it will not carry on business except for the purpose of selling and realizing on its assets and of otherwise providing and by means of the shareholders' double liability furnishing the moneys necessary for the payment as herein provided of its notes in circulation, debts, liabilities, and obligations, including therein all advances and interest and other obligations that may be owing or due to the Bank of Montreal

under the provisions hereof or otherwise." Clauses 10 to 14 provided the machinery by which the arrangement between the two banks was to be worked out. Clause 15 bound the Bank of Montreal to account to the Ontario Bank for any surplus realized from the securities transferred to it under the agreement. And clause 16 provided for the payment by the Bank of Montreal to the Ontario Bank of $150,000 for any indirect benefit derived by the Bank of Montreal under the agreement. An order having been made on the 29th September, 1908, for the winding-up of the Ontario Bank under the Dominion Winding-up Act, the Bank of Montreal presented a claim as a creditor, and the question then arose whether the above agreement was valid and binding in whole or in part upon the Ontario Bank and its shareholders, so as to form a sufficient basis for taking an account of what was due to the Bank of Montreal:—Held, that the transaction was not a sale of the assets of the Ontario Bank within the provisions of secs. 99 to 111 of the Bank Act; that it was an arrangement which was within the powers of the board of directors to enter into; that it was binding; and that the Bank of Montreal was entitled to make proof of its claim against the estate of the Ontario Bank upon the footing of it. Bank of Australasia v. Breillat (1847), 6 Moo. P.C. 152, specially referred to. Per Moss, C.J.O.:—A fair reading of the whole instrument, giving to each part its proper effect in relation to the remainder, and bearing in mind the evident object and intention of the parties, leaves no reasonable doubt as to its meaning and effect. The strongest ground in favour of the contention that the transaction was a sale was the use in clause 2 of the expression "purchase by way of discount and of rediscount at the rate of six per cent." But these words merely describe a species of dealing with a particular class of securities which is quite as consistent with a pledge as an absolute sale. Per Maclaren, J.A.:—The banks had the right to make the agreement under the law as it stood in 1900, before the Bank Amendment Act of that year (now secs. 99 to 111 of the Bank Act, R.S.C. 1906, c. 29), the powers conferred by the Interpretation Act, R.S.C. 1906, c. 1, s. 30, and by s. 76 of the Bank Act, being wide enough to include the transaction in question; and the amendment of 1900 did not take away the previous powers of the directors by requiring such an agreement to be carried out exclusively under the provisions and subject to the formalities of secs. 99 to 111.

Re Ontario Bank, Bank of Montreal's Claim, 21 O.L.R. 1.

—Indorsement of note by company to bank —Holder in due course—Fraud—Illegality.] —Defendants, in certain transactions with an insurance company who under their charter had no power to indorse, give or accept negotiable instruments, gave the company a promissory note, which the company indorsed to the plaintiff bank. They did not pay the note when it fell due. The company was heavily indebted to the bank which held this and other notes for advances to the company. The practice was for the company to sell shares and take notes therefor which were discounted with the plaintiff bank. On suit being brought, defendants set up that the note was given for the accommodation of the company who took and held it without consideration; that the bank, having knowledge of the circumstances under which the note was given, and of the company's legal position as to negotiable instruments, was not a holder in due course, and that the note was therefore tainted with fraud and illegality:—Held, upon the evidence, that defendants had failed to prove under s. 58 of the Bills of Exchange Act that there was such fraud or illegality in the issue or negotiation of the note as to deprive the plaintiff bank of its status as holder in due course and therefor entitled to recover. Held, further, that the company under s. 48 of the Bills of Exchange Act could, notwithstanding their inability to borrow, indorse over to a third party any negotiable instrument made in their favour, and thus enable such third party to enforce payment against the maker or acceptor; and that the company would be estopped from denying that shares issued for such negotiable instrument were legally issued. Per Irving, J.A.:—The note in question having been given carrying seven per cent. interest until paid, and the trial Judge having given judgment for seven per cent. to due date and five per cent. afterwards to date of writ, the judgment should be corrected to allow seven per cent. to date of judgment.

Merchants Bank of Canada v. McLeod, 15 B.C.R. 290.

—Balance in bank—Appropriation by bank to payment of unmatured note.]—The plaintiffs commenced this action on the 18th November, 1909, and issued a garnishee summons against a bank, which was served upon the bank on that day. On the 17th November the defendant had a balance to his credit in the bank of $756.20; but the bank held a promissory note of the defendant for $700, maturing on the 13th December; and on that day, the 17th November, the bank charged the note to the defendant's account, allowing a rebate for the days it had to run, and thus, if this was effective, reducing the defendant's balance to $60. This was done without the knowledge or consent of the defendant:—Held, that the garnishee summons effectively attached the whole sum of $756.20.

McCready v. Alberta Clothing Co., 13 W.L.R. 680.

Affirmed sub nom. McFarland v. Bank of Montreal, [1911] A.C. 96.

—Illegal trafficking by bank in its own shares—Transfer of shares—Consideration.]

—The money of a chartered bank was used in purchasing shares of its own stock to the extent of about $400,000. The shares acquired stood in the names of various nominees of the bank, who undertook no personal responsibility. The shares were bought to be again sold, and the plan was to keep up the price of the stock and to make possible profits—the whole transaction being arranged and carried out by the general manager of the bank:—Held, that the money was illegally withdrawn from the funds of the bank and used in violation of the Bank Act, R.S.C. 1906, c. 29, s. 76; the transaction amounted to an illegal trafficking in the shares, was ultra vires, in disregard of public policy, and placed in jeopardy the charter of the bank. The directors of the bank, in order to save the bank, divided the shares, so illegally acquired, among themselves and their friends, and they and their friends gave promissory notes to the bank for the shares. In getting notes from their friends and in putting shares in their names, the directors assured them that they were incurring no risk—that they would never be called upon to pay—that the shares were to be held in trust for the bank, and that all would shortly be paid out of the sale of the stock. These notes were indorsed by the bank to the plaintiff, and the plaintiff sued the makers of the notes thereon:—Held, that, although the defendants considered that the notes were given for the accommodation of the bank, that was an understanding not recognized by any one representing the shareholders, and not binding on the bank as a corporate body; and on this branch of the case nothing was proved sufficient to outweigh the legal consequences arising from the making of negotiable promissory notes. But, regarding the notes as given for value, represented by the transfer of shares to each defendant, and in the whole representing the $400,000 of the bank's money illegally expended, which was the consideration, or at any rate a part of the consideration, as between the bank and the defendants, the bank had not the power to transfer the shares or enforce payment for them; the original acquisition of the shares was not merely voidable, but void; it was a nullity, not to be validated by lapse of time or by any action of the bank or the shareholders; and the transfer of these shares to the defendants, in exchange for the notes sued on, was a sale of the shares, and a further act of illegality in violation of the statute; the bank had no power to sell or transfer the shares illegitimately acquired. The bank could not undertake to indemnify the defendants in regard to their having become holders of the stock; the expenditure of the bank's money was a misfeasance in the first place, and any indemnification would be an agreement further to misuse the shareholders' money. The bank had no legal title to the shares, and could confer none; so that, in the hands of any one having knowledge or notice of the facts or of the violation of the statute, the notes could not be enforced by action; and upon the evidence, the plaintiff, as to fifteen of the notes sued upon, had sufficient notice of the situation to prevent his recovering. As to the other nine notes, a case of illegal consideration was shown, and the law cast the burden of proof upon the holder to prove both that value had been given and that it had been given in good faith without notice. The plaintiff had not given evidence on this head, and had not satisfied the Court of his right to recover; and, in the circumstances, the case should not be opened up to give him an opportunity to do so.

Stavert v. McMillan, 21 O.L.R. 245.

—**Security—Pledge of grain—Sale without notice—Customer's receipt.**]—The plaintiff obtained from the defendants, a banking corporation, at their Winnipeg office, an advance upon a draft drawn upon a Toronto broker, to which draft were attached six bills of lading for 30,000 bushels of oats shipped to the broker. This was accompanied by a memorandum hypothecation, signed by the plaintiff, which provided that the securities hypothecated, renewals, substitutions, and the proceeds thereof, were to be held by the defendants as a general and continuing collateral security for the payment of the present and future indebtedness and liability of the plaintiff, and any ultimate unpaid balance thereof, and that the same might be realized by the defendants in such manner as might seem to them advisable, and without notice to the plaintiff, in the event of default. The draft on the Toronto broker not having been paid, and the price of oats having dropped, the defendants, without giving any written notice or otherwise complying with s. 98 of the Bank Act, sold the oats for 36 1-2 cents a bushel. Shortly afterwards the price rose. At the end of the month in which the sale was made, the plaintiff signed the usual customer's receipt, whereby he released the bank from all claims in connection with the charges and credits in the accounts and dealings up to the end of the month:—Held, that the release was valid and given for a good consideration, and was sufficient to bar the plaintiff's action for an account in respect of the oats.

Graves v. Home Bank, 14 W.L.R. 291 (Man.).

—**Collateral security—Release of, by manager of bank.**]—The plaintiffs, a banking corporation, held the defendants' promissory note for $9,000. As collateral security for the payment of the note, the plaintiffs held two promissory notes of C., aggregating the same amount. By a private arrangement between the plaintiffs' manager and C., the manager returned to C. his promissory notes, undertaking with C. to be

liable to the plaintiffs for what C. would have to pay. In an action by the plaintiffs upon the defendants' note, the defendants disputed liability upon the ground that the plaintiffs were not in a position to return to them C.'s notes, which were their property and pledged by them as collateral security for the payment of the note sued on. This was set up both as matter of defence and counterclaim:—Held, a good ground of counterclaim. Upon the evidence it must be taken that C.'s notes were, when returned to him, worth their face value, and so the defendants' damages equalled the plaintiffs' claim upon the defendants' note, and judgment should go for the plaintiffs for the amount of their claim, and on the counterclaim for the defendants for theirs, the one being set off against the other. The act of the manager was the act of the plaintiffs so far as regarded the defendants, between whom and the bank there existed the relationship of pledgor and pledgee. In the case of documents creating or evidencing rights, the thing pledged must be taken to be both the instrument and the right—not the bare instrument without the right, nor the mere right without the instrument.

Hochelaga Bank v. Larue, 13 W.L.R. 114.

—Security for debt—Assignment of lease—Transfer of business to bank.]—By section 76, sub-section 1 (d) of the Bank Act, R.S.C. 1906, c. 29, a bank may "engage in and carry on such business generally as appertains to the business of banking;" by sub-sec. 2 (a) it shall not "either directly or indirectly . . . engage or be engaged in any trade or business whatsoever;" s. 81 authorizes the purchase of land in certain cases of which a direct voluntary conveyance by the owner is not one:—Held, affirming the judgment of the Court of Appeal, Peterboro v. McAllister, 17 Ont. L.R. 145, that these provisions of the Act do not prevent a bank from agreeing to take in payment of a debt from a customer an assignment of a lease of the latter's business premises and to carry on the business for a time with a view to disposing of it as a going concern at the earliest possible moment.

Ontario Bank v. McAllister, 43 Can S.C.R. 338.

[Leave to appeal refused by Privy Council, Feb. 28, 1911.]

—Absentee—Curator irregularly appointed.]—In an action by the curator of an absentee to recover the amount of a deposit standing in the name of the latter, the defendant may plead that the plaintiff's appointment as curator was tainted with serious irregularities and ask for its annulment.

Plourde v. Bank of Montreal, 11 Que. P.R. 429.

—Discount of agent's paper—Employment of proceeds—Fraud of agent—Notice to bank.]—A bank which deals with an agent and discounts notes signed by him as such is not obliged to ascertain nor be concerned about the use made of the proceeds. But a bank which discounts the personal notes of a customer indorsed by him as agent of a third party also a customer, having a current account, and which sees by its books that all the funds of the principal pass, by this transaction, to the credit of the agent has notice which suffices to put it on inquiry. If, without receiving satisfactory explanations, it continues to discount such notes, it becomes the accomplice of the agent in his abuse of confidence and liable to the principal who has a right of action to recover from it the sums thus diverted. This recourse, however, is subject to the express condition contained in par. 2 of Art. 1048 C.C., and, therefore, no longer exists when the discounted notes have been paid.

Gratton v. Hochelaga Bank, Q.R. 37, S.C. 324 (Sup. Ct.)

—Deposit receipt—Action against indorser—Presentation.]—Defendant secured a receipt from a bank for a sum of money deposited, which the bank agreed to pay on demand. This document he endorsed to plaintiffs, who immediately forwarded it to the agents of the bank for collection. Before the document could be presented the bank became insolvent and suspended payment, and the agent returned it unpaid. Thereupon the defendant was notified of the dishonour. Not hearing from him, the plaintiffs, after five days' delay, caused the document to be again presented and upon dishonour, protested. All this took place in the State of Minnesota, and expert evidence was given to the effect that the document was by the law of that state similar to a promissory note; that the first notice of dishonour would have been sufficient if it had been proved that defendant received it, which could not be done, and that, in any event, the protest was sufficient evidence of the notice of dishonour. No evidence was given as to the law of Minnesota regarding time for presentment:—Held, that the question of presentment and notice is one of evidence for the Court, and, under the Bills of Exchange Act, s. 71, s.-s. (f), the protest must be accepted as prima facie evidence of these facts. (2) That no evidence having been given as to the law of Minnesota regarding time for presentment of a demand note, the Court must apply the principles of the law of Canada, and, applying those principles and having regard to the nature of the instrument and the facts of this particular case, the presentment was made within a reasonable time.

The Security National Bank v. Pritt, 3 Sask. R. 188.

Advances—Security—Bank Act, s. 74.]—H. held a chattel mortgage on a sawmill

belonging to G., with the machinery and lumber therein, and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no priority over subsequent incumbrances. Two months later G. gave H. a second mortgage on said property to secure a note for $794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes. G. being unable to purchase the logs asked the Merchants Bank for an advance. The bank, knowing G. to be financially embarrassed, refused the advances to him but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of $3,500 G. assigned the contractor's order to the bookkeeper and agreed to cut the logs at a price fixed and deliver them to the bookkeeper at the mill site. The latter then assigned to the bank all monies to accrue in respect to the contract, which assignment was agreed to by the contractor, and a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. This purported to be done under s. 74 of The Bank Act. Two or three days later G. made an assignment for benefit of his creditors, previous to which, however, the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage:—Held, affirming the judgment of the Supreme Court of British Columbia (Merchants Bank of Halifax v. Houston, 7 B.C. Rep. 465), that no property in the logs assigned to the bank had passed to G., and H. having no higher right than his mortgagor, could not claim them under his mortgage. Shortly before G.'s assignment for benefit of his creditors his bookkeeper transferred to the bank a chattel mortgage given him by G. to secure payment of $800. The judgment appealed from ordered the assignee in bankruptcy to pay the bank the balance due on said mortgage. Held, reversing said judgment, that the assignee had been guilty of no acts of conversion and was not liable to repay this money. The mortgage was not given to secure advances and did not give the bank a first lien on the property. The bank was in the same position as if it had received the mortgage directly from G. when he was notoriously insolvent.

Houston v. Merchants Bank of Halifax, 31 Can. S.C.R. 361.

—Bank Act, ss. 64 and 68—Man. Sale of Goods Act, 1896—Contract of Sale—Consideration—Warranty of title.]—Under s. 68 of The Bank Act security may be taken from the owner of horses for an existing debt by a bill of sale of the horses which expressly states that it is taken only by way of additional security for the debt, and s. 64 of the Act does not prevent the bank from recovering on promissory notes made in its favour by a person who purchases the horses from the transferor. Section 12, sub-s. 1, of The Manitoba Sale of Goods Act, 1896, does not prevent the recovery by the bank of the price of horses sold under such circumstances, for under sub-s. (c) of s. 11, a breach of the implied condition that the seller of goods has a right to sell them could be treated only as a breach of warranty and not as a ground for repudiating the contract:—Held, also, under the circumstances set out in the statement below, that the contract of sale between the vendors of the horses and the defendant was completed, that the property in the horses had passed to him and that he was liable for the price agreed on.

Bank of Hamilton v. Donaldson, 13 Man. R. 378.

—Banker's lien — Overdrawn accounts — Partner's separate account.] — Where the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm, the bankers have no lien for such balance on the separate accounts.

Richards v. Bank of B.N.A., 8 B.C.R. 143, Martin, J.

—Donatio mortis causâ — Bank deposit book.]—A banker's pass book, which is numbered, and in which it is stipulated that deposits recorded in it will not be repaid without its production, is a proper subject of donatio mortis causâ, and delivery of such a book in anticipation of death operates as a transfer of the debt to take effect upon death.

Brown v. Toronto General Trusts Corporation, 32 O. R. 319.

—Deposits in banks — Foreigner — Succession duty.]—Payment of duty under the Succession Duty Act is based upon administration; and duty is payable upon any property which can properly be administered only in Ontario. Payment of non-negotiable deposit receipts, payable after notice at branches in Ontario of Canadian banks, held by a foreigner at the time of his death in the foreign country, cannot be enforced except by his personal representative in Ontario, and succession duty is payable there in respect of the amount covered by them.

Attorney-General of Ontario v. Newman, 1 O.L.R. 511 (C.A.).

—Action against director of bank for false representations —Prescription — Discharge by statute.]—Held, 1. The recourse of creditors against the president or directors of the "Banque du Peuple," for false reports, etc., was suspended by Act 60-61 Vict., c. 75 and 62-63 Vict., c. 123. 2. The right of

action against the directors of the "Banque du Peuple," personally, was not taken away by the Act 62-63 Vict., c. 123. 3. A director cannot invoke such Act by way of demurrer, but only by a plea to the merits.

Prefontaine v. Grenier, 4 Que. P.R. 21.

—Fraudulent alteration of cheque—Payment by third party.]—See BILLS AND NOTES.

Imperial Bank v. Bank of Hamilton, 31 Can. S.C.R. 344, affirmed (1903) A.C. 49.

Accounting for securities received as collateral security.]—A creditor who has received collaterals as security for a debt is bound, after payment of the debt, to return them or account to the debtor for their face value in the absence of evidence to show that the respective amounts of them could not be collected. Driffil v. McFall (1877), 41 U.C.R. 313, followed. The County Court Judge disallowed certain sums of money which the defendants swore the plaintiff bank had received on certain collateral securities held for them because their evidence showed that these sums had first been received by defendants and they were unable to give dates and particulars of the payments to the bank, and had no books or memoranda to support their statements, and he was of opinion that they should have given undoubted evidence of the times of receipt and payment to the bank or in some other way brought home to the bank conclusively the receipt and noncredit of the money, but his verdict was not based on any finding that the defendants were unworthy of belief as witnesses: — Held, that, under the circumstances, it was proper for the Court above to review the finding of the County Court Judge upon the evidence, and that, taking into consideration the bank's duty to produce or account for the collaterals which it had failed to do, and the presumption to be drawn from such failure, the defendants had sufficiently proved the receipt of said moneys by the bank and were entitled to judgment for same.

Union Bank v. Elliott, 14 Man. R. 187.

—Bank Act (Can.) s. 73.]—Under s. 73 of the Bank Act the bank has no other or higher rights than the consignors.

Imperial Bank v. Hull, 4 Terr. L.R. 498.

—Set-off—Compensation—Unmatured bill or note—Intervention.]—A deposit in a bank is a loan to said bank, and Art. 1190 C.C., which makes the debt resulting from a deposit incapable of compensation, does not prevent the sum deposited from being set off against a debt due to the bank by the depositor. The compensation between a debt due to a bank and that arising from a deposit may have effect until service of a petition for winding up the bank, inasmuch as the two debts are equally clear, and exigible. But the term of a letter of credit or a note is deemed to have been arranged in favour of both creditor and debtor, and therefore the maker or indorser of a note discounted by a bank cannot, by waiving the benefit of the time which the note has to run, set off against the debt arising therefrom a sum on deposit to his credit in the bank. The indorser of a note discounted by a bank only becomes a debtor to the bank when the note is protested and notice of protest served on him. Although a creditor of a bank in liquidation has a right to intervene in an action pending between the liquidators and a debtor of the bank who claims that his debt has been discharged by compensation, to watch the proceedings and take the steps necessary to protect his rights, such credit or will be condemned to pay the costs incurred by the debtor if he files, against the claim of the latter, a useless contestation based on grounds already invoked by the liquidators.

Vanier v. Kent, 11 Que. K.B. 373, affirming 20 S.C. 545.

—Lien—Prior debt—Product of forest—Manufactured wood—Bank Act, 53 Vict., ch. 31, s. 74 (D).]—A bank cannot, under s. 74 of the Bank Act, 1890, obtain a lien on the products of the forest for a pre-existing debt. Manufactured wood, that is wood transferred into deals, planks, plinths and mouldings, do not constitute a "product of the forest" within the terms of said s. 74.

Molsons Bank v. Beaudry, 11 Que. K.B. 212.

—Intervention—Interest of intervenant—Art. 220 C.P.C.]—A creditor of a bank in liquidation can intervene in an action brought by the liquidator against a debtor of the bank and adopt the conclusions taken by the liquidator and the grounds thereof without setting up any new matters, subject to the power of the Court to condemn him to costs if his intervention proves to have been improperly filed.

Sisters of Charity v. Bastien, 11 Que. K.B. 64.

—Bankers' Lien—Overdrawn accounts—Partner's separate account.—Where the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm, the bankers have no lien for such balance on the separate accounts.

Richards v. Bank of B.N.A., 8 B.C.R. 209 (Full Court).

—Insolvent bank—Winding-up Act—Sale of unrealized assets—Set off—Funds in hands of Receiver-General — Estoppel.]—Where moneys belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General as unadministered assets in the case of the insolvency of a bank in

proceedings under The Winding-up Act (R.S.C. ch. 129) and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund:—Held, (1) that if it was clear that the matter had been really determined, effect should be given to the estoppel; but that where to give effect to it would work injustice, the Court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision. In this case there was no estoppel, and a reference to the registrar was directed to ascertain what proportion of the fund in the hands of the minister properly belonged to the suppliants. The rule as to estoppel stated by King. J., in Farewell v. The Queen (22 Can. S.C.R. 558) referred to). (2) One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the bank at the date of its insolvency. It appeared that at the time of the bank's insolvency certain of its debtors had at their credit in the bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General. Held, that the suppliants were not entitle to such indemnity.

Hogaboom v. The King, 7 Can. Exch. R 292.

—Institute — Liability as contributory—C.C. 944, 947.]—He who possesses bank stock as institute, may be held liable as contributory if the bank is put into liquidation.

La Banque Ville Marie v. Archambault, 4 Que. P.R. 429.

—Execution — Seizure by sheriff — Bank notes paid in a bank—Property in the money.]—A superannuated civil servant having presented his certificate at the wicket of a bank, which paid superannuation allowances for the Government, the teller counted out the amount in notes and placed them on the ledge in front of the wicket, when, before the payee had touched it, the money was seized by a sheriff's bailiff under an execution against him:—Held, that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it. Judgment of the local Master at Ottawa affirmed.

Hall v. Hatch; Bank of Montreal v. Hatch, 3 O.L.R. 147.

—Assignment of share in partnership—The Bank Act.]—See PARTNERSHIP.

Negligence—Material alteration in note—Liability of branch manager of bank.]—The defendant, a branch manager of the plaintiffs', accepted a joint instead of a joint and several promissory note as security for an advance, although expressly instructed to require the latter. On discovering the mistake, he inserted the words "jointly and severally" in the belief that this alteration was to be initialled by all the makers, which, however, was not done. After consulting the bank's solicitor, the defendant crossed out the inserted words. In the result the plaintiffs were held to have lost their remedy on the note on the ground of material alteration, and brought this action against the defendant for damages:—Held, that since the note as taken was to all intents and purposes as valid as if made jointly and severally, only nominal damages were recoverable against defendant for his breach of duty in this regard. Held, also, that the defendant was not liable for the result of his subsequent acts, since he acted in good faith, and in ignorance of the legal consequences, and had exercised reasonable care and diligence under all the circumstances, and the mere fact that his judgment was mistaken, and his acts prejudicial to the plaintiffs, was not enough to render him liable.

La Banque Provinciale v. Charbonneau, 6 O.L.R. 302, 2 C.L.R. 478.

—Bank manager—Promissory note—Duress—Verdict of jury.]—In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager:—Held, that the jury having believed the defendant's account and given him a verdict which the evidence justified, such verdict ought to stand.

Western Bank v. McGill, 32 Can. S.C.R. 581, affirming the Court of Appeal for Ontario.

—Banks and banking—Cheques—Fraud of agent—Payment by bank.]—N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five the insurance subsequently lapsed, of which the company were kept in ignorance. Afterwards N., representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, when cheques for the respective amounts, made by the company in favour of the alleged

claimants and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt, to see the payees and procure discharges from them. N. was in the habit of certifying to the bank the genuineness of the signatures of the payees of the cheques in payment of claims, and most of the cheques in question had been certified to by him. The endorsements of the payees' names were forged by N., and the cheques presented to the bank and paid in good faith, to whom or how did not appear, the amounts thereof being charged to the company's account:—Held, that the company was affected by what had been done by N., so as to preclude it from disputing the right of the bank to pay the cheques and charge the plaintiffs with the amounts.

London Life Insurance Company v. Molsons Bank, 5 O.L.R. 407, 2 C.L.R. 97. (Meredith, C.J.C.P.)

—Insolvent bank — Liquidator — Action against debtor of the bank.]—Held, affirming the judgment of Pagnue, Co.J. (19 Que. S.C. 556):—1. The liquidator of a bank in liquidation has no right of action as such against debtors of the bank, upon a note which became due before the liquidation proceedings began, but the action should be brought in the name ofthe bank. 2. In an action so instituted without proper capacity, the liquidator cannot bring in the bank as a party to the case by means of an amendment. 3. An intervention is not a separate distinct demand, but it is incidental to the principal action and must fall with it when such action is null ab initio 4. In the present case, the intervention having been without utility, inasmuch as it was founded upon the grounds already invoked by the plaintiffs, the Superior Court was right in dismissing it with costs.

Kent v. Bastien, 12 Que. K.B. 120

—Donation of "all movables and movable effects"—Deposit in bank.]—Held, reversing the judgment of Langelier, J., That the definitions of the meaning of the words and terms "movables," "furniture," "movable property," and "movable things," when employed alone, are declaratory, and given by way of illustration to aid in judicial interpretation in doubtful cases. When the parties to a deed use together several times the terms "movables and movable effects" to designate movables alone, and not moneys or credits, the same words repeated anew in the same disposition, preceded even by the word "all," are presumed to be employed in the restricted sense which the parties have already given to them, and do not include a deposit of money in a bank.

Sabourin v. City and District Bank, 12 Que. K.B. 380.

—Bank Act—Right of bank to hold securities as against creditors — Compromise of action—Effect of possession taken under.]—B. being indebted to the Commercial Bank of Windsor, gave to the bank a document purporting to be a warehouse receipt, and also a general transfer or bill of sale. The bank took possession of a portion of the goods covered by the documents and removed them, and was proceeding with the removal of others of the goods when the removal was forbidden by one of B.'s clerks. Two actions of replevin, brought by the bank to recover possession of the balance of the goods, were compromised by B.,who agreed that the bank should take the goods and sell them, and credit him with the amount received:—Held, that, not withstanding any irregularities under the Bank Act, the title of the bank was complete under the compromise made between the bank and B., and that plaintiff, who purchased a portion of the goods from the bank, was entitled to recover against the defendant sheriff who levied on the goods under an execution against B:—Held, also, assuming it to be correct that the security on the goods held by the bank was void under the provisions of the Act, not being for a present advance but for a past due debt, and that the bank was not entitled to hold such security against the creditors of B., that the bank was not obliged to rest its title on the document, and that its defects, if any, would not affect the subsequent transaction by which the bank became the actual purchaser of the goods and dealt with them as its property.

Armstrong v. Buchanan, 35 N.S.R. 559, 1 C.L.R. 506.

—Cheques — Fraud — Payment by bank — "Fictitious person."]—N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five, the insurance subsequently lapsed, of which the company were kept in ignorance — afterwards N., representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging the signatures thereto, when cheques for the respective amounts made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank were sent to N., whose duty it was, on the receipt to see the payees and procure discharges from them. The endorsements of the payees' names were forged by N., the genuineness of the signatures on most of the cheques being certified by his attestation. The cheques were presented to and paid by the bank in good faith, to whom or how did not appear, the amounts thereof being charged to the company's account:—Held, in this disagreeing with the judgment

of Meredith, C.J.C.P., at the trial (Maclaren, J.A., dissenting), that there was no evidence that the bank was aware that N. had any connection with the transactions out of which the cheques arose, and that they were not entitled to rely on his identification of the payees or his attestation of their signatures. Held, however, that under the circumstances the cheques must be regarded as payable to fictitious or non-existent persons, and therefore under sub-s. 3, s. 7, of the Bills of Exchange Act, 1890. 53 Vict. ch. 33 (D.), payable to bearer, and that the bank had the right to pay and charge the company with the amount.

Bank of England v. Vagliano Bros. (1891), A.C. 107, followed.

London Life Insurance Company v. Molsons Bank, 8 O.L.R. 238, (C.A.).

—Promissory note—Indorsement for collection.]—1. A bank to which a promissory note is indorsed "for collection," becomes, for that purpose, the agent of the indorser, to whom it is bound to account for the amount collected. 2. The signature of another party, under that of such indorser, does not affect the relative rights and obligations growing out of such restrictive indorsement. 3. The bank is bound to pay a cheque drawn for a part only of funds collected by it under the foregoing circumstances, and is liable in damages for refusal to do so.

Perreault v. Merchant's Bank, Q.R. 27 S.C. 149, Champagne, J.

—Securities — Railway bonds — Power of sale.]—As a collateral security to a promissory note, the makers deposited with a bank 300 railway bonds, and, by a memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for any loss occasioned thereby":—Held, (Osler, J.A., dissenting), that the power was to sell by auction, and that the bank had no power to sell by private contract. Semble, that, even if there was power to sell by private contract, the sale made to the respondents could not, upon the evidence as to the methods adopted, be supported, they having notice that the bank held the bonds as pledges.

Toronto General Trusts Corporation v Central Ontario R. W. Co., 10 O.L.R. 347, C.A.

—Interest—Cheques as payment—More than seven per cent.—Bank Act, ss. 80, 81.]—Defendant borrowed large sums of money from the plaintiff bank by way of overdraft and on promissory notes. Having agreed to pay interest, first at 24 per cent., and afterwards at 18 per cent. per annum, defendant from time to time gave the bank cheques on his current account to pay the interest at those rates respectively up to 31st January, 1902. When such cheques were given the account had already been overdrawn, but it was afterwards changed into a credit balance in defendant's favor by deposits or by collections made by the bank for defendant's account. Held, that such cheques should be deemed to have been payment of the interest, and that defendant could not recover back such interest or any part of it, although it was in excess of the seven per cent. rate which the Bank Act permits a bank to charge. Held, also, that, under sections 80 and 81 of the Bank Act, the bank was not entitled to sue for and recover interest accruing after 31st January, 1902, at seven per cent. per annum, but could only recover interest at the legal rate of five per cent. per annum from that date on the principal then due.

Bank of British North America v. Bossuyt, 15 Man. R. 266, Richards, J.

—Bank in liquidation—Compensation—Set off.]—After a bank has suspended payments, and its insolvency is notorious, compensation of a debt due to the bank cannot be effected by a transfer to the debtor of debts due by the bank to third parties, where such transfer has been made to the debtor after the suspension and within thirty days prior to winding up proceedings under the Winding Up Act. This rule is not affected by the circumstance that the amounts offered in compensation consisted of monies deposited with the bank by such third parties, for the special purpose of aiding the debtor to meet his indebtedness to the bank, but not transferred to the debtor until after the suspension of payments.

Sisters of Charity v. Kent, 13 Que. K.B. 483.

—Winding-up — Appointment of liquidators—Right to appoint another bank.]—The Winding-up Act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to be appointed liquidators, and the Judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the Judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank:—Held, affirming the judgment of the Court below, that there is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators; and that if any appeal lies from the decisions of the Judge in exercising his judgment as to the appointment, such discretion was wisely exercised in this case.

Forsyth v. Bank of Nova Scotia (1890) 1 S.C. Cas. 209.

—**Unauthorized interest—Recovery.**]—Interest at a rate beyond that permitted by the Bank Act, if paid voluntarily, cannot be recovered by the customer, but if simply charged by the bank to the customer, can be reduced upon taking the account.

Canadian Bank of Commerce v. McDonald (Y.T.), 3 W.L.R. 90.

—**Cheque payable to order—Forged endorsement—Collection by third party through his bank—Payment over—Liability to refund.**]—The defendant, McE., having a cheque on New York payable to his order, of which he claimed to be the owner, indorsed and handed it to the defendant H., who had done business for him, to collect and pay the amount over to him. H., believing McE. to be the owner and entitled to receive the money, handed it to the plaintiffs to be collected; telling their manager that he saw McE. indorse it and that he knew him; but when the manager offered to cash it at once if H. would indorse it, he declined, stating he knew nothing of it and it might not be paid. For the purpose of collection H. signed his name as witness to the indorsement, writing beneath his signature "without any recourse to me whatever." The plaintiffs collected the money and credited the proceeds to H., who accounted for them to McE. The New York bank subsequently demanded the money back, alleging McE.'s indorsement to be a forgery, and the plaintiffs paid back the amount received and brought action against H. and McE.:—Held, that H. having acted honestly, he was not liable in an action for deceit; but that the facts constituted a contract of warranty by him that he was entitled, as agent for the rightful owner of the cheque, to request the plaintiffs to collect it and pay the proceeds to him as such agent when collected, and that if the indorsement was forged, he was liable to repay the amount.

Bank of Ottawa v. Harty, 12 O.L.R. 218 (D.C.

—**Banking Act of 1890—Fire insurance policy—Advances on as collateral—Right of bank to make—Interest in property insured.**]—Where a company is being wound up under the New Brunswick Winding-up Act, a bank is entitled to an order for the payment to it of the proceeds of policies of fire insurance effected by the company on their property, and made payable, in case of loss, to the bank, as interest may appear under a verbal agreement between the bank and the company that the policies should be so effected as security for advances which the bank from time to time might make, the bank having no interest in the property insured. Such a transaction is not prohibited by section 64 of the Banking Act, 1890, 53 Vict. c. 31.

Re Shediac Boot and Shoe Company, 37 N.B.R. 98.

—**Deed of Settlement — Ambiguity — Discharge of debtor.**]—Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement. A deed of settlement between B. and a bank declared that he owed the bank $4,731.61 for interest on an advance in respect to a lottery scheme, and a further sum of $18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the large note only. Subsequently, the directors of the bank passed a resolution authorizing the discharge of B., on payment of $15,000 by one V., "jusqu'à concurrence de la dite somme de $15,000," and the transfer of the shares to V. This resolution was followed by a deed of compromise, V. paying the $15,000 and obtaining a transfer of the shares, and it was thereby declared that, by the transaction, B. was discharged in so far as concerned the bank's advances on the stock account "vis-a-vis la banque des avances qu'elle lui a faites du chef susdit mentionnées en un acte de règlement," etc., the resolution being annexed and the deed of settlement referred to for imputation of the payment, and V. was to become creditor of B. under conditions mentioned, "jusqu'à concurrence de $15,000," the note which had not become due and the securities being allowed to remain in possession of the bank. In an action by D. to whom the notes held by the bank were assigned:—Held, reversing the judgment appealed from, that the effect of the deed of compromise was to discharge B. merely to the extent of the $15,000 on account of the larger note; and further, affirming the judgment appealed from, that no action could lie upon the smaller note, as it represented interest on a claim in relation to a contract of an illegal nature. L'Association St. Jean Baptiste v. Brault, 30 Can. S.C.R. 598, followed.

Deserres v. Brault, 37 Can. S.C.R. 513.

—**Surrender of draft to acceptor—Discharge of drawer—Collateral security—Life policy—Cash surrender value.**]—(1) A claim by a bank against a customer for an overdraft originally evidenced by cheques, etc., may be proved against a third party contesting it, by the parol testimony of the customer, corroborated by his acknowledgment in writing of the correctness of the balance shown in his bank account, and his receipt for his cheques returned to him monthly according to custom, both given at the date of such surrender. (2) A surrender of a draft, by the bank holding it, to the acceptor, with the word paid stamped on it, is a complete discharge of the drawer, and it cannot afterwards be used by the bank in support of a claim against

the latter, because the acceptor has since become insolvent. (3) A bank is not bound to credit a customer, who has become insolvent and upon whose estate it has a claim, with the cash surrender value of a policy of life insurance on the life of a third party, which had been transferred to it by the customer as collateral security.

Tessier v. Banque Nationale, 28 Que. S.C. 140 (C.R.).

—Rate of interest—Agreement to pay more than statutory rate.]—S. 80 of the Bank Act does not prevent a bank from entering into a contract to be paid a higher rate of interest than 7 per cent., and if, under such contract, interest is paid in excess of said rate, it cannot be recovered back.

Williams v. Canadian Bank of Commerce, 13 B.C.R. 70.

—Lumber operator—Advances to upon security of logs—Bank Act, c. 29, s. 76, R.S.C.]—A bank made advances to a lumber operator upon the security of an agreement between him and a trustee that he should sell and deliver a specified quantity of logs to be cut by him, to the trustee, who should have the property therein as from the stump, and who should upon delivery pay for the same by, inter alia, paying the bank amount of its loans:—Held, that the security was void under s. 76 of the Bank Act, c. 29 R.S.C.

Randolph v. Randolph, 3 N B. Eq. 576.

—Interest—Bank Act, ss. 80 and 81—Reduction to maximum legal rate.]—In an action to recover principal and interest on certain promissory notes, bearing interest at twelve per centum "as well after as before maturity," defendant pleaded s. 80 of the Bank Act:—Held, reading ss. 80 and 81 together, such a contract between the bank and the creditors is merely invalid in so far as it stipulates for more than seven per cent.

Bank of Montreal v. Hartman, 12 B.C.R 375 (Martin, J.).

—Security for advance—Assignment of goods—Claim on proceeds of sale.]—A bank to which goods have been transferred as security for advances under s. 74 of the Bank Act, 1890, can follow the proceeds of sale of said goods in the hands of a creditor of the assignor to whom the latter has paid them when the purchaser knew, or must be presumed to have known, that the same belonged to the bank.

Union Bank of Halifax v. Spinney, 38 Can. S.C.R. 187.

—Liability of director of bank—Overdrafts of customers improperly allowed by cashier of bank—Failure to detect errors in audited accounts.]—Where the collapse of a bank was due to overdrafts which the cashier, the principal executive officer of the bank under the directors, whose accounts had been duly audited by a board of auditors duly appointed and entirely independent of the directors, had irregularly and improperly allowed to certain customers:—Held, that by the law of Quebec as by the law of England, a charge of negligence could not be established against the president of the bank simply by reason of his having in good faith failed to detect the cashier's concealment of such overdrafts.

Préfontaine v. Grenier [1907], A.C. 101, 15 Que. K.B. 563, affirmance by the Privy Council of the decision of the Quebec Court of King's Bench, 15 Que. K.B. 143, varying 27 Que. S.C. 307.

—Bank Act—Indictment for making false and fraudulent return—Non direction of jury.]—Defendant, as president of the Bank of Yarmouth, was indicted and tried for having wilfully made a false and deceptive return to the government respecting the affairs of the bank. On the trial, other returns made both before and after that in respect to which the indictment was laid, were received in evidence without the jury having been cautioned that they were not to be influenced by such other returns in coming to a conclusion on the main issue respecting the offence charged:—Held, per Townshend, J., and Graham, E.J., that there must be a new trial on this ground. Per Sir R. L. Weatherbe, C.J., and Meagher, J., on the facts, that there was no evidence of guilty knowledge and that the case should have been withdrawn from the jury. Per Russell, J., (who concurred that there was no evidence to warrant a conviction), that there were matters as to which it was open to the jury to draw a conclusion, and that the cause therefore was one which could not be withdrawn from them.

The King v. Lovitt, 41 N.S.R. 240.

—Bank—Discounts against sales—Goods drawn against not accepted—Liquidation of drawer—Sale by liquidator—Right to proceeds—Equitable lien.]—The S. Boot & Shoe Co. had an understanding with a bank that they would draw on their customers as goods sold were being forwarded and these drafts would be discounted by the bank. Under this arrangement a draft was made on M. for certain goods that had been shipped to him at N. M. refused to accept the goods and the draft was returned dishonoured. It was then agreed between the bank and the company that the manager of the company should proceed to N., take possession of the goods for the bank, and endeavour to get M. to accept them. It did not appear what the manager did at N., but he did not induce M. to accept the goods, and they remained at the railway station at N. until the S. Co. went into liquidation. It was then

agreed between the bank and the liquidator of the company that the latter should take possession and dispose of the goods and hold the proceeds subject to the order of the Court:—Held, that the bank had an equitable lien and was entitled to the proceeds of the sale.

Re Shediac Boot and Shoe Company, 38 N.B.R. 8.

—Crown—Forged cheques—Payment—Representation by drawee.]—A clerk in a department of the Government of Canada, whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other banks, on presentation, and charged against the Receiver-General on the account of the department with the bank. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General: —Held, affirming the judgment appealed from (11 Ont. L.R. 595) that the bank was liable unless the Crown was estopped from setting up the forgery. Per Davies, Idington and Duff, JJ., that estoppel could not be invoked against the Crown. Per Girouard and Maclennan, JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of this case a private person would not have been estopped had his name been forged as drawer of the cheques. Per Davies and Idington, JJ. The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the accounts could be reopened to have the mistake rectified. The defendant bank made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them respectively. On these third party issues, it was held, per Girouard and Maclennan, JJ., the drawee, having paid the cheques on which the name of its customer was forged, could not recover the amounts thereof from holders in due course. Price v. Neal (4 Burr. 1355) followed. Per Davies and Idington, JJ. As the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and subsequently paid out of the funds to their depositor or on his order, the drawee was estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake. In the result, the judgment appealed from (11 Ont. L.R. 595) was affirmed.

Bank of Montreal v. The King, 38 Can. S.C.R. 258.

—Forged cheque—Negligence—Responsibility of drawee—Payment—Mistake.]—A cheque for $6, drawn on the plaintiff, was fraudulently altered by changing the date, and the name of the payee, and by raising the amount to $1,000. The drawee refused payment for want of identification of the person who presented it. The defendant bank, without requiring identification, advanced $25 in cash to the forger on the forged cheque, placed the balance, $975, to his credit in a deposit account, indorsed it and received the full amount of $1,000 from the drawee. After receipt of this amount, the defendant paid the further sum of $800 to the forger out of the amount so placed to the credit of his deposit account. The fraud was discovered a few days later, and, on its refusal to refund the money it had thus received, the action was brought to recover it back from the defendant as indorser or as having received money paid under mistake of fact:—Held, that the drawee of the cheque, although obliged to know the signature of its customer, was not under a similar obligation in regard to the writing in the body of the cheque; that, as the receiving bank had dealt with the drawee as a principal and not merely as the agent for the collection of the cheque and had obtained payment thereof as indorser and holder in due course, it was liable towards the drawee which had, through the negligence of the receiving bank, been deceived in respect to the genuineness of the body of the cheque, and that the drawee was entitled to recover back the money which it had thus paid under a mistake of fact, notwithstanding that, after such payment, the position of the defendant had been changed by paying over part of the money to the forger. Bank of Montreal v. The King, 38 Can. S.C.R. 258, distinguished. Judgment appealed from (17 Man. R. 68) affirmed.

Dominion Bank v. Union Bank, 40 Can. S.C.R. 366.

—Presentment of customer's cheque to the wrong clerk—Refusal to pay.]—A clerk from one bank presented at another bank a cheque of a customer of such last mentioned bank, but at the wrong ledgerkeeper's wicket, and was directed to present it at another wicket. There was no evidence that this was done, and a telegram was sent out by the first mentioned bank that the drawer of the cheque had no account:—Held, on appeal, that the trial Judge was right in taking the case

from the jury and dismissing the action for want of sufficient evidence.

Rear v. Imperial Bank, 13 B.C.R. 345. Affirmed 42 Can. S.C.R. 222.

—Banks and banking—Right of bank to carry on business—Bank Act, R.S.C. 1906, c. 29, ss. 76, 81—Indemnity—Agreement executed by local manager—Validity of—Lease—Agreement to assign—Obligation to pay rent.]—In 1905 the defendants, a firm carrying on a milling business, being heavily indebted to a bank, effected a settlement by which, upon payment of $10,000 and a transfer of all their assets, the partners were to be discharged from all liability. An agreement was entered into between the bank and the partners, executed by them, and by the local manager of the bank on its behalf, whereby the firm agreed to pay $10,000 to the bank, to surrender to it all the assets, and assign the lease of the milling property. The bank, in consideration thereof, assumed payment of certain specified liabilities of the firm as set out in a memorandum attached, which, however, did not specially refer to the accruing rent of the milling property; and agreed to forthwith release the firm, as well as the individual partners, from all liability. At the same time another agreement was executed between the bank, by its local manager, and one of the partners, by which for the more convenient liquidation of the assets and the disposal of the business as a going concern, the partner mentioned was to act as manager and continue the business in the firm's name, the bank indemnifying the partnership against all liability incurred while doing so. The release agreed on, containing recitals of the above, was duly executed by the bank under its corporate seal. The mill property was held by the firm under a lease for 10 years, which contained a covenant not to assign without leave. The bank continued the business for a time, and paid the rent for the period of their occupation, but refused to pay the quarter's rent accruing due subsequently. The bank were brought in by the defendant as third parties:—Held, that the agreement being recited in the release was valid and binding on the bank, who, as equitable assignees of the term were impliedly bound to indemnify the lessees against the rent subsequently accruing due. (2) That in view of the powers conferred by s. 81 and other sections of the Bank Act, R.S.C. 1906, c. 29, the carrying on of the business for the purpose of, and to the extent provided for by the agreement was not ultra vires of the bank under s. 76 of the Act.

Peterborough Hydraulic Power Company v. McAllister, 17 O.L.R. 145.

—The Bank Act—Security in form C.—Rancher—Description of property.]—A rancher whose business is raising cattle is not, no matter how large his transactions may be, "a wholesale purchaser or shipper of or dealer in live stock," within the meaning of s. 88 of the Bank Act, R.S.C. (1906) c. 29. The description in a security in the form in schedule C of that Act must be sufficient to identify the property.

Hatfield v. Imperial Bank, 6 Terr. L.R. 296.

—Overdrawn customer's account—Promissory notes—Collateral securities—Transfer to third person—Inspection of customer's account.]—R. having had an account with a bank for many years previous to the 16th July, 1903, was on that day indebted to the bank in a large sum for moneys advanced, for which the bank held securities pledged to them by R. and a promissory note made by R., payable on demand, for a sum larger than the amount then due. M. had been negotiating with the bank for an assignment of the debt due by R., and had been permitted by the bank to see the entries in their books relating to that debt, and, on the day mentioned, the bank assigned to M. the sum due and all the securities held by them, covenanting that the sum named was due and to produce and exhibit their books of account and other evidence of indebtedness, etc. The pledged securities were handed over to M., and afterwards the demand note, upon which he sued R., who brought a cross-action against the bank and M. for an account and damages and other relief:—Held, that the bank were not prohibited by s. 46 of the Bank Act, 1890, from allowing M., for the purposes mentioned, to inspect the account of R. with the bank; that the agreement was not invalid; that M. was entitled to succeed in his action upon the note; and that R.'s action failed:—Held, also, Meredith, J.A., dissenting, that the bank were not entitled to charge R. compound interest; but where the bank had made a discount or an advance for a specified time and had reserved the interest in advance, this should be allowed; in other cases, where there had been an overdraft, and payments had been made, interest should be reckoned up to the date of each payment, and the sum paid applied to the discharge of the interest in the first place, and any surplus to the discharge of so much of the principal.

Montgomery v. Ryan; Ryan v. Bank of Montreal, 16 O.L.R. 75 (C.A.)

—Security under s. 88 of Bank Act—Assignment of—Payment of principal debt by guarantor—Subrogation.]—A security acquired under s. 88 of the Bank Act, R.S.C. 1906, ch. 29, whereby a bank may lend money to manufacturers upon the security of goods manufactured by them is not legally assignable by the bank so as to transfer the special lien or security—

conferred by that Act—to a third party. The purpose of the security is satisfied when the debt it is given to secure is paid to the bank. A guarantor to a bank, which also holds such a security for the debt guaranteed, is not subrogated to the rights of the bank in the security on payment of the debt by him.

Re Victor Varnish Co., Clare's Claim, 16 O.L.R. 338.

—Discount—Assignment of warehouse receipts as security—Present advance.]—Before November 28th, 1904, a cream and butter business was being carried on by a married woman under the trading name of the Toronto Cream and Butter Company, her husband being the manager. On that date, with the view of opening an account with the defendants' bank, a letter was written in the trading name stating that a line of credit would be required from $10,000 to $12,000 secured by warehouse receipts on butter, and from $1,000 to $2,000 on the firm's note, to be otherwise secured. In November, 1904, the account was opened and advances made by the bank, and on October 23rd, 1905, the account was overdrawn to the amount of $10,158.01, and there was an outstanding note of $1,700 due in November. On October 23rd the manager discounted a promissory note made under the trading name for $6,000 at three months, and by the same name assigned to the bank as security therefor warehouse receipts of 401 cases of butter, promising also other warehouse receipts to cover the indebtedness. After placing the $6,000 to the firm's credit there remained a debit balance of $4,258.01, which was gradually reduced, and, on December 26th, 1905, when liquidation proceedings were taken, there was outstanding the $6,000 note, a $2,000 note discounted on October 27th, 1905, and an open debit balance of $2,000. No attempt was ever made to draw out the $6,000, but the manager of the bank stated that there was no restriction preventing it. The 401 cases had been warehoused on September 21st and 26th, and October 4th, 10th and 20th, while 99 cases had been warehoused on October 20th and 21st, although no warehouse receipts had been obtained therefor, and there was nothing to show they had ever been assigned to the bank. The firm had been incorporated as a company by letters patent, dated April 5th, 1905, one of the objects being to acquire the business as a going concern; and by an agreement dated June 1st, 1905, made between the wife and the company, and executed by both parties, all the property, assets and good-will of the business were sold to and transferred to the company, which agreement was confirmed by a resolution of the shareholders, the husband being appointed manager, and the defendants' bank appointed the company's bank. Notwithstanding the incorporation and sale to the company, the business continued to be carried on as theretofore in the trade name, no by-laws being passed, and no stock was ever allotted to the vendor of the business, the bank, not being aware of the incorporation and sale until some days after the transfer to them of the warehouse receipts:—Held, that the business was that of the wife and not of the husband, and that there was a valid transfer by her to the company of all the firm's assets and business, so as to vest in them the title to the butter, and though the continuance of the business in the old trade name was objectionable and gave colour to the contention that there was no change in the ownership or control of the business, she was estopped from contesting the company's title thereto:—Held, also, that as to the 401 cases, the transaction was supportable, under s. 73 of the Bank Act, 53 Vict. c. 31 (D.), now s. 86 of the R.S.C. 1906, c. 29, as on the evidence there was a present advance and not a mere form to cover a past indebtedness; but that the bank had no claim to the 99 cases. Held, also, Osler and Garrow, JJ.A., dissenting, that the bank would not be entitled to hold the warehouse receipts, under the letter of November 28th, as not constituting an agreement to furnish security for advances thereafter to be made. Meredith, J.A., dissenting, on the ground that the note was not "negotiated" within the 90th section of the Bank Act, at the time of the acquisition of the warehouse receipts. Ontario Bank v. O'Reilly (1906), 12 O.L.R. 420, applicable, and Halsted v. Bank of Hamilton (1896), 27 O.R. 435 (1897), 24 A.R. 152, 28 S.C.R. 235, distinguished. Held, also, that the company, and not the liquidator, were the proper parties to the action.

Toronto Cream and Butter Company v. Crown Bank, 16 O.L.R. 400.

—Cheque countersigned by representative of bank—Authority of representative—Promise not made in writing.]—A firm of dealers in fruit, whose account was overdrawn at their bank, applied for further advances, which the bank refused to make unless one D. was employed to look after the business, act as bookkeeper, receive all produce, and countersign cheques given for same. D. was so employed, and represented to producers of fruit that it was safe for them to bring their produce to the factory, and that cheques given for same countersigned by him would be paid by the bank. The plaintiff, relying on these representations, delivered peaches, for which he received their cheque countersigned by D. The bank which at the time had liens on the plant and property of the firm, through D. disposed of the whole output of the factory, including the plaintiff's goods, and received the entire profit of

same. On the cheque being presented, the bank refused payment, upon which this action was brought:—Held (Meredith, C.J., dissenting), (1) that the bank had such an interest in the goods delivered by the plaintiff as prevented the application of the 4th section of the Statute of Frauds, and were therefore bound by D.'s promise or representation that they would pay the cheque, though not made in writing. The principle of Sutton v. Grey, [1894] 1 Q.B. 285, discussed and applied. (2) That there was evidence to support the finding of the Court below, that there was an original liability on the part of the bank, on which the plaintiff was entitled to recover, on the authority of Lakeman v. Mountstephen (1874), 7 H.L. 17.

Simpson v. Dolan, 16 O.L.R. 459.

—Bank Act—Security under s. 88—Substitution of goods.]—It is only the owner of the goods who can give security under s. 88 of the Bank Act, R.S.C. 1906, c. 29; and a bank which has taken such security on goods from the owner, cannot, under that section, substitute other goods afterwards coming into the possession of the giver of the security as agent for sale. S. 47 extends the class of persons who may give or indorse a warehouse receipt or bill of lading under s. 86, but is not incorporated in s. 88, by sub-s. (6) of that section.

Barry v. Bank of Ottawa, 17 O.L.R. 83.

—Crediting customer with amount of note—Discount—Collateral security—Separate instruments — Sureties in different amounts.]—A bank, wishing to close an account on which a balance of $1,000 of advances to a customer remained unpaid, took a joint and several demand note for $1,000 of the customer and another as surety, payable to it, with interest and credited the customer's account with its face value, writing the word "disc." before the credit entry:—Held, that it was open to the bank to show that the note was in fact taken by it as collateral security merely, and not in payment of the balance due so as to release the accommodation makers of two other notes held by it as collateral security in respect to the same account. Sureties by different instruments for the same principal debt are liable to contribute in proportion to the respective amounts to which they have agreed to be sureties. A person as surety made a note for $3,000 to be held by a bank as security for advances to be made to a customer, and the ultimate balance thereof, and two others, as sureties, made a joint and several note for the like amount and for the same purpose, and another, as surety, made a note for $1,000 for the same purpose. Held, that they were liable to contribute respectively in the proportion of three-sevenths, three-sevenths and one-seventh of the ultimate balance requiring to be paid off.

Ostrander v. Jarvis, 18 O.L.R. 17.

—Cheque payable to firm—Indorsement and deposit by partner in bank to credit of another firm.]—C., a member of a partnership of R. M. & C., received a cheque payable to the firm for a large sum due to the firm, and indorsed it in the name of the firm, which he had a right to do. Instead, however, of depositing the cheque to the credit of the firm or cashing it and applying the proceeds for the benefit of the firm, he and M., without the knowledge or consent of R., took the cheque to a bank, where they opened an account in the name of a new firm, M. C. & M., of which they were members, and handed the cheque to the bank, indorsed also in the name of the new firm; the bank at once credited the new firm with the amount of the cheque. The assistant general manager of the bank, with whom the business was transacted, made no inquiries of any kind as to the old firm or the new firm. The trial Judge found no negligence and good faith on the part of the bank:—Held, that the transaction was a discounting or purchase of the cheque by the bank; that the trial Judge's findings were supported by the evidence, and that without proof of negligence and bad faith the plaintiff, R., was not entitled to succeed against the bank in an action for conversion of the cheque or misapplication of it in breach of trust.

Ross v. Chandler, 19 O.L.R. 584.

—Curator—Action to set aside deed.]—The curator to an insolvent's estate who is authorized to take action against the insolvent and the purchaser to have the fraudulent conveyance of an immovable and obtains judgment therefor, may execute it by ordering the immovable to be sold and filing an opposition afin de conserver for re-payment of the price of sale by the insolvent. Creditors of the insolvent cannot contest this opposition but should file their claims with the curator.

Daiveau v. Gagné, Q.R. 36 S.C. 289.

—Advances by bank to lumbermen—Insurance of lumber against fire—Loss payable to bank.]—The defendant bank advanced to C. & Co., lumbermen, money wherewith to carry on lumbering operations. With the bank's knowledge, the plaintiff contracted with C. & Co. to saw their logs into lumber, which he did. C. & Co. then insured this lumber, making the loss payable to the bank; and, while lying in the plaintiff's yard, the lumber was burnt. The plaintiff claimed to be entitled to payment, out of the insurance moneys, in priority to the bank, of the contract price of the sawing:—Held, that the plaintiff had, at most, a mere possessory lien upon the lum-

ber, for the price of the sawing, depending not upon contract, but wholly upon possession, and therefore brought to an end by the fire; while the bank had a lien upon the insurance moneys, which the plaintiff was not in a position to attack or displace.

Chew v. Traders Bank, 19 O.L.R. 74.

—Subscription for shares—Subscription conditional on bank opening branch—Parol evidence.]—The defendant subscribed in writing for shares of a bank "on the strength of the bank agreeing to open a branch at S.," and the bank did so, but closed it five months afterwards:—Held, that the defendant was bound to pay for the shares, and parol evidence that the agent who obtained his subscription promised that a branch would not only be opened but maintained at S., was inadmissible. Held, also, that notwithstanding ss. 37 and 38 of the Bank Act, R.S.C. (1906) c. 29, directors of a bank may agree with a shareholder as how his shares shall be paid for—at all events, when the times for payment are to be such as they might fix under s. 38 if there were no agreement

Farmers Bank v. Blow, 18 O.L.R. 530.

—Rights and liabilities upon bills and promissory notes.]—See BILLS OF EXCHANGE.

—Power to take a deposit in trust—Deposit made in hands of manager outside the bank.]—(1) Under the provision in the Banking Act, R.S.C. c. 29, s. 76, sub-s. 1, s (d), that "banks may engage in and carry on such business generally as appertains to the business of banking," a bank may lawfully receive money deposited with it in trust, for the purchase of stock to be transferred by it to the depositor. (2) Such a deposit may be lawfully made in the hands of the manager of the bank, outside the bank premises at the office of the depositor, to whom the bank, on taking possession of the money, becomes liable for it.

Hooper v. Eastern Townships Bank, 35 Que. S.C. 221.

—Advances—Restrictive clause in trust deed—Notice.]—The trust deed of plaintiff company to secure debentures of the A. P. Co., contained a clause charging in favour of the trustees "its other assets whatsoever and wheresoever with the payment" of all moneys for the time being owing on the security of these presents and providing that "such charge shall rank as a floating charge, and shall in no way hinder the company from selling or otherwise disposing of such assets in the ordinary course of its business, and for the purpose of carrying out the same." The deed contained the following restriction, "but the company shall not be entitled to mortgage or charge the same in priority to or pari passu with the security hereby constituted." It becoming necessary for the company to obtain an advance to pay for pulpwood and to carry on its business, the defendant bank was applied to for a loan, and granted the same upon security being given, under the terms of the Bank Act, s. 74, upon the company's wood at different places:—Held, by Townshend, C.J., and Longley, J. (Meagher, J., concurring in the conclusion), that in determining the question whether or not the restrictive clause in the trust deed was brought to the attention of the bank before the money was advanced, the positive evidence of an officer of the company giving details of what occurred must be preferred to the evidence of the bank manager, who testified that he had no recollection on the subject. Also, that so long as the money remained under the control of the bank it was open to the bank to cancel the loan and retain the money upon discovering that the credit was given under a misapprehension as to the nature of the security. Also, the fact that the bank, in making the loan, relied upon the assignment under the Bank Act, s. 74, could not prejudicially affect plaintiff when it was shown that the advance was made after notice of the restriction contained in the trust deed.

Indian and General Investment Trust v. Union Bank, 42 N.S.R. 353.

Sale of bank stock.]—

See COMPANY (shares).

—Advance by bank "on call"—Failure to allege call—Collateral securities.] — Upon a motion by the plaintiffs for judgment upon the statement of claim in default of defence in an action to recover a sum of money advanced, repayable "on call," with interest:—Held, that the making of a call was not a condition precedent to bringing an action—there being a present debt and a promise to pay on demand. In re Brown's Estate, [1893] 2 Ch. 300, followed. Judgment was also granted in respect of an alternative claim made by the plaintiffs, with leave to the defendant to elect to accept an offer made by the plaintiffs.

Imperial Bank of Canada v. Holman, 1 O.W.N. 593.

—Bank stipulating for usurious rate — Reduction to maximum rate.]—

Bank of Montreal v. Hartman, 2 W.L.R. 57 (B.C.).

— Deposit account—Forged cheque—Fraud —Perjury—Burden of proof.]—

Futural v. Dominion Bank, 4 E.L.R. 232 (Que.).

—Cheque — Signature of drawer as agent — Requirements of signature to relieve

drawer of personal liability — Bills of Exchange Act, s. 52.]—
Royal Bank v. Douglas, 4 E.L.R. 425 (Que.).

—Cancelling bank charter—Scire facias — Fiat of attorney-general — Discretion.] — Art. 978 C.P. confers no obligation upon the attorney-general of Canada to take proceedings to cancel the charter of a bank, when required to do so by a shareholder. (Ruling of Deputy Minister of Justice.)
Lapierre v. Banque de St. Jean, 12 Que. P.R. 169.

—Collateral security deposited with bank to secure payment of promissory notes and advances—Memorandum of hypothecation—Settlement—Fiduciary relationship.]—
Barrette v. Canadian Bank of Commerce and Syndicat Lyonnais du Klondike, 8 W. L.R. 927 (Y.T.).

— Powers of provisional directors — Payment of commissions for obtaining stock subscriptions — Breach of trust.] — The Dominion Act incorporating the bank, 4 & 5 Edw. VII. c. 125, was in the form set forth in schedule B of the Bank Act, R.S. C 1906, c. 29, and, while it named the provisional directors, conferred no special powers on them:—Held, that the powers of the bank, and of the provisional directors acting for it, depended entirely upon the provisions of the Bank Act; and the provisional directors had no power to authorize payment out of the funds of the bank of commissions to persons who obtained subscriptions for shares of the capital stock; and, in the winding-up of the bank, under the Dominion Winding-up Act, they were properly found liable, upon the ground of breach of trust or misfeasance, to pay to the liquidator the sums which had improperly been paid under their authority. Provisions of the Bank Act considered. Quære, whether even shareholders' directors would have authority under the Bank Act to pay commissions for obtaining subscriptions for stock. One of the provisional directors did not authorize or direct to be paid any money for commission, except in one instance, when he, with the others, signed a cheque for $700 "on account of commissions;" at most he was aware of other payments being made by his co-directors. Held, following Young v. Naval Military and Civil Service Co-operative Society of South Africa, [1905] 1 K.B. 687, that he was liable for the $700 only.
Re Monarch Bank of Canada, 22 O.L.R. 516.

— Bank — Petition for winding-up — Four days' notice — Waiver — Power of Court to shorten time — Curator.] — The provision of the Winding-up Act, R.S.C. 1906, c. 144, s. 13 (2), that "four days' notice shall be given to the company before the making of" an application for a winding-up order, cannot be waived by the company; and, where the full four days' notice has not been given, a Judge has no power to make the order. The Consolidated Rules of Practice are not by any of the provisions of the Winding-up Act made applicable so as to authorize the Court to shorten the time. Where a curator has been appointed for a bank under the Bank Act, R.S.C., 1906, c. 29, he is by ss. 119 and 121, vested with all the powers which directors and solicitor had before his appointment; and after the appointment of a curator, the board of directors have no power to give a solicitor authority to consent to a winding-up order or to anything which may have any effect upon the rights and interests of creditors; and a solicitor has no such authority derivable from his former retainer by the bank; and in this case the consent, admission and waiver of a solicitor, purporting to act on behalf of the bank, though made in good faith, after the appointment of the curator, had no validity. An application for an order for the winding-up of a bank was refused, the curator objecting to the notice. The Judge might have adjourned the hearing under s. 14 of the Winding-up Act; but, as there were other applications pending, he considered that the first applicant who was wholly regular should not be deprived of any advantage to which his adherence to the rules, statutes and practice, entitled him. The applicant was ordered to pay costs to the curator, who opposed the application, but not to creditors and others who appeared upon the hearing.
Re Farmers' Bank of Canada, 22 O.L.R. 556 (D.C.).

—Assignment by insolvent to bank—Advances on security thereof—Bank Act—Bona fides—Knowledge of insolvency.]— One Broley made a general assignment of all moneys due him to the defendant as security for an advance and subsequently made a specific assignment of all moneys due to him by a school district. Later being still indebted to the bank in large sums he conveyed to the bank a house and lot. A further specific assignment of a debt due by the town of North Brantford to Broley was given at a later date and within 60 days of this last assignment Broley made an assignment for the benefit of his creditors. Advances were made on the security of all assignments to the bank except that last mentioned. In an action by the assignee to set aside the various assignments and conveyances as being in fraud of creditors:—Held, that the various assignments were valid under the Bank Act, and even if the advances upon such security were not authorized, Broley could not, having received good consideration, assail the pledge, and his creditors occupied no better position. (2) That as to all the assignments save the last the bank acted in perfect good faith and believing in

Broley's solvency and without any intent to defeat, delay or prejudice any creditor or prefer the bank's claim and the assignments were therefore valid. (3) That as no advance had been made on the security of the last assignment which was made within 60 days before the assignment for the benefit of creditors the assignment was void under the provisions of the Assignments Act.

Norton v. Canadian Bank of Commerce, 1 Sask. R. 448.

—Hypothecation of securities—Terms of pledge.]—B. sold property to the syndicate and took as security for the price mortgages on real and personal property and a promissory note and transferred the securities to the bank to secure his present and future indebtedness to it. He signed a document authorizing the bank to realize on the same in its discretion, to grant extensions, and give up securities, accept compositions, grant releases and discharges and otherwise deal with them as it might see fit without prejudice to B.'s liability. The note not being paid at maturity, the bank sued the syndicate and B. upon it and on the covenants in the mortgages and obtained judgment against both. In the same action, the syndicate, on counterclaim for damages for deceit, had judgment against B. which was eventually set aside, but, while it existed, the bank made a settlement with the syndicate and discharged the latter from all liability on the judgment of the bank on payment of over $20,000 less than the debt. B. was not a party to this settlement and the bank afterwards refused to give him any information about it or to give him a statement of his account with the bank itself. In an action by B. for an account and to have the bank enjoined from further dealings with the securities:—Held, that the power given to the bank to deal with the securities was to be exercised for the purpose of liquidating B.'s debt, and, as to the surplus, for B.'s benefit; that, the settlement having been made solely for the benefit of the bank and in sacrifice of B.'s interests, the bank violated its duty, and had not satisfied the onus upon it of showing that, had the whole amount of the judgment been recovered from the syndicate, B. would not have benefited thereby.

Canadian Bank of Commerce v. Barrette, 41 Can. S.C.R. 561.

—Insolvent bank—Right of directors to rely upon representations of officials—personal liability after being put upon enquiry.]—The bank of Y., having suspended payment, plaintiff, who was appointed curator, brought an action under the Winding-up Act, R.S.C. c. 129, against defendants, the former directors of the bank, alleging misfeasance and neglect of duty. The acts chiefly complained of were the advancing of large sums of money to one of the customers of the bank, practically exhausting the capital and reserve of the bank, upon the security of paper drawn upon people who were insolvent, or who had no existence, and, when the paper was returned unpaid or unaccepted, retaining it and treating it as assets. Also issuing improper balance sheets, and paying dividends out of capital. The evidence showed that, down to a certain date, the directors were misled by their cashier, in whom they had the fullest confidence, but that, after the date referred to, when they became aware that they had been deceived by the cashier, and that he had disobeyed instructions and that the resources of the bank were seriously involved they still continued him in his former position without change:—Held, that the directors, in accepting that position, impliedly undertook that they had reasonable skill and ordinary ability for the discharge of the business in which they engaged, but that, in order to hold them accountable for the acts of their officer, gross negligence must be shown, such negligence being a question of fact to be determined upon the evidence, and that the findings of the trial Judge in relation thereto, founded more or less upon conflict of fact and inferences from the evidence, should not be disturbed. Held, also, that the directors were not obliged to examine the books of the bank, but that, if they became aware of anything reasonably suggesting the need of inquiry, it was their duty to seek for full information and explanation. Held, also, that, in retaining the cashier in office, after they became aware of his conduct and the manner in which he had involved the resources of the bank, they were guilty of indefensible misconduct, and were personally responsible for all losses sustained, as the result of his subsequent acts. Held, also, that the payment of a dividend, after the directors became aware that the bank was wrecked, and that it could not reasonably hope to continue business, was ultra vires, and that they were personally liable in relation thereto. Per Russell, J. (concurring), that in view of the evidence of negligence on the part of the directors in the performance of their duties, their personal liability for losses incurred should commence at an earlier date, and that in this connection it was not unreasonable to attribute to them knowledge of the statements of the affairs of the bank prepared for the information of shareholders and the general public. Per Longley, J. (also concurring), that the principle which relieves directors from liability where they have relied upon the representations of their officials, is not to be extended to cases where facts are brought to their attention leading them to suspect the integrity, skill and competence of such officials.

Stavert v. Lovitt, 42 N.S.R. 449.

--Banks and banking—Crediting customer with amount of cheque—Negotiation—Holder for value—Dishonour of cheque—Honouring subsequent cheques—Bills of Exchange Act, ss. 22, 54, 56, 58, 70, 74, 165.]—The account of M. at the plaintiffs' bank was $409.53 overdrawn. On May 23rd he posted to the plaintiffs from Chicago a cheque of W. & Co. for $1,000, dated May 16th, with the instructions to place the amount to his credit, which the plaintiffs did on receipt on May 26th, thus leaving a credit balance in M.'s favour of $590.47. On the same day the plaintiffs sent this cheque for collection to the clearing house, but it was returned dishonoured on May 27th, W. & Co. having stopped payment on May 23rd. On May 28th certain cheques drawn by M. on his account came in, which the plaintiffs paid and charged up. The plaintiffs again twice sent the $1,000 cheque to the clearing house, but it was on each occasion returned unpaid, the plaintiffs on each occasion crediting and debiting M.'s account with the $1,000. The plaintiffs now sued W. & Co. on the $1,000 cheque. It was admitted that M. had not given consideration for it, and that, if he were holder, he could not recover on it:—Held, that the plaintiffs, by crediting M.'s account with $1,000 on receipt of the cheque sued on, became holders for value of the latter. The position of the plaintiffs with reference to the cheque sued on, became fixed when the latter was negotiated to them, and nothing which took place subsequently altered the plaintiffs' position, except that by the dishonour of the cheque and notice to M. his liability in respect to it became absolute, having previously been only conditional. Held, also, that the interval between May 16th, the date of the cheque, and May 23rd, the date of its being mailed to the plaintiffs, was not, in the circumstances, sufficient to give the cheque the character of an overdue bill, so as to make it, under s. 70 of the Bills of Exchange Act, R.S.C. (1906) c. 119, subject in the plaintiffs' hands to any defect of title affecting it. Held, also, that s. 22 of the Bills of Exchange Act applies to cheques.

Bank of British North America v. Warren, 19 O.L.R. 257.

— Securities — Mortgage of land made to bank — Bank Act, s. 76—Security for present advance — Invalidity — Evidence.]—

Canadian Bank of Commerce v. Wilson, 9 W.L.R. 359 (Y.T.).

—Deposit account—Contest as to person entitled—Costs.]—

Adams v. Union Bank of Halifax, 1 E.L.R. 561 (N.S.).

—Bank Act—Securities under s. 76—Mortgage of land made to bank—Security for present advance—Invalidity.]—

Canadian Bank of Commerce v. Wilson, 11 W.L.R. 539 (Y.T.).

—Bills and Notes.]—

See that title.

—Liquidation of bank.]—

See COMPANY.

BANKRUPTCY.

Ontario.

--Assignment by tenant for benefit of creditors—Rent in arrear—"Preferential lien"—Insurance moneys in hands of assignee.]—Two days after an assignment to the defendant by M. for the benefit of his creditors, under the Assignments and Preferences Act, the goods in the possession of the assignee upon premises demised by the plaintiff to M. were destroyed by fire. The goods were insured by M., and the policies had been assigned to the defendant. At the date of the assignment M. was indebted to the plaintiff for rent in the sum of $626.38, $300 of which had accrued due within one year prior to the date of the assignment (R.S.O. 1897, c. 170, s. 34 (1)). From the goods destroyed the plaintiff could, by distress, at or before the date of the assignment, have made the whole of the rent due:—Held, that the plaintiff was not entitled to a "preferential lien"—the expression used in s. 34 (1)—upon the insurance moneys paid to the defendant in respect of the goods destroyed. In re McCraken (1879), 4 A.R. 486, and Lazier v. Henderson (1898), 29 O.R. 673, distinguished. Chew v. Traders Bank of Canada (1909), 19 O.L.R. 74, specially referred to.

Miller v. Tew, 20 O.L.R. 77.

Company—Assignee for creditors—Declaration of trust—Right of assignee to sue—Cause—By-law—Time for payment of—Forfeiture of stock.]—The plaintiff sued as an assignee for creditors under an assignment which excepted shares in companies not fully paid up, and in which his assignor was declared a trustee for plaintiff, to transfer the shares in such way as he should direct. In this action plaintiff sought to have it declared that he was the owner of certain shares, standing in the name of his assignor, in a company incorporated under R.S.O. 1897, c. 191, and that he was entitled to pay the balance of calls made thereon:—Held, that he was not entitled to call on the company to account to him for the shares or any dealings therewith. Under s. 35 of the above statute, stock may be forfeited by the company where the amount payable on a call is not paid within the time limited by the special Act incorporating the company, or by the letters patent, or by a by-law of the com-

pany. Where, therefore, no time was limited in the statute, or letters patent, or in the by-law making the call, such call was held to be illegal and an attempted forfeiture of the stock ineffectual.

Armstrong v. Merchants Mantle Manufacturing Company, 32 Ont. R. 387.

Assignment for benefit of creditors—Goods seized by sheriff—Interpleader.]—The company transferred goods by bill of sale to A. on the 2nd July, 1909. Seizure having subsequently been made by a sheriff, under certain executions against the company, of the goods transferred to A., and A. having made a claim, an interpleader issue was directed on the 10th May, 1910. This was determined against the claim of A. on the 30th September, 1910, by a judgment, which, in effect, declared that A. held the goods subject to the executions against the company. On the 4th October the final order of interpleader was made, setting forth that the sheriff, in lieu of selling the goods, had, at the request of A. and the company, continued in possession pending the trial of the issue, and directing the sheriff to sell the goods, and out of the proceeds to pay the executions, costs and expenses—"the said creditors having a special lien therefor." On the 8th October the company made a general assignment to M. for the benefit of creditors, under the Assignments and Preferences Act, and a confirmatory assignment on the 13th October. A. transferred the assets to another company, by an instrument dated the 1st October, and that company transferred to the company in question by an instrument of the same date, but it was admitted that these instruments were not in fact executed until after the general assignment and confirmatory assignment. M. made a demand upon the sheriff for the property in his hands, and the sheriff applied for an interpleader order as between M. and the execution creditors:—Held, that the special provisions of the Creditors' Relief Act, 9 Edw. VII. c. 48, s. 6, sub-ss. 4 and 5, in favour of interpleading creditors, were to be regarded as an exception to the general law regarding the ratable distribution of assets, either under the Creditors' Relief Act or the Assignments and Preferences Act; and that the execution creditors were entitled as against M. to the priority given them by the former order. Held, also, that nothing passed by the assignment to M. but a potential right to vacate, by proper means, the transfer to A., which had already been declared fraudulent as against the interpleading creditors; and the voluntary retransfer by A. did not put the assignee, M., in any better position as regards those creditors. The transfer by the company to A. was valid as between them, and the title and property were out of the company altogether. The circumstances of the case withdrew it from the scope of the Assignments and Preferences Act, 10 Edw. VII. c. 64, s. 14, which applies to goods of the insolvent validly assigned to the assignee under the Act. The goods were not those of the company at the time of the assignment, and the assignee could not take a better title as against the interpleading creditors than A. could give.

Re Henderson Roller Bearings, Limited, 22 O.L.R. 306.

—Landlord and tenant—Assignment for creditors—Acceleration clause—Forfeiture—Assignee's election—Payment under protest—Division Court jurisdiction.]—The effect of s. 34 R.S.O. 1897, c. 170, "The Landlord and Tenant's Act," is to place the assignee, who has elected by notice in writing under his hand to retain the premises occupied by the assignor at the time of the assignment for the unexpired term of the lease under which said premises were held, in the same position as respects the lease, as the assignor would have been in had the assignment not been made; the landlord in such cases being entitled to the full amount of the rent reserved by the lease, but to nothing more; and where accelerated rent due for the unexpired term of a lease containing the usual forfeiture clause on an assignment for the benefit of creditors being made by the lessor, had been paid by his assignee for creditors, who had elected to retain the premises to the end of the term, he was held entitled to recover back a further sum for rent of the premises for a portion of the same period, which he had paid on demand of the landlord, under protest, to avoid distress. Rent payable under a lease of land is an incorporeal hereditament, and where the right or title to it comes in question, a Division Court has no jurisdiction in an action to recover it.

Kennedy v. MacDonell, 1 O.L.R. 250.

—Assignments and preferences—Judgment—Execution—Sheriff—Sale of land.]—Unimpeachability of a preferential transfer of goods is rebutted by showing that it was entered into by the transferee in good faith and without knowing, or having reason to believe, that the transferor was insolvent. Judgment of Falconbridge, C.J., affirmed on other grounds.

Dana v. McLean, 2 O.L.R. 466 (C.A.).

—Assignments and preferences—judgment—Execution—Sheriff—Sale of land.]—Under a writ of fieri facias a sheriff seized the interest of a judgment debtor in certain lands and advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors, pursuant to the provisions of R.S.O. 1897, c. 147. The assignee gave notice to the sheriff of the assignment and asked for a statement of the costs incurred to that

time. No tender of the costs was made or undertaking given to pay them, and the sheriff proceeded with the sale and sold the land to the plaintiff. The assignee, notwithstanding the sheriff's sale, assumed to sell the land to, and executed a conveyance in favour of, the defendant's son, who allowed the defendant to remain in possession as his agent:—Held, that the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, and that the sale by the assignee was nugatory and void, and the sheriff's vendee entitled to possession of the land.

Elliott v. Hamilton, 4 O.L.R. 585 (Britton, J.).

—Assignments and preferences—Declaration of right to rank—Division Court.]—An action for a declaration of the right to rank against an insolvent estate vested in an assignee under the Assignments Act, R.S.O. 1897 c. 147, is not within the jurisdiction of the Division Court.

In re Bergman v. Armstrong, 4 O.L.R. 717.

—Lease—Covenant—Forfeiture— Waiver.]—A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors six months' rent should immediately become due, and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment, which was afterwards done, the lessors executing the assignment as creditors assenting thereto:—Held, reversing the judgment of the Court of Appeal (1 O.L.R. 172), that the lessors and the company were distinct legal persons, and the individual interests of the former were not affected by the above action: Salamon v. Salamon (1897), A.C. 22, followed. The assignee of the company held possession of the leased premises for three months, and the lessees accepted rent from him for that time and from sub-lessees for the month following. Held, also, reversing the judgment appealed from, that as the lessors had claimed the six months' accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; and as the assignee had a statutory right to remain in possession for the three months and collect the rents; and as the evidence showed that the receipt by the lessors of the three months' rent was in pursuance of a compromise with the assignee in respect to the acceleration; and as the month's rent for the sub-tenants was the only compensation by the latter for being permitted to use and occupy the premises and for their accommodation; the lessors could not be said to have waived their right to claim a forfeiture of the lease. Mortgagees of the premises having notified the sub-tenants to pay rent to them, the assignee paid them a sum in satisfaction of their claim with the assent of the lessors, against whose demand it was charged. Held, that this also was no waiver of the lessors' right to claim a forfeiture. Quaere. Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company, or would it, on surrender of the original lease, have bound the lessor and a purchaser from him of the fee?

Soper v. Littlejohn, 31 Can. S.C.R. 572.

—Money paid—Voluntary payment—Insolvency of debtor—Action of assignee—Status.]—S. a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim, and took from S. notes aggregating in amount $708, all payable in September, which S. agreed in writing to pay at maturity and did pay. In November, 1899, S. assigned for the benefit of his creditors, when the arrangement between him and V. first became known and the assignee and other creditors brought an action to recover the said sum of $708 from V. as part of the insolvent estate:—Held, affirming the judgment of the Court of Appeal (3 Ont. L.R. 5), and that at the trial (32 O.R. 216) that S. having paid the notes voluntarily without oppression or coercion could not himself have recovered back the amount and his assignee was in no better position. Held, per Taschereau, J.: As anything recovered by the assignee would be for the benefit of his co-plaintiffs only who would thus receive what would have been an unjust preference if stipulated for by the agreement for extension, the plaintiffs had no locus standi in curia.

Langley v. Van Allan, 32 Can. S.C.R. 174, affirming 3 O.L.R. 5.

—Assignment for benefit of creditors—Annuitant—Right to rank on estate—Assignments Act.]—An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R.S.O. 1897, c. 147. Previous to the assignment the assignor had covenanted with the plaintiffs to pay J.R. $100 per quarter on the first day of each quarter during her natural life:—Held, that the growing payments were in the nature of contingent debts; and that the plaintiffs were not entitled under R.S.O. c. 147 to rank upon the estate of the insolvent for the present value of such payments. Grant v. West (1896), 23 A.R. 533, and Mail Printing Co. v. Clarkson (1898), 25 A.R. 1, followed. Such claims are not

subject to attachment under the garnishee provisions of the English Judicature Act and Rules as accruing debts. In Re Cowans' Estate (1880), 14 Ch. D 638, has been disapproved in Webb v. Stenton (1883), 11 Q.B.D. 518.

Carswell v. Langley, 3 O.L.R. 261.

—Transfer by insolvent debtor—Attacking —Time — Division Court proceeding — Collateral inquiry—Pressure—Evidence of.]—A garnishee summons was issued from a Division Court on the 22nd January, 1900, wherein the primary creditor claimed from the primary debtor $200 upon a due bill, and whereby all debts due from an insurance company to the primary debtor were attached. The primary debtor had recovered a judgment against the insurance company on the 7th December, 1899, and had assigned the judgment on the same day to the claimant. No formal notice of the proceedings in the Division Court or of any contest as to his rights was ever given to the claimant, but he appeared in the proceedings on the 6th July, 1900, and consented to an adjournment to them, and afterwards appeared again before the Judge, when his rights under the assignment were tried, and judgment was given against him setting aside the assignment as an unjust preference:—Held, on appeal, that the transfer to the claimant was not attacked when the summons was issued, nor until the claimant appeared in the proceedings, and, therefore, it was not attacked within sixty days, and its validity could be supported by proof of pressure in procuring it. Held, also, Falconbridge, C.J., dissenting, that, as it appeared from the evidence both of the primary debtor and the claimant, that the latter had asked the former for security shortly before the security was given, and that the security given was that which was promised, there was pressure inducing the giving of the security, and it should be upheld, notwithstanding, that the claimant was merely liable for a debt of the primary debtor which it was expected he should pay, as he did, and notwithstanding that he was not present at the time the assignment was made to him, it having been drawn by his solicitor. Molsons Bank v. Halter (1890), 18 S.C.R. 88, and Stevens v. McArthur (1891), 19 S.C.R. 446, followed.

Morphy v. Colwell, 3 O.L.R. 314.

—Assignments and Preferences Act—Motion to remove assignee for benefit of creditors—Proposed examination of assignee.]—Where a summary motion is made under section 8 (1) of the Assignments and Preferences Act, R.S.O. 1897, c. 147, to remove an assignee for the benefit of creditors, the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application. The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application, under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it.

Re Wilson, 6 O.L.R. 564, Osler, J.A.

—Defeating creditors—Setting aside conveyance—Absence of fraudulent intent.]—A grantor, believing himself solvent, conveyed, in January, 1903, certain lands voluntarily to his daughter. At the time he owned shares in the plaintiff company, from which he had borrowed upon them, but which shares up to the time of the failure of the company, in June 1903, were saleable above par, and considered then, as when he borrowed on them, ample security for the debt due on them. On the evidence, no fraudulent intent on the part of the grantor could be inferred:—Held, that, although at the time of action brought, the plaintiffs were, by reason of the impeached conveyance, hindered in recovering their claim, this was not the necessary consequence of the grant within the meaning of R.S.O. 1897, c. 147, and therefore the conveyance could not be set aside. Spirett v. Willows (1863), 3 De G. & S. 293, and Freeman v. Pope (1870), L.R. 5 Ch. 538, specially considered.

Elgin Loan and Savings Company v. Orchard, 7 O.L.R. 695, Britton, J.

—Fraud on creditors—Right of assignee for creditors—Termination of.]—One of the defendants mortgaged land to the plaintiff bank, and then made an assignment under R.S.O. 1897, c. 147 to the other plaintiff for the benefit of creditors. The assignee conveyed to the bank the equity of redemption in the land. This action was then brought to have a lease of the land made by the mortgagor to his co-defendant declared void. The bank alleged that the lease, though dated before the mortgage, was not made until after it; and both plaintiffs alleged that the lease was made voluntarily, when the lessor was, to the knowledge of the lessee, in insolvent circumstances, and with intent to defraud creditors:—Held, that the right to relief upon the latter ground could be claimed only by the assignee under section 9 of the Act, and his right terminated when he so dealt with the estate as to render the relief useless to it; and therefore the assignee was improperly joined as a plaintiff. Semble, that the proper order would be to strike out the name of the assignee as plaintiff, and the claim to set aside the lease as fraudulent against creditors. The order made below, 7 O.L.R. 613, was, however, affirmed.

Bank of Hamilton v. Anderson, 8 O.L.R. 153 (D.C.).

—Insolvent Company.]—See COMPANY.

—Assignment for creditors—Purchase by assignee—Statutory presumption—Rebuttal.]—On the 15th October, 1896, an insolvent made a second mortgage of his farm to the defendants, solicitors, as security for a bill of costs, and six days later made a statutory assignment to the plaintiff for the benefit of creditors. The assets were realized and a dividend paid to the creditors in June, 1897. The farm was sold, subject to the first mortgage, on the 13th March, 1897, to a nominal purchaser, who conveyed it to the plaintiff himself in August, 1897. After providing for the first mortgage out of the purchase money, there was a balance of $600, which the plaintiff distributed among the creditors. The defendants filed their claim as creditors (but without disclosing their mortgage) in December, 1896, and received their share of the dividend in June, 1897. The defendant's mortgage was not registered until the 10th February, 1897, and the plaintiff had no notice or knowledge of it until October, 1897. The plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until he received notice of the exercise of the power of sale contained in the defendants' mortgage, on the 10th May, 1903, when this action was begun by the plaintiff as assignee to invalidate the instrument or to stay proceedings thereon. The action was tried without a jury, and the trial Judge dismissed it without hearing the defendants' evidence:—Held, that the plaintiff was still assignee and had a status to maintain the action; his purchase of the farm could not stand for his own benefit, and he was to be regarded as in possession as trustee for the creditors and liable to account, which he submitted to do. Held, also, in view of the conflicting authorities that the defendants should be allowed upon a new trial to give evidence to show the validity of their mortgage notwithstanding the presumption that it was an unjust preference within the meaning of 54 Vict. c. 20, s. 2, sub-s. 2, (b) (O.), and notwithstanding the decision in Macdonald v. Worthington (1882),, 7 A.R. 531, as to the effect of accepting a nonsuit in an action tried without a jury. Judgment of Britton, J., reversed; Idington, J., dissenting.

Craig v. McKay, 8 O.L.R. 651, D.C. (same case 12. O.L.R. 21.)

—Preferential transfer of cheque—Deposit with private banker—Application by banker upon overdue note—Absence of pre-arrangement and of intent to prefer.]—On the 5th September, 1904, a merchant, being then insolvent, sold his stock-in-trade at 50 cents on the dollar, and received in payment the purchaser's cheque on the defendant's private bank for $1,172.27, payable to his own order, which he took to that bank, where he had an account, and deposited it to his own credit. The defendants knew that the sale was about to be made, and had lent the purchaser the money to make the purchase, and knew that the money was to be deposited in their bank by the insolvent, and, in anticipation of this, had charged up against the insolvent's account (without the latter's knowledge) an overdue note for $1,000 and $40 interest thereon. The deposit of the purchaser's cheque with the defendants was attacked by this action (brought within 60 days thereafter) as a preferential transfer of a bill or security to a creditor, within R.S.O. 1897, c. 147, s. 2:—Held, Street, J., dissenting, that, there being no evidence of any pre-arrangement nor of any intent to prefer, the transaction was not within the scope of the Act.

Robinson v. McGillivray, 12 O.L.R. 91 (D.C.).

—Preference—Statutory presumption—Rebuttal—Circumstances rebutting intent to prefer.]—At the revision of the Ontario statutes in 1897, the words "prima facie" were inserted after the word "presumed" where it occurs in sub-s. 3 and 4 of s. 2 of c. 147, and the doubt whether the presumption was rebuttable was thereby set at rest; but even under the language of sub-s. 2 (b) of s. 2 of the Act of 1887, i.e., without the words "prima facie," the presumption was rebuttable; and in the case of a mortgage of land to secure a debt, made on the 15th October, 1896, to the defendants, followed on the 21st October, 1896, by an assignment by the mortgagor to the plaintiff for the benefit of creditors, the defendants were entitled to show that there was no intent to prefer. Lawson v. McGeoch (1893), 20 A.R. 464, followed. Held, also, upon the evidence, that the presumption of intent to prefer was rebutted. Held, also, that the plaintiff, as assignee for the benefit of creditors, occupied no higher position than his assignor, and could not be regarded as a subsequent purchaser for valuable consideration, within the meaning of the Registry Act, so as to avail himself of its provisions with regard to the registration of the assignment before the mortgage.

Craig v. McKay, 12 O.L.R. 121 (C.A.).

—Preferential transfer of cheque—Deposit in private bank—Application of funds to debt due banker—Sinister intention.]—McG., a merchant in insolvent circumstances, although not aware of the fact, sold his stock-in-trade and deposited the cheque received from the price to the credit of his account with a private banker to whom he was indebted, at the time, upon an overdue promissory note that had been, without his knowledge, charged against his account a few days before the sale. Within two days after making the deposit, McG. gave the banker his cheque to cover the amount of the note. In an action to have the transfer of the cheque, so deposited, set aside as preferential and void:—Held, af-

firming the judgment appealed from (13 Ont. L.R. 232) that the transaction was a payment to a creditor within the meaning of the statute, R.S.O. (1897) c. 147, s. 3, sub-s. 1, which was not, under the circumsances, void as against creditors.

Robinson v. McGillivray, 39 Can. S.C.R. 281.

—Fraudulent preference—Security to creditor—Knowledge of insolvency.]—G. had assisted S. with loans and also guaranteed his credit at the Dominion Bank to the extent of $3,000. His own cheque at the bank having been refused payment until the indebtedness of S. of $1,900 was settled, the latter promised to arrange it within a month, which he did by transferring to G. goods pledged to the Imperial Bank, G. paying what was due to both banks. Shortly after S. sold out his stock in trade and absconded owing large sums to foreign creditors and being insolvent On the trial of a creditor's action to set aside the transfer to G. as a fraudulent preference, the manager of the Dominion Bank testified that G.'s cheque was not refused from any doubt of S.'s solvency but because he had heard that S. was dealing with another bank and he wished to close the account:—Held, that under the evidence produced G. had no reason to suppose, when the goods were transferred, that S. was insolvent and he had satisfied the onus placed upon him by the provincial statute of showing that he had not intended to hinder, delay or defraud the creditors of S.

Baldocchi v. Spada, 38 Can. S.C.R. 577.

—Assignment by mortgagor for benefit of creditors — Priorities — Assignment of claims of execution creditors—Redemption.]—After judgment for foreclosure of mortgage or redemption judgment creditors of the mortgagor with executions in the sheriff's hands were added as parties in the Master's office and proved their claims. The Master's report found that they were the only incumbrancers and fixed a date for payment by them of the amount due to the mortgagees. After confirmation of the report S. obtained assignments of these judgments and was added as a party. He then paid the amount due the mortgagees and the Master took a new account and appointed a day for payment by the mortgagor of the amount due S. on the judgments as well as the mortgage. This report was confirmed and the mortgagor having made an assignment for benefit of creditors before the day fixed for redemption an order was made by a Judge in Chambers adding the assignee as a party, extending the time for redemption and referring the case back to the Master to take a new account and appoint a new day:—Held, affirming the judgment of the Court of Appeal subnom. Federal Life v. Stinson (13 Ont. L.R. 127) that under the provisions of section 11 of the Assignments and Preferences Act the assignee of the mortgagor could only redeem on payment of the total sum due to S. under the mortgage and the judgments assigned to him.

Scott v. Swanson, 39 Can. S.C.R. 229.

Assignee for benefit of creditors—Sale of estate of insolvent—Purchase by agents and trustees for assignee.]—In an action by a creditor of H. against C., the assignee of H. for the benefit of creditors, and two persons to whom C. had purported to sell lands forming part of the estate of H., for an account of profits and for damages, etc.: —Held, upon the evidence (Meredith, C.J.C.P., dubitante), that the conclusion of the trial Judge that the other two defendants purchased as agents and trustees for C. was abundantly justified. McG., one of the defendants, resold the house bought in his name, at a profit of $320:—Held, that the measure of liability in respect of this transaction was the $320; interest, occupation rent, and improvements, etc., might be set off against each other. For this sum both C. and McG. were liable. Upon the evidence, it was in McG.'s hands when the action was begun, and his executors (he having died pendente lite) were answerable. Only part of the parcel bought in the name of the third defendant had been resold; the sale was for $200. Held, that, if none of the property had been disposed of, the plaintiff's remedy would have been to have it declared that the property still remained subject to the trust and to have an account upon that footing; or he might have had a resale ordered, taking the increased price realized, and holding the defendants to the purchase if no more was realized; but, as part had been sold, the defendant C. was chargeable with the actual value of the estate at the time it was conveyed to the third defendant; any change of circumstances arising from depreciation of the property while in C.'s hands should be borne by him rather than by the cestuis que trust. Held, however, that the third defendant was not liable to account upon this head, for, although he had lent himself to a fraud, no profit had reached his hands. He was a necessary and proper party to the action, and should answer along with C. for the plaintiff's costs. Held, also, that the trial Judge had properly refused to admit in evidence, on behalf of the executors of McG. his depositions upon his examination for discovery; and had properly refused to compel the plaintiff to read an examination de bene esse taken at his instance, which he did not desire to read; but the defendants should have the costs of this examination. Judgment of Latchford, J., varied.

Atkinson v. Casserley, 22 O.L.R. 527 (D.C.).

—Money advanced to insolvent company to pay one creditor—Preference—Intent to hin-

der and delay.] — The defendant company, an incorporated trading company, being pressed for payment of debts by a bank and other creditors, the directors decided to raise money by chattel mortgage. The bank held as security for their advances to the company an assignment of the book debts of the company, a bond for $5,000 given by J., the secretary of the company personally, and the latter's indorsement of certain promissory notes discounted for the company. J.'s brother, the defendant A., who was employed by J., received from J. a cheque drawn by a third person in favour of A., for $7,000, which A. indorsed and handed back to J., who deposited it to A.'s credit in the bank on the 3rd August, 1909. The money represented by this cheque was obtained by J. on his own note, without the knowledge of A. On the 12th August, 1909, the company made a chattel mortgage and assignment of book debts in favour of A. for $8,300, covering all their personal property. On the 13th of August A. gave a cheque to the defendant company for $8,300, which was deposited to the company's credit in the bank, and on the same day the company gave a cheque to the bank for $2,254.50, being the full amount of the company's debt to the bank. On the 14th August there was a further deposit to the credit of A.'s account in the bank of $1,000, of which a part was obtained from J. and the balance borrowed from another source. On the 7th September, 1909, the bank assigned to A. all their interest in the book debts of the company, the assignment purporting to be in consideration of $8,254.52 paid by A.:—Held, upon the evidence, that, at the time the chattel mortgage was given, the company were insolvent; that J. knew and A. knew or ought to have known of the insolvency; that the effect of the transaction was to give the bank a preference and indirectly to benefit J., who was security to the bank; and that it was done with this object in view. Held, therefore, that the intent to delay, hinder, or defeat creditors was established, and that the case was brought within the Statute of Elizabeth and within sub-s. 1 of s. 2 of the Assignments and Preferences Act, R.S.O. 1897, c. 147. Burns v. Wilson (1897), 28 S.C.R. 207; Campbell v. Patterson, Mader v. McKinnon (1892), 21 S.C.R. 645, and Allan v. McLean (1906), 8 O.W.R. 223, 761, followed. After the mortgage, the company were allowed to collect the book debts and to use the proceeds for their business. Held, that there was no advance specially in respect of the book debts; the whole advance was one transaction; and A. was not entitled to stand in the shoes of the bank and be subrogated to their position in respect of the book debts; but, if he were, he had lost his security by his own laches, and was not entitled to have his loss made good out of the proceeds of the chattels, to which he had no legal right as against the other creditors. Judgment of Teetzel, J., varied.

Stecher Lithographic Co. v. Ontario Seed Co., 22 O.L.R. 577 (D.C.).

—Fraudulent conveyances.]—

See FRAUDULENT TRANSFER.

—Appeal from County Court Judge—Jurisdiction—Leave to appeal.]—A Judge of the High Court of Justice has no jurisdiction to entertain an appeal or to give leave to appeal from an order of a County Court Judge as to the valuing of securities under s. 20 of the Assignments and Preferences Act, R.S.O. 1897, c. 147; but, under Con. Rule 784, he may refer the motion to a Judge of the Court of Appeal, who, under 63 Vict. c. 17, s. 14 (O.), has jurisdiction to grant leave to appeal in such a case; and:—Held, that to do so was proper in this case, in view of the general words in the notice of motion, "or for such other order as may seem just." Under Con. Rule 1130 (1) costs may be awarded against a party to any proceeding in the Supreme Court of Judicature for Ontario, even though there be no jurisdiction to entertain the matter.

In re Aaron Erb (No. 1), 16 O.L.R. 594.

—Proceedings before County Court Judge—Assignments and Preferences Act—Certiorari after judgment — Discretion.] —A certiorari order may be made by a Judge of the High Court in Chambers to bring up proceedings taken before a County Court Judge, under the Assignments and Preferences Act, R.S.O. 1897, c. 147, and this notwithstanding that a right of appeal by leave of a Judge of the Court of Appeal exists under 63 Vict. c. 17, s. 14 (O.). Before judgment the right to certiorari is absolute, but after judgment there is a judicial discretion to grant or refuse; and in such a case as the above certiorari should not be granted after judgment until application is first made for leave to appeal.

In re Aaron Erb (No. 2), 16 O.L.R. 597.

—Assignment for benefit of creditors — Separate liability of partner—Right of creditor of partnership to rank on estate of partner.]—A member of a partnership joined with the partnership in making a promissory note for the price of goods supplied to the firm by plaintiff:—Held, that the plaintiff was entitled to rank upon the insolvent estate of the partner for the amount of the unpaid note, ratably with the individual creditors of the partner. The plaintiff having elected, before accepting a dividend from the insolvent estate of the partnership, to pursue his remedy against the estate of the partner, the question whether, under the statute, it was necessary to elect, did not arise.

Gordon v. Matthews, 18 O.L.R. 340, affirmed 19 O.L.R. 564 (C.A.).

—Assignment for creditors — Examination of assignor—Service of appointment.]—On the examination of an assignor for creditors under the Act respecting Assignments and Preferences, R.S.O. 1897, c. 147, s. 34, 35, 37, sub-s. 1, it is sufficient to serve a copy of the appointment of the special examiner upon the assignor, and it is not necessary to show him the original appointment unless sight of it is demanded. On a motion to commit for failure to attend such an examination, an adjournment of the motion, at the request of the assignor's solicitor, on an undertaking that the assignor would submit himself for examination at his own expense, and that, on default, the order should go, is a complete waiver to any such objection to the regularity of service of the appointment.

Re Ferguson, 17 O.L.R. 576

— Assignment for benefit of creditors — Claim on insolvent estate for rent and taxes —Accelerated rent.]—The plaintiffs, for the purpose of carrying on a branch of their business on the 1st March, 1907, became the lessees of a store at B., the lease being for five years, at an annual rental of $800, payable monthly, and containing covenants by the plaintiffs to pay rent, taxes, etc., and not to assign but they were permitted to sublet to an agent to carry on the business. The plaintiffs appointed H. their agent at B. for a term of five years, subject to determination, on notice. The plaintiffs alleged that H. also became sublessee for the term of the lease, and subject to all its liabilities; but, although a proper document had been prepared, no sublease was ever executed it being conditional on H.'s furnishing security, which he failed to do. H. entered into possession, however, and carried on the business, paying the monthly instalments of rent up to September, 1907. On the 9th January, 1908, he made an assignment for the benefit of his creditors, to the defendant. H.'s appointment as agent had been cancelled on the 1st August, 1907, and in May, 1908, by an arrangement made with their landlord, the plaintiffs' lease was cancelled:—Held, that H.'s holding was merely that of a monthly tenant, so that, as against him or his assignee, only the monthly rent due under such tenancy could be claimed, and not accelerated rent, made payable under the plaintiff's lease in case of an assignment, etc.; nor could a claim for the taxes be maintained, and taxes, in the circumstances, being properly payable by the plaintiffs. The plaintiffs' right to maintain the action was attacked, on the ground that, being an extra-provincial corporation, they had no license to do business in Ontario, as required by 63 Vict. c. 24, s. 6 and 14 (O). Held, per Riddell, J., that such a license was necessary, but the difficulty was removed by the production of it after the argument of the appeal. Bessemer Gas Engine Co. v. Mills (1904), 8 O.L.R. 647, followed. Judgment of Boyd, C., at the trial, affirmed.

Semi-Ready Limited v. Tew, 19 O.L.R. 227 (D.C.).

Quebec.

Opposition to seizure — Insolvency of debtor—Cession de biens.]—An incomplete assignment of property (cession de biens) in that it does not contain a sworn list of the debtor's creditors and has not been followed by the prescribed notice cannot be set up against a seizure of the debtor's goods. The modes of execution prescribed by the Code of Procedure (old text) as to immovables transferred by way of cession de biens do not exclude the usual mode open to the creditor, in virtue of his judgment, of proceeding by writ de terris to seizure and sale of the immovables of his debtor.

St. Joire v. Morni, 10 L.N. 14, followed. Birks v. Lewis, 30 Can. S.C.R. 618, affirming 8 Que. Q.B. 517.

— Assignment for benefit of creditors — Fraudulent preference—Bribery—Promissory note—Illegal consideration.]—A secret arrangement whereby the provisions of the Code of Civil Procedure respecting equal distribution of the assets of insolvents are defeated and advantage given to a particular unsecured creditor is a fraud upon the general body of creditors notwithstanding that the agreement for the additional payment may be made by a third person who has no direct interest in the insolvent's business. A promissory note given to secure the amount of the preference payable under such an arrangement is wholly void. An agreement for a payment to an inspector of an insolvent estate to influence his consent to an arrangement which is not for the general benefit of the creditors is a bribe which is, in itself, sufficient reason to adjudge the transaction, to induce which it was given, corrupt, fraudulent and void.

La Banque Jacques Cartier v. Brigham, 16 Que. (S.C.) 113, reversed. Bingham v. La Banque Jacques Cartier, 30 Can. S.C.R. 429.

—Contestation of statement—Secretion.]—The debtor who makes an assignment for benefit of creditors (cession de biens) must, in case his statement is contested, render an account of the moneys which he has had in his possession during the preceding year. Clement v. La Banque Nationale, Q.R. 14 K.B. 493. Hence, his failure to account for a surplus of $6,000 of receipts on the total of his accounts creates a presumption, equivalent to proof, of the secretion aimed at by Art. 885, par. 4 C.P.Q. The debtor who, within five weeks before his assignment, has negotiated a loan with a creditor who is also his father-in-law, in consideration of

a conveyance of real rights is bound, in order to rebut the presumption of secretion, to prove that the transaction was legitimate. It is not sufficient to establish that the money borrowed was paid to his creditors; he must also prove that the conveyance did not amount to an undue preference to the lender and prejudice his other creditors. The intention to appropriate to the debtor's own use the goods secreted is not an essential element in the offence of secretion.

Desmarteau v. Guimout, Q.R. 19 K.B. 25, reversing 34 S.C. 508 and restoring 33 S.C. 78.

—Immovables of insolvent—Seizure and sale.]—A creditor cannot, after his debtor has assigned for the benefit of creditors, cause the immovables of the latter to be sold and the curator has the right to oppose such sale, even if the seizure of the immovable was made before the assignment. The costs incurred by seizure of an immovable before the owner has assigned for benefit of creditors are privileged.

Taylor v. Wilks, 11 Que. P.R. 270.

—Authority to sue—Insolvency of curator.]—Authority to the curator of an insolvent estate to sue must be given in the district in which the assignment was made and the Superior Court of another district in which an action is brought cannot order the curator to procure a fresh authority. Insolvency of the curator is not a ground for removing him from the office or for suspending the action. The Act authorizing the curator to sue for the debtor makes him the representative of the body of creditors as well as of the insolvent for the purposes of the action; the creditors cannot individually sue for the same purpose by claiming to exercise the rights of the same debtor.

Lamarche v. Globensky-Wilson, 11 Que. P.R. 347.

—Liquidator—Disqualification.]—It is better that a single person should be appointed liquidator of the estate of an insolvent, the appointment of joint liquidators being often a cause of difficulty and expense in liquidation. It is also to be preferred that a director of a bank which is creditor of the insolvent for a large sum should not be appointed liquidator. When two persons are jointly nominated as liquidators of an insolvent estate, if one of them proves to be disqualified to act the votes cast in favour of the other are thereby annulled.

In re Diguard, 11 Que. P.R. 389.

—Abandonment of property—Petition for liberation.]—Held: That a pretended abandonment, whereby the defendant states that he has no assets whatever, cannot avail against a judgment of the court declaring that the defendant had fraudulently done away with his property, and absconded from the province, especially where the said pretended abandonment had been intituled and filed in another cause, where the plaintiff was not a party, and had not been followed by the appointment of a curator or any other proceeding.

Roumilhac v. Vianez, 3 Que P.R. 362

—Remission of debt—Payment for composition—Illegality.]—In the law of the Province of Quebec voluntary remissions made by creditors to their debtors leave no natural obligation subsisting and in this respect there is no difference between remissions between traders and non-traders. A payment by a debtor to procure the creditor's signature to a compromise is a violation of the laws of public order and is therefore a nullity, as the contract itself is, and subject to be repaid. Such repayment may be effected by way of compensation. It is too late for plaintiffs to oppose the compensation, when the cause has been submitted for hearing on the merits, when the parties have proceeded to take evidence on the whole action, and when the court is in a position to decide as to both debts at once and to settle them by its judgment. There is then no further impediment to the compensation and the court should give effect to it.

Kirouac v. Maltais, 18 Que. S.C. 158 (C.R.).

—Husband and wife—Ante-nuptial contract—Registry — Loan to husband.] — A donation made by the future husband to his future wife in their marriage contract of a sum of money that the latter "shall have and take whenever she sees fit from the first available and convenient property of the future husband" is legal if it was made without fraud, if the husband was solvent at the time and the contract was executed and if the debt of the contestant did not then exist; the wife, on the subsequent insolvency of her husband, may claim this sum and rank au mare la livre with his other creditors. The contract of marriage may be set up against subsequent creditors of the husband if it was registered at the domicile the contracting parties had when it was executed, though it was only registered later at the places where the insolvency was declared. A contract of loan between husband and wife is valid and the wife can claim the sum lent on the husband's insolvency ranking with the other creditors.

In re Denis, 18 Que. S.C. 436 (S.C.).

—Insolvent partnership—Action by liquidator—Rent and damages — Authority of court—Premature action.]—Liquidators appointed under Art. 1896 (a) C.C. to administer the assets of an insolvent partnership may take proceedings against a debtor (lessee) of the firm for rent due

and damages with conclusions for resiliation of the lease, without first obtaining authority from the Court or a Judge or from members of said partnership. When an instalment of rent is payable on a day certain the lessee has the whole of it to pay, and an action brought on such a day is premature.

Robert v. Gagnon, 10 Que. K.B. 237.

—Hypothec of Ship—Insolvency of owner —Sale of ship.]—Although the holder of a hypothec on a ship is not thereby the owner, he may dispose of it as absolutely as if he were. The sale of a mortgaged ship, though made en justice and by authority of the court on abandonment of his property by the owner, but without the consent of the hypothecary creditor, has no effect as against the latter and the purchaser may refuse to pay the price until the hypothec is discharged. The mere fact that the creditor was present at the sale, and even that he was a bidder, does not constitute acquiesence therein, when the sum realized is not sufficient to satisfy his hypothecary claim.

In re Robert, 18 Que. S.C. 101 (S.C.).

—Lien—Board in convent—Art. 2006 C.C.] —The debt incurred for board in a convent for the previous twelve months of children of an insolvent constitutes a privilege on the insolvent's property.

Sisters of the Congregation of Notre Dame v. Bilodeau, 18 Que. S.C. 152 (Cir. Ct.).

— Contested Collocation — Costs.] — The costs of opposing the report of distribution of an insolvent's estate will be imposed on defendant when the circumstances of the case show that the contest was occasioned more by his fault than by errors of others.

Belgarde v. Carrier, 3 Que. P.R. 513 (S.C.).

—Assignment of debt—Curator—Purchase of claims—Litigious rights.]—A creditor of an insolvent has no interest to enable him to contend that the assignee of another creditor did not give valuable consideration, and that the assignment was not served on the debtor. Nothing in the law prevents the curator of a vacant insolvent succession from purchasing from creditors of the succession their claims against it. The plea of litigious rights can only avail if the debtor who makes it offers to reimburse the purchaser for what he has paid out.

Johnson v. Sharswood, 3 Que. P.R. 473 (S.C.).

—Abandonment of property—Sale of immovables.]—A creditor cannot after his debtor has abandoned his property, cause the latter's immovables to be sold, and the curator acting in that capacity has a right to oppose such sale.

Guimond v. Gravel, 4 Que. P.R. 17 (S.C.).

—Curator's fees—Seizure—Art. 599 C.P.Q.] —The curator appointed to liquidate the estate of an insolvent is a public functionary whose fees, under the terms of Art. 599 C.P.Q. are not seizable.

In re Snyder, 3 Q.P.R. 271 (S.C.).

Annulment of sale in fraud of creditors—Simulated sale—Chattel mortgage —Arts. 1025, 1032, 1472 C.C.]—(1) Although a sale of movable effects may be perfect without delivery, the want of deplacement gives rise to the presumption that the sale was simulated. (2) The laws of this province do not permit chattel mortgages, and, in a prominent degree, refuse recognition of subterfuges whereby a creditor may secure advantages at the expense of his fellow-creditors. (3) Where it appears that a pretended deed of sale, without any delivery having taken place, is, in reality, an unlawful pledge of the movables affected, such deed will be annulled.

In re Goyer, 21 Que. S.C., 502, Davidson, J.

—Assignment of property — Seizure of debtor's immovables — Arts. 878, 879 C.C.P.]—After the assignment of property by a debtor for the benefit of his creditors, one of the creditors cannot in execution of the judgment that he has obtained against the debtor, cause to be seized and sold, without the consent of the curator of the other creditors, or of the Court, the immovables of such debtors, but the seizure and the sale of these immovables must be made on proceedings by the curator. Burke v. Lewis, 8 Que. K.B. 517, discussed.

Demers v. Gagnon, 11 Que. K.B. 498.

—Contempt of Court—Revision of Judge's order—Insolvency — C.P. 884.] — An insolvent cannot be imprisoned for contempt of Court until he shall answer one of the questions put to him by the curator, while under examination, under Art. 884 of the Code of Civil Procedure, which provides that "any person summoned who refuses to appear or to answer, or produce any book or document may be condemned by the Judge to imprisonment for a term not exceeding one year."

Saxe v. Kent, 5 Que. P.R. 94, Fortin, J.

— Insolvent — Fraudulent statement by debtor who has made a judicial abandonment—Art. 885 C.C.P.—Evidence required to convict of secretion under this article.] —Held (reversing the judgment of the Superior Court, Mathieu, J.), (1) Proceedings instituted under Art. 885 of the Code of Civil Procedure, against a debtor who has made a judicial abandonment, are of a penal nature, and the rules and principles

which govern evidence, and its effects in criminal cases, must be applied, and to justify a conviction the guilt of the debtor as to omission to enter property in his statement, or secretion of property, must be established by clear and conclusive evidence. (2) A discrepancy between two statements made by the debtor—one made 31 December, 1900, showing a surplus of $1,227, and the other, made 26 July, 1901, showing a deficit of $1,849, while it raises a presumption of mismanagement of his business and of extravagance in his expenses, does not show conclusively any omission to enter property belonging to him in the statement filed with his declaration of abandonment, or secretion of any part of his property.

Bryce v. Wilks, 5 Can. Cr. Cas. 445, 11 Que. K.B. 464.

—Cession de biens—Temporary guardian—Art. 864 C.C.P.]—In case of assignment for benefit of his creditors the fact that the temporary guardian appointed by the prothonotary is creditor for an amount less than that claimed by another creditor is not sufficient cause for his replacement by the latter. The Court will order a change of temporary guardians only on proof of incompetence or dishonesty.

In re Bonhomme and Burnett, 5 Que. P.R. 40 (Sup. Ct.).

—Cession de biens—Demand—Cessation of payments.]—A cessation of payments is an essential condition to the demand for an assignment. But if the debtor by his default has given occasion for making the demand, and has not acquitted himself of his obligation, but on the contrary has caused considerable expense to the petitioner for assignment, the demand for an assignment will be dismissed without costs.

Hétu v. Poirier, 4 Que. P.R. 242 (Sup. Ct.).

— Insolvent estate—Action by the curator —Authorization.] — 1. The incapacity of a plaintiff or his want of proper quality, in the present case the fact that as curator to an insolvent estate, he was not properly authorized to sue, must be invoked by means of an exception to the form and not by a dilatory exception. 2. If a defendant complains that the formalities which should have preceded the pronouncing of a judgment authorizing a curator to an insolvent estate to sue have not been observed, he must proceed by a petition in revocation of judgment.

Lamarche v. City of Montreal, 12 Que. P.R. 153.

—Preference—Assignment—Art. 888 C.C.P.] —The debtor who arranges with one of his creditors, a relative, to make an assignment, and that after transferring to him goods in part payment of his debt, and moreover does not give in his schedule the names of all his creditors, will be condemned to imprisonment pursuant to the provisions of Art. 888 C.C.P.

In re Thibault and Gardiner, 4 Que. P.R. 259 (Supt. Ct.).

—Demand of assignment—Application to annul—Affidavit—Notice.]—There is no need of an affidavit to support an application to set aside a demand of assignment of property even if the facts invoked do not appear on the record. Notice for a day fixed of the making of the application is not necessary, a notice of its having been filed of record being sufficient.

Dufresne v. Superior, 5 Que. P.R. 28 (Sup. Ct.).

—Insolvency pendente lite—Reprise d'instance.]—Authority to take up the instance in the name of a party who has become insolvent since the action was instituted, should be demanded by application made in the proceedings in insolvency and not in the cause in which the curator seeks to take up the instance in the place and stead of the insolvent.

Clark v. Wilder, 5 Que. P.R. 24 (Sup. Ct.).

—Cession de biens—Possession—Curator—Authorization—Arts. 876-7 C.C.P.]—The curator of an insolvent estate cannot, without notice to the creditors or inspectors, and authorization by a Judge, answer by writing a summary application to recover possession of effects which have come into his possession through the assignment.

In re Rowe v. Hyde, 5 Que. P.R. 64 (Sup. Ct.).

—Contestation of claim—Particulars—Delay—Art. 174 (4) C.C.P.]—In the contestation of the claim of a creditor against an insolvent it is too late for the contestant to demand particulars a month after the contestation was filed.

In re Montreal Cold Storage and Freezing Co. and Stevenson, 4 Que. P.R. 340 (Sup. Ct.).

—Insolvency—Notes given by insolvent to creditor and inspector of his estate, to obtain the creditor's signature to deed of composition.]—(1) Where a creditor, who was also one of the inspectors of the insolvent estate, exacted promissory notes from the insolvent as a condition of his assent to a compromise, such notes were illegal, null and void, as made in fraud of the other creditors, and against public order, and no action could be maintained on the notes by the creditor, or by a pretenom. Brigham v. Banque Jacques-Cartier, 30 Can. S.C.R. p. 429, followed. (2) The Judge a quo dismissed the action "with costs." The Court of Review, declined,

under the circumstances, to interfere with the discretion of the trial Judge.

Cartier v. Genser, 21 Que. S.C. 139 (C.R.).

—Hotel license—Landlord's privilege—Costs—Cession de biens—Arts. 1619, 1620 C.C.]—The proceeds of sale of a hotel license (sold under cession de biens) is not subject to the landlord's lien. The only costs of judicial proceedings which take precedence of special privileges are those incurred in the interest of the privileged creditors and for the preservation of their security (gage). Therefore, in a cession de biens the costs made necessary by the assignment and those for the administration of the assets in insolvency, and their liquidation are not superior to the landlord's claim, but it is otherwise in respect to the costs of sale of the articles subject to his security, of the inventory thereof, and of the distribution of the proceeds of sale.

Poulin v. St. Germain, 11 Que. K.B. 353.

—Prescription — Interruption — Collocation of claim.]—The cession de biens does not interrupt prescription. The filing by a creditor of his claim with the curator of the property of an insolvent, and the collocation and partial payment of such claim by the curator will interrupt the prescription.

Coster v. McLean, 20 Que. S.C. 395 (Sup Ct.).

—Saisie-arret—Insolvency of debtor—Decree against tiers-saisi.]—After the creditor who has procured the issue of a saisie-arret has obtained, without fraud, a judgment ordering the tiers-saisi to pay the sum which he has admitted that he owes the debtor, another creditor of the latter cannot, by tierce-opposition, have the judgment set aside on account of the insolvency of the debtor; the allegation of insolvency must be made prior to the entry of judgment confirming the saisie-arret.

Manslau v. Bruyere, 11 Que. K.B. 16.

—Demand of abandonment—Mode of contesting — Deposit.]—(1) The contestation of a demand of abandonment is not governed by the rules governing pleadings, but is made by summary petition, which need not be accompanied by a deposit, even if it questions the jurisdiction of the Court in the office of which the demand is filed. (2) If a debtor, by his petition, urges that a delay was granted to him by the creditor demanding abandonment, the adjudication on his petition, and on a motion to reject the same, will be deferred until after proof is made by both parties of their respective allegations.

Mussen v. Filion, 5 Que. P.R. 170 (Doherty, J.).

—Promissory note—Waiver of protest by curator.]—The curator to a cession de biens has no authority to waive the protest of a note of which the insolvent is indorser.

Molsons Bank v. Steele, Q.R. 23 S.C. 316.

[See also Denenberg v. Mendelssohn, Q.R. 22 S.C. 474.]

—Contestation of list filed by insolvent—Allegation of fraud.]—Held, affirming Charland, J., that if a list filed by an insolvent is contested on account of fraud, and the insolvent, in his answer to the contestation, explains his acts in order to justify it, the contestant has a right to reply to such answer by alleging facts in connection with the allegations of his contestation to explain and justify them, and such allegation will not be rejected on the ground that they should have appeared in the contestation itself.

Bessette v. Ball, 5 Que. P.R. 233.

—Abandonment of property—Place where declaration and statement by insolvent must be filed—Domicile—Principal place of business.]—1. To constitute a valid abandonment of property, the declaration and statement of the debtor must be filed in the office of the Superior Court for the district in which the debtor has his principal place of business or his domicile. (2) If the declaration and statement are filed in any other district than the above, the abandonment is illegal, and all proceedings therein are null and void.

In re Rivard, 22 Que. S.C. 190 (Andrews J.).

—Privilege of lessor—Insolvency—Retroactivity of statute—61 Vict. (Q.), c. 46; Art. 2005, C.C.—Interest.]—Held (reversing the judgment of the Superior Court, Archibald, J., 22 Que. S.C., p. 46):—(1) A right which has been acquired under an existing law cannot be affected by a law subsequently enacted, unless it has been expressly declared by the legislature that it shall have a retroactive effect. (2) The amendment made by 61 Vict. (Q.), (replacing Art. 2005 of the Civil Code), by which, in the case of the liquidation of property abandoned by an insolvent trader, the lessor's privilege is restricted to twelve months' rent due, and to rent to become due during the current year, etc., in the absence of any provision making the statute retroactive, does not apply to or include claims for rent due under authentic leases made previous to the coming into force of the amending Act. (3) Where it appears, on the other hand, that an amount of interest has accrued during the winding up of an insolvent estate, on moneys deposited in banks, representing the gage of particular creditors, but, on the other hand, that the expenses of administration of the estate have exceeded such sum, the creditors have no right to claim such interest.

In re Bulmer, Beaudry v. Ross, 12 Que. K.B. 334.

—Sub-collocation—Art. 824 C.C.P.]—Art. 824 of the Code of Procedure, which authorizes a creditor of a person who is entitled to be collocated, or who is collocated upon monies levied, to file a sub-opposition, does not confer any privilege on such creditor. If the person primarily entitled to be collocated is insolvent, the amount of the collocation must be distributed among his creditors, according to law. The service of a writ of attachment, attaching such monies in the hands of the sheriff, does not give the sub-opposant any special right thereto. Art. 1981 C.C.

Marion v. Brien, 23 Que. S.C. 52 (C.R.).

—Demand for abandonment—Contestation—Time limited.]—The time fixed for giving notice of inscription for the adduction of evidence and hearing upon the merits upon a contestation of a demand for abandonment for the benefit of creditors is regulated by Art. 34 C.C.P.

Lemay v. Parizeau, 5 Que P.R. 427.

—Contestation—Exception to the form.]—(1) The original of a contestation of a claim against an insolvent estate should be filed with the curator and it is not sufficient to file a copy of such contestation with him. (2) In such a contestation, an allegation that the contestant has been subrogated in the rights of several creditors of the insolvent cannot be attacked by exception to the form on the pretext that it is not accompanied by vouchers. (3) The fact that certain grounds of contestation of the claim form actually an opposition by a third party while the contestant does not occupy the necessary position to become tiers-opposant, is also a question upon the merits which cannot be raised upon exception to the form.

Re Beaudoin, insolvent, 5 Que. P.R. 356.

—Assignment for benefit of creditors—Filing of sworn claim—Prothonotary's fees.]—In virtue of Art. 44 of the tariff of prothonotaries' fees, the latter may charge a fee on every sworn claim filed in their offices authorizing the creditor producing it to vote at a meeting for the apointment of a curator, etc., under the provisions of Art. 867 C.C.P.

Beaudoin v. McLimont & Lefaivre et al., 5 Que. P.R. 291.

—Curator—Inspection of filings.]—The curator to an abandonment for the benefit of creditors must permit creditors of the estate and the vouchers accompanying such claims.

Re Williamson, insolvent, 5 Que. P.R. 407.

—Temporary guardian—Art. 864 C.P.Q.]—The fact that the temporary guardian of an insolvent estate appointed by the prothonotary is a creditor for an amount less than the claim of another creditor, is not a sufficient reason for the Court to replace him by the latter. The Court will change the temporary guardian only on proof of incompetence or dishonesty.

In re Bonhomme, Q.R. 22 S.C. 22 (Sup. Ct.).

—Duty of curator—Art. 880 C.P.Q.]—The curator of a bankrupt estate should not pay any money received from the property of the insolvent to a creditor, even a privileged creditor, before all the formalities required by Art. 880 C.P.Q. for preparation of the dividend sheet (bordereau de collocation) have been observed. The Court or a Judge should not, as a general rule, order the curator, who nevertheless is under their summary jurisdiction, to derogate from the requirements of said Article.

Smith v. Gagnon, Q.R. 22 S.C. 372 (Sup Ct.).

—Dividend sheet—Objection to claim—Service—Requete civile.]—The curator to a cession de biens having made and given notice of a first dividend in which the creditor Veilleux was, as were the others, collocated for 15 per cent., and having afterwards, with the necessary authority, contested the collocation of Veilleux—his claim being attacked at the same time—is obliged to immediately transmit such contestation to the prothonotary; and it should be served on the creditor. Where it was not so served the judgment by default against the creditor maintaining the contestation was set aside on requete civile. The requete though entitled "requete en revision" will, if it contains all the procedure required for a requete civile be considered as such. The enumeration in Art. 1177 C.P.Q. of the cases in which the requete civile will die is not restrictive. If, instead of serving on the collocated creditor a copy of the contestation of his collocation the bailiff, by mistake serves on him a copy of contestation of another creditor's collocation, it will be equivalent to an entire absence of service. On motion for leave to contest the bailiff's proces-verbal of service the Judge will order the taking of evidence avaunt faire droit, and if it is proved that the proces-verbal is false, it will be set aside. A letter written by the contesting curator to the creditor whose claim is contested and who has not been served with the contestation informing him that the same is filed and that he must attend to it or else judgment will be entered against him will not cure the defect of want of service, especially when it is not proved that the creditor received it. Nor is it cured by service on the creditor—who has not appeared and is not represented by an attorney of record—of an order to answer on faits et articles, on which order he also fails to appear. This last order was returned on 6th May. The

creditor contested had appeared neither in person nor by attorney. Then on the back of the order the following was written. "By consent continued to 7th instant, 6th May, 1901. F.P.T.R. & Co., attorneys for contest. P. Cantin." The Court takes official notice of the signature of an attorney; it knows, therefore, that "P. Cantin" is the signature of an attorney of that name. But Cantin did not appear for the creditor and there was nothing to show that he signed for the creditor or as authorized by him:—Held, therefore, that the curator cannot from the fact that the signature "P. Cantin" is there, find an acquiescence by the creditor in the proceedings or an act that cures the want of service of the contestation The curator prepared a second dividend sheet providing for payment of 17 per cent. On account of the judgment by default against Veilleux rejecting his collocation on the first sheet his name was omitted from the second. He was not aware of said judgment at this time and contested the second collocation claiming the right to be included therein. When he afterwards became aware of the said judgment he presented a "requete en revision" or requete civile against the same:—Held, that his proceeding against the second dividend sheet was not lis pendens, but said proceeding and the "requete en revision" were two distinct processes. The insolvent Moisam had contracted to deliver to Veilleux, at the Louise wharf, a certain quantity of wood at a fixed price per foot, the cost of measurement to be paid by Moisam, who was to furnish Veilleux with the specifications, the measuring to be done by measures of the Quebec Harbour Commission:—Held, (a) that delivery was only complete on the measuring being finished and the specifications furnished to Veilleux. (b) That it was incumbent upon Moisam (or the curator representing him) to prove that Veilleux had received a larger quantity of wood than the specifications showed or than he acknowledged, and such proof should be clear and certain. In a commercial matter interest or money will not be allowed unless it is alleged and proved that it is the custom of trade to grant. There is in commercial matters mise en demeure by the mere lapse of time. By the failure of Moisam to deliver the quantity of wood contracted for Veilleux is entitled to recover as damages the difference between the sum contracted for and the price for which he might have sold it.

Moisam v. Veilleux, Q.R. 22 S.C. 423 (Sup. Ct.).

—Distribution of assets—Delay in filing claim.]—The creditor who has not filed his claim with the curator to a cession de biens is not for that reason deprived of the right to be paid from the assets of his debtor, but if any money remains to be distributed he may claim to be paid, in preference to the other creditors, an amount proportionately equal to that which had been paid to the latter and to be ranked equally with them for the balance due.

In re Brais, Q.R. 22 S.C. 470 (Sup. Ct.).

—Preference — Fraud — Delay.]—(1) A judgment, and a judicial hypothec created thereby on the property of the debtor while he was insolvent, and procured for the purpose of obtaining a fraudulent preference over the debtor's other creditors, is a proceeding which must be attacked within the delay provided by Art. 1040 C.C. (2) A judgment is a judicial contract. (3) The delay for contesting the fraudulent deed of a debtor does not run only from the date of distribution of his assets, establishing his insolvency, but from the date of the knowledge by the creditor of the fraud, that is of the prejudice to him which results from the fraudulent deed.

La Banque Nationale v. Common, Q.R. 22 S.C. 284 (Sup. Ct.).

—Acceleration of cause of action—Insolvency of debtor—Art. 1092 C.C.]—Under Art. 1092 of the Civil Code of Lower Canada an action to recover the balance of purchase money of land may be brought although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security.

Kensington Land Company v. Canada Industrial Company [1903] A.C. 213, 2 Commercial L.R. 388.

—Interest earned during liquidation.]—Interest earned by money representing the gage of particular creditors during the winding up proceedings falls into the mass and cannot be claimed by such creditors.

Re Bulmer, 22 Que. S.C. 46 (Archibald, J.).

—Mandate—Authority to liquidate estate.]—An insolvent debtor may authorize any person to liquidate his estate for benefit of his creditors. In such case he only gives a mandate, and does not make an assignment of his property. Even if he makes a voluntary transfer of all his property it will only be set aside if made in fraud of his creditors.

Chouinard v. Caron, Q.R. 25 S.C. 254 (Ct. Rev.).

—Cession de biens—Contestation—Delay—Proceedings after expiry.]—The plaintiff, having made a demand of assignment (cession de biens) on the defendant, the latter did not oppose it within the delay to two days prescribed by Art. 857, C.P.Q., but after it expired. On permission obtained ex parte from a Superior Court Judge, he filed a contestation and plaintiff moved for

its rejection on the ground that it was too late:—Held, that Art. 205, C.P.Q., applies to proceedings for assignments as well as to all other causes, and the plaintiff not having appealed from the judgment allowing the contestation to be filed could not ask for its rejection on the ground that it was filed after expiry of the delay.

Mussen v. Tilion, Q.R. 24 S.C. 308 (Ct. Rev.).

—Profits from insolvent's services—Husband and wife—Void agreement.]—A contract by which the wife of an insolvent is to receive for services to be rendered by her husband a certain salary and part of the profits of the business of the other party to the contract, is void as made in fraud of creditors. Therefore, the creditors of the husband can attach the salary due under such contract.

Orsali v. Aubry, Q.R. 24 S.C. 320 (Sup. Ct.).

—Powers of liquidators—Procedure—Form of service.]—An insolvent firm was indebted to the City of Montreal for taxes, and an action was brought to recover the amount against the liquidators, G. and C., who were summoned sur faits et articles, not in their capacity of joint liquidators, but as "being associated together as liquidators under the name and style of G. and C." The defendants did not respond to the summons, and the Superior Court ordered the interrogatories to be taken pro confessis, and judgment to be entered for the plaintiff. The defendants inscribed in review:—Held, (1) the liquidators appointed to administer an insolvent estate possessing only the powers of a judicial guardian, cannot represent the insolvents in legal proceedings, the latter being still in the free exercise of their rights and alone having the capacity to sue or defend themselves in courts of law. (2) Moreover, in the present case, the summons sur faits et articles was irregular and illegal, the defendants being summoned, not as joint liquidators, but as members of a firm of liquidators doing business together as such. (3) The service on the liquidators was also irregular and void, being made on one of them only at their place of business. (4) A partnership of liquidators is a moral entity distinct from its members, who are joint liquidators as individuals and not as partners, and cannot, therefore, be summoned to reply sur faits et articles in the name of the insolvents of whom they are liquidators. (5) A summons sur faits et articles to the joint liquidators cannot affect the rights of the insolvents, and the interrogatories cannot be held to be established by default inasmuch as the admission resulting from default cannot be made by the liquidators and is beyond their powers.

City of Montreal v. Gagnon, Q.R. 25 S.C. 178 (Ct. Rev.).

—Revendication.]—The owner of goods of which the temporary custodian of an insolvent estate has taken possession as the property of the insolvent, may revendicate them by action, and is not obliged to proceed by summary petition to a Judge.

Bergeron v. Campeau, Q.R. 25 S.C. 26 (Sup. Ct.).

—Contested claim—Burden of proof.]—When a creditor has filed a claim under oath which is contested by the curator in the name of the insolvent, the creditor is obliged to prove his claim at the hearing, and the affidavit filed to support it is not sufficient proof.

Tessier v. Piché, 6 Que. P.R. 179 (Ct. Rev.).

—Action against two indorsers—Insolvency of one—Composition—Transfer of debt.]—The Bank Ville-Marie, by its prete-nam, Harel had obtained judgment on a note against Langlois, first indorser, and on Archambault, second indorser. The latter having failed, Harel filed with the curator of his estate a claim based on the judgment for the debt and costs. Shortly afterwards the bank accepted in composition a certain sum from L. Archambault's daughter, to whom it assigned, with subrogation, its claim "as filed" with the curator but retaining possession of the note. Subsequently an agreement was made between Langlois and L., by which the latter released him from any claim she might have under the above mentioned transfer:—Held, that the assignment by the bank was of its total debt under the judgment, that is to say, of its recourse against all the parties on the said note, and not merely an abandonment of its rights against the insolvent; and that the release obtained by Langlois from the party to whom such assignment had been made was available against the bank or those claiming under it.

Langlois v. Harel, Q.R. 13 K.B. 475.

—Cession de biens—Domicile.]—The assignment for benefit of creditors (cession de biens) made to the Clerk of the Superior Court for the District of Quebec by a merchant having his domicile and place of business in the District of Three Rivers, is absolutely void, so also are the appointment of the curator and inspectors and all proceedings under such assignment. Any party interested may, on application to the Superior Court at Quebec, have such nullity entered on the record of the assignment and service of the application on the curator and inspectors is sufficient, service of the insolvent being unnecessary. In this case the application was granted with costs to the applicant without stating against whom.—The costs of such application are costs incurred in the general interest and the applicant may claim payment by lien on the proceeds of a sale by

the sheriff of an immovable of the insolvent notwithstanding such sale was made under writ of fi.-fa. issued by another creditor after the assignment was declared void.—The prothonotary in preparing his collocation sheet should consider the legality of the hypothecs recorded by the Registrar, and if it appears by the certificate that a hypothec mentioned therein does not in law affect the immovable so he should not take it into consideration.—The plaintiff in an action paulienne who has obtained the annulment, for fraud against creditors, of a sale made by the debtor of his immovable has a lien for his costs on the proceeds of such sale but the prothonotary should not collocate it unless it is claimed by opposition afin de conserver. The procedure to be followed on contestation of the order or rank in a collocation is different from that in contesting the merits of the debt collocated.

Rousseau v. Rivard, Q.R. 26 S.C. 176 (Sup. Ct.).

—Cession de biens—Action by insolvent.] —Where the defendant, in an action by an insolvent, after his assignment, on an account due his estate, wishes to dispute his right to sue he should do so by defense au fonds and not by exception to the form.

Coté v. Marinier, 7 Que. P.R. 110 (Cir. Ct.).

—Landlord's privilege for rent.]—Where insolvent tenants judicially abandoned their property for the benefit of their creditors and the statute law (61 Vict. (Que.) c. 46) at the date of the abandonment restricted the lessor's preference to two years' rent, ranking them as ordinary creditors for the balance, while no such restriction was in force at the date of the leases:—Held, that the existing statute applied to all liquidations which arose after its enactment, and governed the lessor's privilege unless expressly excepted therefrom. Judgment of the King's Bench (Que.) reversed and judgment of Archibald, J., restored.

Ross v. Beaudry [1905], A.C. 570, 14 Que. K.B. 544.

—Workmen's lien—Cutting timber—Contract of sale—Insolvency—Distribution of assets.]—The lien given by Art. 1994 (c) C.C. to workmen hired to cut wood in the forest to secure payment of their wages ceases from the time that the wood passes into possession of a third party who has bought it and paid the price. But the lien is not extinguished by sale of the wood so cut if, in fact, there has been no delivery and it remains in possession of the vendor, and this is so even when the purchaser has made advances to the vendor to an amount exceeding that realized from the subsequent sale of the wood by the curators of the estate of the insolvent vendor.—A contract for sale of the wood, executed before and during the cutting, the consideration of which is advances and prior debts, is not a fraud on the rights of the unpaid workmen since they retain their lien on the wood notwithstanding. In this case the wood in the litigation was sold, by authority of the Court, by the curators of the estate of the wood merchant and the proceeds deposited in Court subject to the final adjudication. By the judgment of the Superior Court part of the wood was declared to be the exclusive property of the petitioners (purchasers) and part subject to the lien of the workmen:—Held, that the curators were not obliged to remit directly to the petitioners the proceeds of sale of the portion belonging to them but should make a regular distribution of it in the usual form of a dividend sheet.

In re Hurtubise, Q.R. 26 S.C. 137 (Ct. Rev.).

—Judgment against curator—Appeal—Authority.]—The curator of an insolvent estate has no right, without permission of a Judge granted on the advice of the inspectors, to take proceedings in review from a judgment given against him, and the Court of Review may strike out the inscription on this ground though the objection is not taken by the adverse party. —The curator who inscribes in review without being so authorized is personally liable for the costs. A creditor, not of the insolvent but of the curator as such cannot contest a dividend sheet prepared by the latter.

Slater Shoe Co. v. Marchand, Q.R. 27 S.C. 123 (Ct. Rev.).

—Composition and discharge—Novation—Reservation of collateral security—Delivering up evidences of debt.]—By deed of composition and discharge the bank agreed to accept composition notes in discharge of its claim against the plaintiff at a rate in the dollar, special reserve being made as to the securities it then held for the debt due by the plaintiff. The original debt was to revive in full on default in payment of any of the composition notes. Upon receiving the composition notes the bank surrendered the notes representing the full amount of its claim:—Held, reversing the judgment of the King's Bench (Que.), that the effect of the agreement coupled with the reservation made was that the debtor was to be discharged merely from personal liability on payment of the composition notes but that the securities were to be still held by the bank for the purpose of reimbursing itself, if possible, to the extent of the balance of the original debt. Held, also, that the surrender of the original notes by the bank did not extinguish the debt they represented and under the circumstances there was no novation.

Banque d'Hochelaga v. Beauchamp, 36 Can. S.C.R. 18.

—Right of insolvent to be represented by counsel—Examination—Parties.] — Under Art. 883 of the Code of Civil Procedure, the insolvent has the right to be represented by counsel at the examination of persons whom the curator deems capable of furnishing information regarding the insolvency; moreover such person may be cross-examined on behalf of the insolvent in the manner and form prescribed by Art. 340 C.P., the insolvent being considered a party in the proceedings. [Vide re Riopelle, 4 Que. P.R. 180.]

Re Cohen and Kent, 7 Que. P.R. 26 (Lavergne, J.).

—Preference after judgment on a saisie-arrêt.]—

See ATTACHMENT.

Mailloux v. Blackburn, Q.R. 27 S.C. 91 (Cir. Ct.).

—Insolvent company.]—

See COMPANY III.

—Privilege—Commercial traveller's salary —Art. 2006 C.C.]—A commercial traveller whose services are not required in the store, shop or workshop in which his employer's goods are contained, has not privilege on the same for his salary.

Cohen v. Kent, 28 Que. S.C. 95 (Dunlop, J.).

—Fraudulent assignment—Insolvent debtor—Judgment annulling deed—Rights of creditors.]—The judgment annulling a deed of assignment or obligation, as having been made in fraud of creditors (in this case a matrimonial convention), by an insolvent debtor, in favour of a person aware of his insolvency, inures to the benefit of the creditors generally who are presumed to be represented in the proceedings, although they were brought in the name of a single creditor. (2) A creditor who has been collocated for a proportionate share in the report of distribution of the funds realized has an interest that all other creditors should be ratably collocated therein, and may contest a colocation based upon an illegal claim which might delay payment of the creditors or diminish the chances of the contestant to payment out of assets of the debtor in the future.

Chevalier v. Martel, Q.R. 27 S.C. 356 (Ct. Rev.).

— Appointment of curator — Affidavits signed by an attorney—Affidavits received by a justice of the peace—Art. 867 C.P.Q.] Upon the appointment of a curator to an insolvent estate, affidavits made and signed by societies represented by attorneys are irregular and void. (2) So also are affidavits received by a justice of the peace, no statute authorizing the latter to receive affidavits.

Brossard v. Ouimet, 7 Que. P.R. 471 (Fortin, J.).

—Abandonment of property—Who may make demand—Holder of bill of exchange for collection only.]—The holder for collection only of a due bill of exchange of two hundred dollars or upwards is a creditor of the acceptor within the meaning of Arts. 853 and 854 C.C.P., and has a right to make a demand of abandonment of property upon him.

Dibs v. Smith, 27 Que. S.C. 446 (Archibald, J.).

—Insolvent Act of 1875—Surety of assignee — Claims filed — Judgment inter partes—Chose jugée—Prescription.]—The surety is not in the position of a third party in respect to the creditor of the principal obligation and cannot plead defences not open to the principal debtor. (2) A claim filed in conformity with s. 104 of the Insolvent Act of 1875, and which has not been contested, thereby became established against all parties interested in the insolvent estate with the effect of a judgment in favor of the claimant. (3) Such a claim has the effect of chose jugée as against the surety of the assignee of the insolvent estate, without further proof, and is subject only to the prescription of thirty years. (4) The surety of a defaulting assignee of an insolvent estate against whom an action is brought by a creditor, under s. 68 of the Insolvent Act of 1875, who claims under that section the exclusive benefit of the result of the action, cannot set up as a defence to the action that the total amount for which he had become bound as surety would be absorbed by privileged creditors of the insolvent estate, if settled by him.

Kent. v. Letourneux, Q.R. 14 K.B. 60.

—Assignment for benefit of creditors—Contestation of statement—Secretion.]—A debtor who makes an assignment for the benefit of his creditors and files his statement, is obliged, upon a contestation by a creditor, to give an account of the assets in his possession during the preceding year. His inability to do so is equivalent to proof of the secretion mentioned in paragraph 3 of Art. 885 C.P.Q., and renders him liable to the penalty of imprisonment provided by Art. 888 C.P.Q.

Clement v. Banque Nationale, Q.R. 14 K.B. 493.

—Life insurance policy held as collateral—Cash surender value—Credit.]—

See BANKING.

(Tessier v. La Banque Nationale, 28 Que. S.C. 140.)

—Fraudulent preference to inspector of estate.]—

See BILLS AND NOTES.

(Evans v. Tracey, 29 Que. S.C. 97.)

—Collocation and distribution of moneys—Interest of unpaid creditor to contest claims of third parties.]—An unpaid creditor has at all times an interest in preventing his debtor's assets from being diverted to pay illegitimate or unlawful claims. When therefore in the distribution of moneys of a debtor by the prothonotary, a party making an unlawful claim is collocated, a creditor to whom an amount is allotted in the same report as if such a claim had not been made, has nevertheless the right to contest the latter, inasmuch as a reduction in the dividend allotted to the other creditors must have the effect of impairing the contestant's chances of payment out of other or future assets of the debtor.

Chevalier v. Bessette, 15 Que. K.B. 206.

—Restaurant business—License—Curator.] —In the absence of fraud the creditors of a debtor who has made an assignment (cession de biens) are represented by the curator in the judgment against the latter on a claim for return of the property which was regularly served on him Third parties will not be allowed to set up, against the demand for setting aside the sale and restoring the property for default in payment of the price asked by the vendor of a restaurant business, including the license to sell liquor, the fact that the license being personal, is not assignable and cannot be restored. The agreement respecting the license affects only the parties to the contract, and is as to third parties, res inter alios acta. The appeal given to the license by entry and registration on the commissioners' list is a public regulation required by law in the public interest. The creditors of the holder of the license cannot find therein an addition to the assets of their debtor.

Canadian Breweries Co. v. Gariepy, Q.R. 16 K.B. 44. (An appeal from this judgment to the Supreme Court of Canada was quashed for want of jurisdiction, 38 S.C.R 236.)

—Purchase of debt—Action by purchaser—Rights of other creditors.]—The purchase at a small price of a debt by a relative of the debtors and an action taken against them by the purchaser without any intention to execute the judgment thereon, but for the purpose of protecting the defendants are not unlawful acts and do not give to other creditors the right to intervene and contest the action.

Williamson v. Bradshaw, Q.R. 30 S.C. 166 (Ct. Rev.).

—Place for assignment—Business in other districts.]—A merchant who has suspended payments and been requested to make an assignment (cession de ses biens) should do so in the district where he has his domicile of origin and which is the headquarters of his business. It does not matter that he may be engaged in the business of an industry in one or two different districts under a partnership name, and that he has made, before the clerk of the Superior Court of one of them, the declaration provided for by Art. 1834 (a), C.C.; such special enterprise is not a basis for a particular assignment.

Henderson v. Harbec, Q.R. 15 K.B. 338.

—Demand—Service—Domicile.] — When the return of the bailiff states that the demand of assignment was served on the defendant at his place of business he not being able to find his domicile, the defendant cannot, in his contestation of the demand complain of such service unless he shows where his domicile is.

Deslongchamps v. Davies, 8 Que. P.R. 386 (Mathieu, J.).

—Curator—Property of third parties—Intervention.]—The cession de biens does not confer on the curator any right to possession of property belonging to third parties who may revendicate them on summary application to the Judge. The curator only represents the creditors in matters affecting the property of the insolvent; in exercising the rights of a single creditor for the latter's benefit only, in respect to property of a third party he exceeds his powers. Movable effects sold on condition that the property therein should pass only on payment of the whole purchase money can be revendicated by the vendor from the purchaser, or the curator appointed in a cession de biens by the latter, if part of the price has not been paid.

O'Cain v. Domina, 8 Que. P.R. 172 (Ct. Rev.).

—Demand—Nature of debt.]—A person who carries on a trade (e.g., dressing skins for gloves) in which he uses material belonging to another which he does not buy in order to re-sell, is not a trader (commerçant) within the meaning of paragraph 2, Art. 853, C.C.P. He is not, therefore, obliged to comply with a demand made on him for an assignment (cession de biens). The depositor is not the creditor of the dépositaire for the value of the deposit within the sense of the same article. Therefore, a debt which does not amount to $200 joined with a claim of this nature does not give the right to make a demand for a cession de biens.

Vermette v. Vermette, Q.R. 30 S.C. 533 (Sup. Ct.).

—Dividend sheet — Contestation—Privileged creditor.]—When on a contestation of a dividend sheet by a creditor, who

complains of not being collocated for the full amount of his claim by privilege, the contestation succeeds and the curator is ordered to prepare a new sheet, it is not necessary for him to do so if he pays the privileged claim and thereby deprives the creditor of his interest in the matter.

Guimont v. Damphousse, Q.R. 30 S.C. 358 (Ct. Rev.).

—Demand—Deposit of declaration and statement.] — A demand of assignment (cession de biens) on a commercial firm, not followed by deposit by the latter of the declaration and statement required by Art. 859, C.C.P., or by any other procedure, does not constitute a state of insolvency so as to cause a dissolution of the partnership. A commercial firm dissolved by insolvency continues to exist as a fictitious person and can act as such for the purposes of its liquidation. In either case the firm sued may exercise the recourse en garantie which it may have against third parties.

Block v. Carrier, Q.R. 30 S.C. 37 (Sup. Ct.).

—Contracts in fraud of creditors—Action brought more than a year after contract—Knowledge obtained by creditor within the year.]—On the trial of a contested action pauliana brought more than a year after the contract impeached was made, but in which the plaintiff alleges that he only obtained knowledge of it within the preceding year, the burden of proof is not on the plaintiff to establish the negative proposition that he did not know of it sooner, but on the contesting defendant to show affirmatively that he did.

Boulais v. Monast, 29 Que. S.C. 509 (C. R.).

—Abandonment for benefit of creditors—Dividend sheet—Funds to meet privileged claim—Conditional order.]—(1) The lessor who purchases the rights under the lease of his insolvent lessee, without prejudice to any claim for rental to which he may be legally entitled, has a right to be collocated by privilege out of the proceeds of the movable property garnishing the leased premises for a proportion of rental for the current year corresponding to the part of it elapsed at the date of his purchase. (2) When on the contestation of a dividend sheet prepared by the curator to abandoned property, by a creditor who claims and has the right to be collocated by privilege out of special proceeds or a special fund, it does not appear whether the curator has in hands an amount sufficient to cover the claim, the Court will maintain the contestation nevertheless, and make a conditional order accordingly.

Macpherson v. Symonds, 29 Que. S.C. 119 (C.R.).

—Revendication.]—No authorization of a Judge is necessary to proceed in an action in revendication against the curator of an insolvent estate.

Re Desrochers, 8 Que. P.R. 125.

—Costs on demand of assignment—Examination on discovery.]—(1) When a demand of assignment is successfully contested, the costs will be of the class of action of the amount of the debt involved. (2) An examination on discovery does not mitting the goods to remain in his possession was inconsistent with any suspicion on his part that there was a general injustify taxation as in an action settled after inscription for enquete, but does equitably justify a fee similar to the one provided by No. 46 of the old tariff.

Imperial Laundry Co. v. Hurtubise, 8 Que. P.R. 209.

—Avoidance of donation made in fraud of creditors—Insolvency of donor.]—A donation of property can only be avoided in an action pauliana, upon clear evidence that the donor became thereby insolvent. When therefore the latter retains in his hands immovable property purchased for a price of $7,000 on which he has paid $2,000, the vendor to whom the balance of $5,000 is due has no action to annul a donation made by his debtor to his son of his other homestead property.

Laporte v. Bernard, 15 Que. K.B. 243.

—Deposit to guarantee dividend—Special purpose—Payment by curator of employees.]—The contract by deposit gives rise to the obligation that the depositee will not divert the sum from the purpose for which the deposit was made. Therefore, the deposit with the curator to an insolvent estate as a guarantee that the liquidation will produce a specified dividend cannot be applied to any other purpose without the consent of the depositor and the curator cannot use it as forming part of the assets of the estate. The curators under an assignment for winding up a company can employ and pay, out of the property they have to administer, persons to do work necessary and useful in the interest of the creditors.

Dignard & Co. v. Chartrand, Q.R. 33 S.C. 147 (Ct. Rev.).

—Insolvent estate—Petition by curator to contest an action—Opposition by creditors.]—If the majority as to numbers and amount of the creditors of an insolvent estate are opposed to the contestation of an action by the curator he will be allowed to appear and contest the same, but on condition that the expenses thereof shall only be imposable on the creditors who are in favor of such contestation.

Re Laurence & Chartrand, 9 Que. P.R. 393.

—Abandonment of property—Demand of assignment—Temporary embarrassment.] —Failure by a trader to meet due bills through a temporary embarrassment, following upon the burning of his premises and pending a settlement with his insurers, when his assets largely exceed his liabilities, is not a cessation of payments such as to entitle a creditor to make a demand of abandonment of property upon him.

Beland v. Colloridi, 33 Que. S.C. 210 (C.R.).

—Promissory note—Short prescription—Interruption—Insolvency of maker—Payment of dividends.]—The short prescription of promissory notes provided for by Art. 2260 C.C. is interrupted by the payment of dividends by the curator of the insolvent estate of the maker.

Caverhill v. Prévost, Q.R. 32 S.C. 81 (Ct. Rev.).

—Liquidation of insolvent corporation—Distribution and collocation — Privileged claim—Expenses for preservation of estate —Fire insurance premiums.] —M. acquired the factory and plant of an insolvent company which had been sold under execution by the sheriff and, pending litigation during the winding-up of the company, operated and maintained the factory as a going concern. The sheriff's sale was set aside and M. then abandoned the property to the curator of the estate and filed a claim, as a privileged creditor, for necessary and useful expenses incurred by him in preserving the property for the general benefit of the mass of the creditors, including therein charges for moneys paid as premiums on policies of fire insurance effected in his own name during the time he had held possession:—Held, that, in the absence of evidence to show that such insurances had been so effected otherwise than for his own exclusive interest, he could not be collocated by special privilege, on the distribution of the proceeds of the estate, for the amount of the premiums. When the appeal first came on for hearing upon inscription ex parte, on suggestion by one of the creditors, not made a party to the appeal, the Court ordered the postponement of the hearing in order that all interested parties might be notified.

McDougall v. La Banque d'Hochelaga, 39 Can. S.C.R. 318.

—Abandonment of property—Distribution of proceeds of real estate.]—(1) A judgment of distribution of the proceeds of the real estate of an insolvent, prepared by the prothonotary in conformity with Art. 879 C.P. as amended by 61 Viet. c. 47, is, notwithstanding Art. 890 C.P., appealable to the Court of King's Bench. (2) The transferee of a hypothecary creditor whose claim is mentioned in the certificate of hypothecs, has, although such transfer was secured after the sale of the property by the sheriff, a prima facie right of appeal from the judgment of distribution. (3) The fact of the appellant having allowed the sheriff to distribute the moneys in his hands does not constitute an acquiescence in the judgment of distribution. (4) If security is given within five days from the filing of the inscription in appeal the appellant may, such security being contested, give additional security to the respondent and the appeal will not be quashed by reason of the insufficiency of the first security or of the lateness or the second, no objection being made to the sufficiency of the latter. (5) The party who appeals from the judgment of distribution of the proceeds of the real estate of an insolvent must give notice of appeal to all parties collocated and not only to the curator, and the Court will, on motion of the latter to quash the appeal, give the appellant delay in which to serve the inscription in appeal upon the other parties to the judgment of distribution or desist from his appeal as regards the collocations in favour of one or more parties.

Bosquet v. Henderson, 9 Que. P.R. 321.

—Curator resigning unconditionally—Petition to get books of insolvent estate.]— If the unconditional resignation of a curator to an insolvent estate has been accepted by the Court, he ceased to be subject to the summary jurisdiction of a Judge of this Court from the moment the judgment was rendered accepting such resignation; a petition asking that he be ordered to hand over to the new curator all the books, papers and documents of the estate will be dismissed.

Lamoureux v. Gibson, 9 Que. P.R. 211.

—Demand of abandonment—Suspension of payments.]—Held, the fact that a trader is temporarily embarrassed in his business, and when his assets greatly exceed all his direct and indirect liabilities, is not a conclusive proof that he has ceased his payments, and a demand of abandonment of property against him will be rejected with costs.

Colloridi v. Beland, 9 Que. P.R. 161 (C.R.).

—Additional inspectors.]—The Court is not authorized by law to accede to a request for the appointment of additional inspectors to an insolvent estate.

In re Clement, 9 Que. P.R. 91 (Sup. Ct.).

—Curator's fees.]—Neither the Superior Court nor a Judge thereof has authority to tax the fees of the curator to an assignment in insolvency.

In re Beaudry, 9 Que. P.R. 232 (Sup. Ct.).

—Action by curator—Authority.]—If the curator to an insolvent estate brings an

action in the name of the creditors without authority and the defendant sets up want of authority by exception to the form the Court, on application of the curator, will authorize him to take the proceedings in question on payment of costs.

Savage v. Legendre, 9 Que. P.R. 254 (Sup. Ct.).

—Gratuitous services by an insolvent husband for the carrying on of his wife's business—Rights of his creditors.]—An insolvent husband may lawfully give his services gratuitously to his wife separate as to property, for the carrying on of her business and his creditors have no right to claim from her, by garnishment, the value of such services.

Excelsior Life Insurance Company v. Désy, 35 Que. S.C. 232.

—Clerical error — Change of a debtor's name.]—(1) The curator to an insolvent trader has no right or quality to ask that a clerical error, in the bilan be corrected; such error might only be corrected at the request of the insolvent alone, but not of the curator. (2) A petition to be allowed to change the name of a debtor of the insolvent in the bilan is useless, the books and deeds showing clearly the name of the debtor whom the curator may sue.

Cleary v. Stevenson, 10 Que. P.R. 176.

—Contested claim—Order against curator—Production of deeds and inventory—Allegation of fraud.]—The petition of an insolvent for an order requiring the curator to bring into Court the documents in his possession respecting the conveyance of property of the estate, the inventory of said property and the moneys produced by the sale will not be granted if a contested claim has not been passed upon by the Court. The demand of the petition against the vendor and purchaser of the assets that the proceeds of the sale shall be paid to the curator only will also be rejected. If fraud and bad faith are alleged against the vendor and purchaser the proceeding should be by action to annul the sale and not by petition.

Gagnon v. Gervais, 10 Que. P.R. 180.

Eastern Provinces.

—Preference—Confession of judgment—Assignment of book debts—Pressure—Collusion—Presumption of fraudulent intent—Commencement of suit—Act. 58 Vict. c. 6.] The defendant in consideration of a promise by a trader to pay to the defendant a sum of money on account of his indebtedness within a given time or to give security, and believing the trader to be solvent, gave him on credit a further supply of goods. Subsequently the trader becoming insolvent announced the fact to his creditors. The defendant thereupon reminded the trader of his promise to him, and urged and induced him to give a confession of judgment for the amount of his indebtedness to the defendant, and to execute an assignment of his book debts to him:—Held, that the confession of judgment having been obtained by pressure, and without collusion, was not within s. 1 of the Act, 58 Vict. c. 6, and that the assignment of book debts having been obtained by pressure was not within s. 2 of the Act. The presumption created by s. 2 (a) of the Act does not arise where the sixty days therein mentioned have expired at the date the writ of summons in the suit is sent to the sheriff for service, though the sixty days had not expired at the date of the teste of the writ.

Amherst Boot and Shoe Manufacturing Company, Limited, v. Sheyn, 2 N.B. Eq. 236.

—Assignment for benefit of creditors—Execution after time provided in deed.]—This was a proceeding by originating summons to determine the rights of certain creditors who executed a deed of assignment for the benefit of creditors after the expiration of the time provided in the deed, but before any dividend was paid. Some of the creditors had not learned of the assignment until after the time had elapsed; others had sent instructions and power of attorney to execute within the time, but the same miscarried, and the execution did not take place until after the time had elapsed. The assignment contained no release:—Held, on the authority of Whitmore v. Turquand, 3 D.F. & J. 107; Haliburton v. DeWolfe, 1 N.S.D. 12; and Douglas v. Samson, 1 N.B. Eq. 137, that the creditors who executed after the expiration of the time limited in the assignment but before payment of a dividend were entitled to participate pari passu with the creditors who executed within the period. Held, also, following Gunn v. Adams, 8 C.L.J., 211, that the costs of all parties should be paid out of the estate.

Capstick v. Hendry (McDonald C.J.), December, 1901. (Not reported.)

—Preferential security — Previous promise—Confession of judgment — Surety.]—

McLeod v. Wightman, 1 E.L.R. 146, 260 (P.E.I.).

—Knowledge of insolvency — Consideration—Onus of proof.]—

Comeau v. White, 1 E.L.R. 99 (N.S.).

—Assignment by insolvent of all personal property to secure maintenance of wife — Knowledge of transferee of insolvency.]—

Forbes v. Dingman, 1 E.L.R. 435 (P.E.I.).

—Committal of debtor for fraud — Assignment.]—

McFatridge v. Marcus, 4 E.L.R. 11 (N.S.).

— Assignment for creditors — Claim for rent.]—
Greenwell v. McKay, 7 E.L.R. 85 (N.S.).

—Composition agreement—Agreement for special advantage.]—
Sillick v. Grosweiner, 2 E.L.R. 493 (N.B.).

—Fraudulent preference—Insurance — Loss — Assignment before service of attaching order.]—
McKinnon v. Coffin, 2 E.L.R. 176 (P.E.I.).

—Bill of sale—Assignment within 60 days —Presumption of insolvency—Evidence to rebut.]—R. was indebted to the plaintiff F. for an overdue draft which fell due in May, 1901. On August 15th, 1901, F. went to R.'s place of business and bought from him a quantity of stoves. A memorandum of the sale was drawn up showing the number of stoves purchased, the prices and the terms of sale. R. agreed to give F. credit for the amount of the purchase, on contra account, and to hold the stoves subject to the order of F. and to deliver them either at Dartmouth or Halifax free of charge. In September following R. made an assignment under the Assignments Acts to the defendant F., the official assignee, for the general benefit of creditors, under which defendant took possession of and sold the stock of R., including a portion of the goods sold to plaintiff. To an action by F. for the conversion of the goods defendant pleaded (1) that the inventory and receipt given by R. to F. were a bill of sale, and within the provisions of the Bills of Sale Act, R.S. 1900 c. 142, and not having been filed in accordance with the provisions of the Act were void. (2) That R. at the time of the transfer to F. was insolvent and that the transfer was void under the terms of the Assignments Acts, R.S. 1900 c. 145:—Held, (1) The inventory and receipt operated as an absolute bill of sale; that they were not intended to operate as a security for the debts but as an absolute transfer of the title. (2) As the inventory and receipt enumerated the articles sold and the prices and the terms of sale, they did away with any objection under the Statute of Frauds in respect to absence of part delivery. (3) In the absence of evidence of knowledge on the part of F. that R. was insolvent or unable to meet his liabilities; and in the absence of evidence that R was as a matter of fact insolvent at the time of the transaction, apart from the fact that the assignment to defendant was made within a month afterwards, the transaction was not one that offended against the terms of the Assignment Act, R.S. c. 145. (4) The provisions of the Act (c. 145, s. 4), which made an assignment for the benefit of creditors within 60 days presumptively given with intent unjustly to prefer, must be read in connection with previous sections requiring insolvency at the date of the transaction to be established, and moreover only raised a presumption which could be rebutted. (5) The conduct of F. in endeavouring at the time to sell other goods to R. and in perability on the part of R. to meet his debts. (6) The word "insolvent" in the Nova Scotia Act was not to be read differently from the word "debtor" in the corresponding section of the Ontario Act.
Fawcett v. Faulkner, 39 Can. Law Jour. 412 (Townshend, J.).

—Preference—Evidence of pressure—Presumption—Levy under execution—Held an "action or proceeding" to impeach or set aside.]—Under the provisions of R.S.N.S. (1900) c. 145, s. 4. (1) "Every transfer of property made by an insolvent person—(a) with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them; or, (b) to or for a creditor with intent to give such creditor an unjust preference over the other creditors of such insolvent person, or over any one or more of such creditors, shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void. (2) If any such transfer to or for a creditor has the effect of giving such creditor a preference over the other creditors of such insolvent person, or over any one or more of them, such transfer shall,—(a) in and with respect to any action or proceeding which is brought, had or taken, to impeach or set aside such transfer, within sixty days after the giving of the same, be presumed to have been made with intent to give such creditor an unjust preference as aforesaid, and to be an unjust preference, whether such transfer was made voluntarily or under pressure. In an action by plaintiff company against the sheriff of the County of Cape Breton, for the conversion of goods levied upon by defendant under executions issued on judgments recovered against R. plaintiffs' title to the goods depended upon a bill of sale from R. The evidence showing that R. was an insolvent person, and the effect of the giving of the bill of sale being to give plaintiffs a preference over the other creditors of R. and the levy made by defendant having been made within sixty days from the giving of the bill of sale:—Held, that the levy was "an action or proceeding" had or taken to set aside the transfer, within the meaning of the Act, and that, under the provisions of sub-s. (2) the bill of sale must be presumed to have been made with intent to give an unjust preference, and to be such preference, whether made voluntarily or under pressure, and that, as against the creditors represented by defendant, it was utterly void.
The Shediac Boot and Shoe Co. v. Buchanan, 35 N.S.R. 511, 1 C.L.R. 481.

—Bankruptcy Act, 1883 (Imperial)—Debt provable under—Action by subject of for-

eign state—Plea of discharge in England.]—A plea that the defendants were adjudged bankrupt, and a certificate of discharge granted in England, under the Bankruptcy Act. 1883, is a good answer to an action for a debt provable against the defendants in bankruptcy brought in New Brunswick by the subject of a foreign state who had never resided or been domiciled within British dominions. Nicholson v. Baird, N.B. Eq. Cases 195, considered.

Ford v. Stewart, 35 N.B.R. 568.

—Assignment—Setting aside—Delay in commencing proceedings—Right to accounting.]—In an equitable action to set aside a deed of assignment containing a preference in favour of the assignee, as fraudulent and void against creditors under the Statute of Elizabeth, the action was not commenced until nearly eight years after the making of the deed, and was not brought to trial until nearly fifteen years after the date of the assignment, no explanation being given of the cause of delay, and the assignee having died in the meantime:—Held, that the Court, in view of the long delay, unexplained, must regard the proceedings with suspicion, and would not lend its aid to the action without some clear and reasonable explanation. Held, also, that, under the circumstances stated, the assignee being dead, the assignor would not be heard to say that the transaction, as between him and the assignee, was a fraud, and a scheme to defeat other creditors. Held, that plaintiff, not being a party to the deed of assignment, was not entitled to an accounting for what was done under it.

Peppet v. McDonald, 38 N.S.R. 540.

—Creditor's action—Adding assignee.]—
See PARTIES.

(Gault Bros. v. Morrell, 3 N.B. Eq. 173.)

—Insolvent company.]—
See COMPANY III.

—Advance under agreement to give bill of sale—Delay—Suit by creditors.]—A trader when in insolvent circumstances to the knowledge of himself and the defendants executed to them a bill of sale of his stock in trade, pursuant to an agreement made with them nearly four years previously to give it whenever required, the advancing to him upon the faith of the agreement a sum of money for use in his business and giving him a line of credit. Shortly after executing the bill of sale he made an assignment for the benefit of his creditors under c. 141, C.S. 1903:—Held, in a suit by the assignee, that the giving and filing of the bill of sale having been postponed until the debtor's insolvency in order to prevent the destruction of his credit, the agreement was a fraud upon the other creditors, and that the bill of sale should be set aside. Held, also, that the delivery of the stock in trade by the trader to the defendants, subsequently to the execution of the bill of sale, did not assist their title; s. 2 of c. 141 C.S. 1903, applying. A preferential transaction falling within the provisions of c. 141 C.S. 1903, may be impeached at the instance of creditors, where the debtor has not made an assignment. Where, after the commencement of a suit by creditors to set aside a bill of sale, as constituting a fraudulent preference under c. 141 C.S. 1903, the grantor made an assignment for the benefit of his creditors, the assignee was added as a plaintiff.

Tooke Brothers v. Brock & Patterson, 3 N.B. Eq. 496.

—Insolvency—Statutory presumption—Rebuttal—Evidence of pressure]—S. 2 (3) of the Assignments and Preferences Act, c. 141 C.S. 1903, provides that in a suit brought within sixty days from the making of a transfer of property, to have it set aside, it shall be presumed that it was made with intent to give the preferred creditor an unjust preference, and to be such, whether made voluntarily or under pressure:—Held, that the presumption is rebuttable but that evidence of pressure is not admissible for the purpose.

Edgett v. Steeves, 3 N.B. Eq. 404.

—Creditors' deed—Balance in hands of trustee—Repayment to debtor—Collection of debts due estate—Negligence of trustee.]—A trustee under a deed of assignment for the benefit of creditors ordered to pay to the debtor balance of estate in his hands, where eighteen years had elapsed from the time of the assignment, though but two creditors had executed the deed, it not appearing that other creditors, if there were any, had ever shown an intention of assenting to the deed and the Court being of opinion that they would now be precluded from doing so. A trustee under a deed for the benefit of creditors may employ an attorney to collect debts due the estate. Where an attorney employed for the purpose by a trustee under an assignment for the benefit of creditors collected $211.38 of $1,028.45 book debts due the estate, and it appeared that mostly all of them were for small amounts, many being for less than a dollar, and that one of the reasons for making the assignment was the difficulty experienced by the assignor in collecting even good debts, it was held that the trustee should not be charged with a sum as for debts that he should have got in. The finding of a referee upon questions of fact depending upon evidence taken viva voce before him will not be disregarded except in case of manifest error.

Thibideau v. LeBlanc, 3 N.B. Eq. 436.

Western Provinces.

—Assignment of partnership assets only for benefit of creditors.]—An assignment by a firm for benefit of creditors which was construed by the Court to be an assignment of partnership assets only, may be a good and valid assignment within the meaning of the Creditors' Trust Deeds Act of British Columbia.

Eastman v. Pemberton, 7 B.C.R. 459.

—Assignment—Preference for one month's wages.]—The preference given by the B.C. Creditors' Trust Deeds Act, 1901, for wages of persons in assignor's employ at time of assignment, or "within one month before," does not include a workman whose last day of employment was 26th of October when the assignment was made on the 27th November following.

Re Clayoquet Co., 9 B.C.R 80.

—Parties to action.]—An insolvent debtor who has made an assignment for the benefit of his creditors is neither a necessary nor a proper party to an action by the assignee to set aside a fraudulent preference given by him.

Schwartz v. Winkler, 14 Man. R. 197.

—Fraudulent preference—Assignments Act, R.S.M., c. 7, s. 33—63 and 64 Vict. (M.), c. 3, s. 1—Trust assignment made to a creditor—Pressure—Creditor's knowledge of the debtor's insolvency.]—Under s. 33 of The Assignments Act, R.S.M., c. 7, a mortgage given by a debtor to a creditor to secure his claim may be set aside as a preference although it has been obtained by pressure, and was given by the debtor without any active desire to prefer the mortgagee to his other creditors, if the debtor knew or ought to have known that such would be the result of giving the mortgage. When an assignment in trust for creditors is made to one of the creditors of the assignor, the assignee may under s. 39 of the Act bring an action to set aside a fraudulent preference without showing the acceptance of the benefit of the assignment by any other creditor or communication of it to any other. An assignment of property made by a debtor for the benefit of his creditors generally is, by virtue of s. 2 (a) of the Act, an "assignment under this Act" although the description of the property may not be in the words set forth in s. 3 or in words to the like effect:—Held, also, following Stephens v. McArthur (1890), 6 M.R. 496, notwithstanding the decisions of the Ontario Court of Appeal in Johnson v. Hope (1893, 17 A.R. 10, and Ashley v. Brown (1890), 17 A.R. 500, that it is not necessary to show notice to the transferee of the debtor's insolvent condition; but that, in any case, if the transferee had such a knowledge of the debtor's financial position that an ordinary business man would conclude from it that the debtor was unable to meet his liabilities, constructive notice of the insolvency should be imputed to him. National Bank of Australia v. Morris, [1892] A.C. 287, followed.

Swartz v. Winkler, 13 Man. R. 493 (Killam, C.J.).

—Fraudulent preference—Assignments Act—Motive actuating debtor in giving security to preferred creditor—Pressure.]—It appeared that the dominant motive of the debtor in giving the impeached security was to make an arrangement for continuing his business. The defendant induced him to give it by promises of assistance in carrying him along and in arranging with other creditors, although not in any definite way enforceable in a court of law;—Held, that under s. 33 of The Assignments Act, R.S.M., c. 7, as amended by 63 and 64 Vict. c. 3, s. 1, there must still be the intent on the part of the debtor to prefer the particular creditor in order to set aside the impeached conveyance; and, while the effect may be to place that creditor in a more advantageous position than other creditors, and the debtor may recognize at the time that such will be the effect, yet, if he gave it for some other purpose, or in the hope that he might thus be enabled to avoid insolvency, it cannot be considered that he gave it with intent to give a preference, and the security should stand. Stephens v. McArthur, 19 S.C.R. 446; New Prance and Gerrards' Trustee v. Hunting (1897), 2 Q.B. 19; S.C. sub. nom. Sharp v. Jackson (1899), A.C. 419; Lawson v. McGeoch, 20 A.R. 464; Armstrong v. Johnson, 32 O.R. 35, followed. Although the amending Act declares that a prima facie presumption of an intent to prefer is to arise from the effect of such a transaction, this does not justify the Court in looking only to the effect and refusing to attach any weight to the proved facts as to the actual intent. The presumption being only prima facie, may be rebutted by evidence. Held, also, that the Court need not determine whether the defendant was acting bona fide or really anticipated that the other creditors could be arranged with and the business continued, it being only the debtor's mental attitude that should be considered. Richards, J., dissented, on the ground that the security was obtained by deceitful representations of the defendant's agent, and should be set aside on that ground.

Codville v. Frazer, 14 Man. R. 12.

— Bill of sale to trustee for particular creditors — Assignments Act, 1906.]—The defendant, a trader, on the 11th August, 1909, executed a bill of sale of certain described goods, etc., in favour of N., who resided out of the province, and was not an official assignee therefor. It was recited

in the instrument that the defendant was indebted to certain creditors, and had agreed to transfer the property for the purpose of having it sold and the proceeds distributed by N. among the creditors. At the same time an agreement between the defendant and N. was executed, in which it was expressly declared that N. was trustee, as to all the property assigned to him, for the creditors whose names were set out in the schedule to the bill of sale. The plaintiffs were judgment creditors of the defendant, and their name was not in the schedule:—Held, upon an interpleader application by a sheriff who had seized, under the plaintiffs' execution, property claimed by N. under the bill of sale, that the bill of sale and agreement did not constitute an assignment for the general benefit of creditors under the Assignments Act, 1906, being for the benefit of a scheduled list of creditors, and not for the benefit of the creditors generally; if it was an assignment, it was for the special benefit of particular creditors. Not being an assignment for the general benefit of creditors for one purpose, it could not be for any other purpose; and, therefore, it could not be void under s. 5 of the Assignments Act, because not made to an official assignee.

The bill of sale and agreement were also attacked by the plaintiffs as constituting a preference under the Assignments Act, and an issue was directed as to that.

Canadian Bank of Commerce v. Davidson, 15 W.L.R. 530 (Sask.).

— Chattel mortgage — Preference — Fraud — Pressure.] — One Lachlan Galbraith, being in insolvent circumstances, executed certain mortgages in favour of plaintiffs, upon request of their agent. Galbraith swore that he gave the mortgages voluntarily and without pressure being brought to bear:—Held, that the mortgages having been given at the request of the plaintiff's agent, they were given under pressure, and were valid against creditors under the Preferential Assignments Ordinance, that it was immaterial whether or not the mortgages were aware of the insolvency; that plaintiffs being liable on certain acceptances of Galbraith's was a sufficient reason for desiring and obtaining the security of the mortgages, and that the implied undertaking of the plaintiffs to protect Galbraith against any liability on such acceptances was a sufficient consideration to support the mortgages.

The Ontario & Western Lumber Company v. Cote, 3 Terr. L.R. 454.

— Assignment of shares — Assignments Act — Seizure under execution — Assignment void as against execution creditors—Interpleader issue.]—

Potts v. Imperial Bank of Canada, 8 W. L R. 583 (Man.).

— Insolvent traders — Composition with creditors — Acceptance by creditors of dividend on claim — Express refusal to accept in full — Action for balance.]—

McPherson v. Copeland, 9 W.L.R. 623 (Sask.).

—Debtor and creditor—Preference—Collusion—Pressure—R.S.B.C. 1897, c. 86 and 87—Bank Act s. 80.]—Where there is good consideration a mortgage comprising the whole of a debtor's property will not be set aside, notwithstanding that the mortgagor is in insolvent circumstances to the knowledge of the mortgagee, and that the effect of the mortgage is to defeat, delay and prejudice the creditors, if there is pressure. A mortgage made by the directors of a company prior to the consent of its shareholders without which consent there was no power to borrow may be ratified by the shareholders.

Adams and Burns v. Bank of Montreal, 32 Can. S.C.R. 719, affirming, 8 B.C.R. 314.

—Assignment for benefit of creditors—Preferential claim—"Wages or salary of persons in employ" of assignor.]—The plaintiff contracted with cannery proprietors (a) to supply labor and pack salmon at a stated price per case, i.e., by piece work; and (b) to act as foreman of the labourers supplied to him at a salary of $50 per month. The proprietors having assigned for the benefit of creditors plaintiff sought to enforce the preference given by s. 36 of the Creditors' Trust Deeds Act in respect to both salary and the piece work:—Held, that the preference must be restricted to the salary.

Tam v. Robertson, 9 B.C.R 505, Irving, J.

—Bill of sale—Fraudulent preference.]—

See BILLS OF SALE.

McClary v. Howland, 9 B.C.R. 479.

—Insolvent company.]—See COMPANY III.

—Agreement for composition and discharge —Alterations in terms of agreement—Default.]—The defendant being in difficulties, procured from all his creditors, among whom were the plaintiffs, a deed of composition and discharge on the terms that within sixty days he should give them secured promissory notes representing 75 cents on the dollar. Before the expiration of the sixty days the defendant, under pressure from his creditors and by an arrangement with them, sold his entire assets on certain terms, which netted to the creditors 64½ cents on the dollar, payable and paid by the purchaser's promissory notes. All the creditors, except the plaintiffs, upon receiving the 64½ cents on the dollar, gave a formal discharge to the defendant. The plaintiffs sued upon the promissory notes for the balance of their original debt, or, alternatively, for the difference between

64½ and 75 cents on the dollar. The defendant, among a number of other defences, paid the amount representing this difference into court together with costs up to defence. The jury found in answer to certain questions, (1) that the plaintiffs did not receive the 64½ cents in full of their claim; (2) that they did receive it on account of the 75 cents; and (3) that the 64½ cents were not paid on account of the original claim:—Held, that the plaintiff's action on the promissory notes was discharged by the agreement for composition and discharge, although its terms had not been fulfilled.

Howland v. Grant, 2 Terr. L.R. 158. Affirmed on appeal, 26 Can. S.C.R. 372.

—Fraudulent preference—Action by creditor to set aside preference—Amendment of statement of claim—Expiration of time limited for suit.]—Action commenced on 2nd November, 1903, to set aside, as a fraudulent preference, an assignment to defendant, dated 5th September, 1903, by one Cockrill, of certain moneys payable under fire insurance policies to secure defendant's claim against Cockrill. No assignment having been made by Cockrill under the Assignments Act, R.S.M., 1902, c. 8, plaintiff alleged in the statement of claim that they brought the action on "behalf of themselves and all other creditors of Cockrill . . . who are willing to join in and contribute towards the payment of the expenses thereof." Section 48 of the Act provides that, when there has been no assignment under the Act, an action to impeach a transaction as a fraudulent preference must be brought "for the benefit of creditors generally, or for the benefit of such creditors as have been injured, delayed or prejudiced," and s. 40 requires that such an action should be brought within sixty days from the time the transaction impeached took place. On 4th December following, plaintiffs amended the statement of claim by adding, after the words first above quoted, the words "and the same is brought for the benefit of the creditors generally of the said debtor." Held, that there was no suit brought for the benefit of the creditors generally, or of such as had been injured, delayed or prejudiced, to impeach the transaction in question until the amendment of 4th December was made, which was more than sixty days after the date of the impeached transaction; and that this objection was fatal, notwithstanding the provision in s. 48 (b) that, "in case any amendment of the statement of claim be made, the same shall relate back to the commencement of the action for the purpose of the time limited by the 40th section hereof." The right to sue and the relief to be given are created by the statute and must be construed strictly. The amendments referred to in that provision must, in strict construction, be confined to allegations of law or fact upon which the relief is to be founded, and that provision presupposes an action to have been commenced in the form provided within sixty days. On the merits, also, the findings of fact were that the impeached assignment was not a fraudulent preference within the meaning of the Act, as it was only the last of a series of transactions all connected together which should be treated as a whole and, so treated, were not open to attack.

Ferguson v. Bryans, 15 Man. R. 170, (Perdue, J.)

—Sale of goods by insolvent—Bona fides—Fraudulent preference—Interpleader order—Res judicata.]—K., a trader in insolvent circumstances, sold the whole of his stock in trade to D., who immediately took possession on the 2nd January, 1888. A few days afterwards the sheriff seized the goods under executions issued upon judgments obtained, subsequent to the sale, by T. B. & Co. and the Bank of B.C. On the 14th January an order was made for the trial of an interpleader issue between D. and T. B. & Co., and the order provided that no action should be brought against the sheriff for the seizure of the goods. Upon the trial of the interpleader issue in the County Court an order was made barring the claimant D. and declaring the bill of sale to him by K. invalid against creditors, and this judgment was affirmed upon appeal to the Supreme Court of British Columbia in banco, on the 21st March, 1888. On the 11th January, 1888, D. instituted an action against the sheriff claiming damages for wrongfully seizing, converting and selling the plaintiff's goods. An interpleader order was also made in which D. was the claimant and the Bank of B.C. was defendant, but upon the delivery of the judgment in the other issue between D., claimant, and T. B. & Co., defendants, the court rescinded the second interpleader order, and further ordered that D. be forever barred from prosecuting his claim against the sheriff. D. thereupon abandoned his first action against the sheriff, but instituted a new action against him on the 22nd November, 1888, claiming larger damages for the same wrongs complained of in his first action. On the trial of this cause, the jury found that K. had sold the goods with intent to prefer some of his creditors but that D. had purchased in good faith and without knowledge of such intention on the part of the vendor and, thereupon, judgment was ordered to be entered for the plaintiff for the sum of $9,161 and costs. On appeal, the full court of British Columbia reversed this judgment (McCreight, J., dissenting), on the ground that the bill of sale from K. to D. was void under c. 51, R.S.B.C., being an Act respecting the fraudulent preference of creditors by parties in insolvent circumstances; and

secondly, that the judgment in the interpleader issue was res judicata. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the Supreme Court of British Columbia, that as the evidence showed the goods had been purchased by D. in good faith for his own benefit, the sale was not void under the statute respecting fraudulent preferences. Held, also, that the judgment on the interpleader issue could not operate as a bar to the present action. Held, further, that. even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case, it appeared that no such estoppel could have been established.

Davies v. McMillan (1893), 1 S.C. Cas. 306.

—Status of assignee for creditors.]—In the North-West Territories an assignee for creditors has no higher rights than his assignor, and cannot sue to set aside a conveyance made by his assignor as fraudulent against creditors.

Diehl v. Wallace (N.W.T.), 2 W.L.R. 24, Scott, J.

—Preferential assignment — Pressure — Knowledge of insolvency.]—The effect of the second session of the Yukon ordinance, chapter 38, Consolidated Ordinances, 1902, is to remove the doctrine of pressure in respect to preferential assignments, and, consequently, all assignments made by persons in insolvent circumstances come within the terms of the ordinance. In order to render such an assignment void there must be knowledge of the insolvency on the part of both parties and concurrence of intention to obtain an unlawful preference over the other creditors. Molsons Bank v. Halter (18 Can. S.C.R. 88); Stephens v. McArthur (19 Can. S.C.R. 446); and Gibbons v. McDonald (20 Can. S.C.R. 587) referred to.

Benallack v. Bank of British North America 36 Can. S.C. 120.

—Conveyance having effect of defeating creditors.]—The effect of s. 2 C.O. 1898, c. 42, is that any conveyance made by a debtor in insolvent circumstances which has the effect of defeating, delaying, or prejudicing his creditors, is void.

Ross v. Pearson, 1. W.L.R. 38.

—Fraudulent preference—Sale of stock to person who assumes liability of insolvent to creditor.]—A trading firm being indebted to G. in a large amount, and G. being dissatisfied with the payments received and the manner in which the firm carried on its business, but not knowing or having reason to believe that they were unable to meet their liabilities, an arrangement was made and carried out whereby the traders sold their stock in trade to L., and received the price in cash less the amount of G.'s claim, which was assumed by L., G. giving time to L. for payment, and releasing the traders. Within sixty days the trading firm made an assignment to the plaintiff under the Assignments Act, R.S.M. 1902, c. 8, for the benefit of creditors generally:—Held, that, as the sale to L was not impeached, the agreement whereby L. was to pay the insolvent's debt to G. could not be set aside as a fraudulent preference under section 41 of the Act; that the effect of it was the same as if L. had paid the full purchase money to the insolvents and they had paid G. in full out of it, and so the case came within the saving clause of the Act, section 44, protecting payments of money, and that there was no assignment or transfer of anything by the insolvents to G. which could be declared fraudulent and void under section 41. Held, also, that the transaction attacked could not be held void under section 45 of the Act, which is limited in its scope to transfers of considerations other than money, such as bills, notes or goods. Quaere, whether, if the plaintiff had been held entitled to the relief asked for, G. would then have had the right, under section 46 of the Act, to have restored to him the claim he had previously held against a surety for the insolvents, it being urged that the discharge of the insolvents discharged the surety also.

Newton v. Lilly, 16 Man. R. 39.

— Preferred claim — Lien on goods for advances — Receipt — Order on consignees.]—

Howe v. Reeve, 3 W.L.R. 555 (B.C.).

— Assignment for benefit of creditors—Insurance of mortgaged premises by insolvent—Insurance moneys paid to assignee—Right of mortgagee to payment over.] —

Wood v. Jagger, 9 W.L.R. 120 (Sask.).

—Hypothecation to bank of securities and chattel property of trading partnership — Preference — Concurrence of intent.] —

Tudhope v. Northern Bank of Canada, 10 W.L.R. 122 (Alta.).

—Assignment for benefit of creditors — Status of assignee to attack bills of sale made by insolvent — Estoppel.]—

Lennox v. Alaska Mercantile Co., 4 W.L.R. 333 (Y.T.).

— Insolvent carrying on business with consent of majority of creditors.]—

Re Matejka, 5 W.L.R. 1 (N.W.T.).

—Action by assignee for return of goods transferred by insolvent.]—

Newton v. Rein, 11 W.L.R. 363 (Man.).

— Assignment for benefit of creditors — Agreement of creditor to postpone claim —

Right of creditor to rank with others in distribution of assets.]—
Fowler v. Barnard, 7 W.L.R. 624 (Alta.).

— Action by assignee for return of goods transferred by insolvent before assignment.]—
Newton v. Rein, 12 W.L.R. 490 (Man.).

—Rights of secured creditor after valuation of his security.]—When the assignee under an assignment for the benefit of creditors, made pursuant to the Assignments Act, R.S.M. 1902, c. 8, has failed within a reasonable time to exercise his right to take over the securities held by a creditor at ten per cent. over the amount at which the creditor has, under s. 29 of this Act, valued them, the creditor has the right to collect what he can from the securities and rank for dividends on the estate as a creditor for the full amount of the difference between his total claim and the valuation made, although he may have collected on the securities more than the amount of the valuation, provided he shall not receive in all more than 100 cents in the dollar. Under such circumstances the creditor cannot be required to revalue his securities.
Bank of Ottawa v. Newton, 16 Man. R. 242.

—Land Registry Act—Unregistered deed—Validity of, as against assignment for creditors.]—Notwithstanding section 74 of the Land Registry Act, c. 23 of 1906, an unregistered deed confers a good title upon the grantee as against a registered assignment for the benefit of creditors of the grantor, if the grantee, or any one claiming under him, can subsequently effect registration.
Westfall v. Stewart, 13 B.C.R. 111.

--Chattel mortgage--Insolvency—Interpleader—Subrogation.]—In an interpleader issue the plaintiff claimed by virtue of a chattel mortgage from C. the goods seized by the sheriff under the defendants' execution against C. The mortgage was dated the 22nd April, 1909, and was filed on the 1st May, 1909. The sheriff seized on the 10th May, 1909; and the sheriff obtained his summons for interpleader on the 10th June, 1909. C. was insolvent at the date of the mortgage; the moneys secured by it were advanced in November, 1908:—Held, that the mortgage had the effect of giving the plaintiff a preference over the other creditors of C., within the meaning of s. 41 of the Assignments Act, and the mortgage was therefore void. The interpleader proceeding was a proceeding to impeach or set aside the mortgage. Cole v. Porteous, 19 A.R. 111, followed. The plaintiff contended that he was entitled to be subrogated to the rights of R., who held a chattel mortgage upon the same property, and whose claim was paid off by C. with the moneys advanced by the plaintiff. Held, that, as R. was not a party to any agreement that the plaintiff should be subrogated, and the payment made by the plaintiff was not made to protect any interest of his own, and was not made by mistake, the doctrine of subrogation had no application. The Queen v. O'Brien, 7 Ex. C.R. 19, followed. Brown v. McLean, 18 O.R. 533, and Abell v. Morrison, 19 O.R. 669, distinguished.
Gower v. Kolchen, 14 W.L.R. 1 (Alta.).

—Assignment for benefit of creditors—Debtor's transfer within sixty days of assignment.]—A few days before making a general assignment for the benefit of his creditors to the plaintiff, W. assigned to his wife, one of the defendants, his interest under an agreement for sale of land, on which he had paid $200, and had erected on the land a building, the money for which was supplied by his wife, on the understanding that she was to have the property. Three months earlier she had entered into an agreement, with the knowledge and consent of W., to transfer this property to S., the other defendant, in consideration of a promissory note for $1,200 made by W. and indorsed by her, the property to be retransferred on payment of the note with interest. At this time all the parties considered that the property was hers. Just before the general assignment, when the vendors under the agreement for sale were pressing for payment, W. made the assignment to his wife, who then assigned to the defendant S., who subsequently paid the balance due to the vendors, and obtained title. In an action to set aside the transactions and make the property available for W.'s debts, it was held by the trial Judge that the transactions were bona fide, but should be set aside under s. 42 of the Assignments Act, because the transfer by W. was made within 60 days before the general assignment:—Held, that the provisions of s. 42 are not wide enough to authorize this result; the section is limited to conveyances made by the debtor, and does not apply to any subsequent conveyance; and an assignee's rights are only such as are conferred by the statute. The most that could be done, therefore, would be to set aside the assignment by W. to his wife, which would be of no effect. Held, also, that, as W. was in effect a trustee for his wife, who had the beneficial interest under the agreement for sale, he was not assigning his own interest, but hers; and, the Statute of Frauds not being pleaded and no amendment having been asked, it was not necessary to consider whether it applied. Judgment of Beck, J., 12 W.L.R. 585, reversed.
Smith v. Sugarman, 13 W.L.R. 671.

Costs of execution creditor.]—Execution creditors who have filed their executions in the Land Titles Office have a lien in Sas-

katchewan for their costs of judgment and execution in precedence of other debts upon an assignment for benefit of creditors.

Re Scribner & Wheeler. 3 Sask. R. 185.

—Fraudulent conveyance—Conveyance made within sixty days before assignment—Concurrence of intent to defraud disproved.]—In an action by an official assignee to set aside a conveyance of land made by one Willie, the insolvent, to the defendant Sugarman within sixty days prior to the assignment, it appeared that Willie's wife had advanced $2,000 to the insolvent towards erection of a building on the land transferred and that it was verbally agreed then or shortly after that the land should be transferred to her as security; subsequently she had endorsed Willie's note in favour of the defendant, and later the defendant had given up the note to her upon her written promise to transfer the land to him as security. The actual transfer did not take place until a date within sixty days of the assignment:—Held, the conveyance was void under the Assignments Act; but it would have been otherwise if the assignment had not been made within sixty days of the transfer, as concurrence of intent to defraud was lacking. Held, also, defendant was entitled to be protected by a charge on the land to the extent of moneys paid by him to discharge certain encumbrances thereon at time of transfer; he was also entitled to a return of the note delivered up to Mrs. Willie, and entitled, as was Mrs. Willie, to rank on the insolvent's estate. Held, further, the plaintiff having offered before action to take the property subject to payment of the encumbrances, he was entitled to costs. Mrs. Willie, who was joined as a party defendant, was held to have been improperly joined and plaintiff was directed to pay additional costs occasioned by reason of her having been joined.

Smith v. Sugarman, 2 Alta. R. 442.

—Assets of foreign insolvent—Appointment of receiver by foreign court—Service outside of the jurisdiction.]—(1) The appointment by a court of a foreign state of a receiver of the assets of an insolvent corporation domiciled in such state does not necessarily effect a transfer to such receiver of assets of such corporation in Manitoba, and, upon the plaintiffs showing that a resident of Manitoba was indebted to such corporation in a sum exceeding $200, which could be garnished, they were held entitled, under Rule 202 of the King's Bench Act, to an order allowing service of the statement of claim outside the jurisdiction. Brand v. Green, (1903), 13 M.R. 101, distinguished. (2) A motion for the allowance of service of a statement of claim out of the jurisdiction is an interlocutory and not a final motion, and, under Rule 507 of the King's Bench Act, an affidavit in support making statements on information and belief with the grounds thereof is sufficient.

Bank of Nova Scotia v. Booth, 19 Man. R. 471.

—Assignment for benefit of creditors—Executions registered against insolvent—Removal of executions.]—B. made an assignment for the benefit of creditors to one C., under the provisions of the Act respecting Assignments and Preferences. At the time of the assignment and subsequently thereto, but before the assignee applied for transmission to him of the land of the insolvent, some eighteen executions were registered in the land titles office. On transmission of the land to the assignee, the registrar endorsed upon the assignee's title memoranda of these executions. It appeared that the costs of the execution creditors had been paid. The assignee applied to the registrar to cancel these endorsements, which the registrar refuseu to do, and in this action he was sustained by the inspector. From this decision the assignee appealed:—Held, that by virtue of s. 8 of the Act respecting Assignments and Preferences the rights of execution creditors are expressly subordinated to those of the assignee, save only as to costs, and the execution creditors having, save as to costs, which are proved to have been paid, no charge on the land, the registrar was not justified in endorsing a memorandum charging the land with such executions on transmission to the assignee. (2) That the registrar, on an assignment being proved, has jurisdiction to issue a title to the assignee free from executions, notwithstanding the provisions of s 129 of the Land Titles Act, inasmuch as the Legislature has expressly declared that, after assignment, the assignment takes priority to all such executions.

Re E. J. Brooks, 2 Sask. R. 504.

—Preferential assignment—Knowledge of insolvency.]—Defendants, just prior to the assignment for the benefit of creditors by a debtor of the defendants, secured an order from the debtor for payment to them of a portion of the moneys payable on the sale of his business, of which they subsequently obtained payment. The debtor having shortly afterwards made an assignment to the plaintiff for the benefit of his creditors, the assignee brought an action to secure the return of the money so paid. It appeared that the defendants had knowledge of the insolvent condition of the debtor at the time of the giving of the order. The debtor was not available at the trial to give evidence, and no direct evidence of insolvency could be given. It appeared, however, that for some time prior to the assignment he had been unable to pay his debts in full, and the assignee showed that the liabilities exceeded the assets which had come into his hands:—Held, that the evidence was sufficient to establish that the debtor was un-

able to pay his debts in full, and the defendants being aware of this, and the assignment of the money to them having the effect of giving them a preference, the assignment of such money should be set aside and the plaintiff have judgment for the amount paid.

Jagger v. Turner, 2 Sask. R. 476.

—Deed of land—Priority as between unregistered equitable charge and subsequent registered conveyance — Assignments Act, R.S.M. 1902, c. 8—Lien Notes Act, R.S.M. 1902, c. 99.]—The defendant Burnett, having executed an agreement under seal creating an equitable lien or charge on his farm land in favor of the plaintiffs for the price of certain machinery which aggrement could not, under section 4 of the Lien Notes Act, R.S.M. 1902, c. 99, be registered, subsequently executed a deed of assignment to the defendant Haverson as trustee for creditors. As regards Burnett's lands, the wording of the assignment was as follows: "The said debtor according to his estate and interest therein and as fully and effectually as he lawfully can or may . . . by these presents doth hereby grant . . . unto the said trustee . . . all the real estate, lands, tenements, and hereditaments of the said debtor . . . of or to which he may have any estate, right, title or interest of any kind or description with the appurtenances." This assignment was made and duly registered shortly after the commencement of this action:—Held, that such deed purported to deal only with such estate or interest in the land as the assignor then had and did not operate or assume to operate so as to convey the land free from the equitable charge or lien previously given to the plaintiffs. Sections 6 and 7 of the Assignments Act, R.S.M. 1902, c. 8, do not help the assignee, as the assignment, was not in the words, or to the like effect of the words given in section 6, and section 7 provides only that every assignment . . . shall vest the estate "thereby assigned" in the assignee, and does not assume to give the deed any larger effect in the way of passing property than on its face it purports to have. The only interest, therefore, that passed to the assignee being what was left after the plaintiff's equitable charge should be satisfied, neither section 72 of the Registry Act, R.S.M. 1902, c. 150, nor section 7 of the Lien Notes Act can have any application, as they only apply to invalidate an unregistered instrument as against a registered instrument that affects the same estate or interest in lands.

Canadian Port Huron Co. v. Burnett, 17 Man. R. 55.

—Fraudulent or preferential transfer — Substance of transaction—Vendor's lien.]—Where a transaction is attacked as void under the Assignments Act, 7 Edw. VII. (Alberta) c. 6, the substantial effect rather than the mere form of the transaction should be considered. A vendor's lien comes into existence and continues, by operation of law, unless there is an intention on the part of the vendor to the contrary. The presumption is in favor of the lien—and the fact that part of the purchase money is secured by mortgage, and the balance covered by a promissory note, is not conclusive of intention to waive the lien.

High River Meat Market v. Routledge, 1 Alta. R. 405.

—Assignments Act, 7 Edw. VII. (Alberta) c. 6—Transactions completed prior to Act coming into force—Unlawful preference—Creditors' action.]—So far as it affects transactions completed before its coming into force, the Assignments Act is not retrospective; but, semble, that s. 49, so far as it gives a right of action to the assignee, to the exclusion of creditors, is retrospective, but this only applies to transactions "in fraud of creditors" or "in violation of this Act."—Hence where an assignee under the Act brought an action to set aside certain transactions between the assignor and one of his creditors, completed prior to the Act coming into force, on statutory grounds:—Held, that fraud not having been shown, the plaintiff's action must fail. A mortgage of land under the Land Titles Act, immediately upon its execution constitutes an effective security as binding as between the parties as if registered. The success of a creditors' action, attacking a transaction as a preference, would depend on proof of knowledge of the debtor's insolvency on the part of both parties, and the concurrence of intention to create an unlawful preference.

Horne v. Galt, 1. Alta. R. 392.

—Priorities as between assignee for benefit of creditors and execution creditors.]—Sec. 8 of the Assessment Act, Stat. of Alberta, 1907, c. 6, is not retroactive so as to affect the rights of execution creditors whose writs were in the hands of the sheriff for execution prior to the passing of the Act. Delivery of a writ of execution to the sheriff for execution creates a lien, or "charge," on the property of the execution debtor in favor of the execution creditor; and seizure, though creating a special property in the sheriff, does not enlarge the lien of the execution creditor. Payment of moneys into Court by arrangement between the sheriff, the execution creditor and the assignee, does not affect the lien of the execution creditor; the proceeds stand in the place of the goods.

Deering v. Gibbon, 1 Alta. R. 7.

—Assignment for benefit of creditors—Application to vacate registration of execution issued after assignment.]—A Judge in Chambers, on an application to vacate the registration of an execution against lands issued and registered subsequent to an assignment for benefit of creditors, in the absence of evidence that the particular parcel of land affected passed under the assignment and was not reserved as a legal exemption has no jurisdiction to make such order.

In re Davis, 1 Sask. R. 97.

Assignments and Preferences Act—Action to set aside chattel mortgage—Intent to obtain preference—Action brought by simple contract creditor.]—Defendant Hourie, being in insolvent circumstances, gave a chattel mortgage to the defendant bank to secure $500 past indebtedness and $250 a present advance. The manager of the defendant bank was well acquainted with the defendant Hourie's circumstances, and must have known him to be insolvent. A simple contract creditor of Hourie brought an action to set aside the mortgage as void under the Assignments and Preferences Act:—Held, that in order to render a conveyance void under the provisions of s. 39 of the Assignments Act, there must be knowledge of the insolvency on the part of both parties and concurrence of intent to obtain an unlawful preference over other creditors. (2) That the chattel mortgage attacked having been given and taken with knowledge of the insolvency of the mortgagor, was as to the past indebtedness of $500 void, but was valid as to the advance of $250, which, although not actually advanced until a few days after the mortgage was given, was intended to be a present advance on the security of the mortgage. (3) That under the Assignments Act any creditor may maintain an action to set aside a fraudulent conveyance under the provisions of the Act, whether his claim has been reduced to judgment or not.

Douglas v. Hourie, 2 Sask. R. 34.

—Consent of majority of creditors obtained subsequent to execution of assignment.]—Sec. 45 provides that "nothing in the last preceding sections shall apply to any assignment made to an official assignee or with the consent of the majority of the creditors . . . computed according to the provisions of the twenty-second section of this Act to any other person resident within the province, etc., etc." Section 5 provides, "Every assignment for the general benefit of creditors . . not made to an official assignee nor to some other person resident of the province, with the consent of the proportion of the creditors prescribed by the forty-fifth section of this Act, shall be absolutely null and void to all intents and purposes":—Held, that it is essential to the validity of such last mentioned assignment that the consent of the majority of the creditors should be given prior to or concurrent with the execution of the assignment, and that it is not sufficient that the consent of the requisite number of creditors has been subsequently attained. Held, that since the appellants in this case could gain nothing by attacking the assignment, and their objection to it was purely technical without any substantial merit, they were not entitled to costs either of the appeal or of the interpleader proceedings. The Ontario Assignment Act distinguished.

Fairchild Company v. Myrum, 1 Alta. R. 472.

—Settlement with creditors—Discharge of insolvent—Acceptance by creditor of amount less than debt—Cheque marked "in full."]—Defendants, being insolvent, made an arrangement with their creditors for sale of their assets and distribution of the proceeds among their creditors rateably. The trustee appointed by the creditors wrote the plaintiffs asking them to send in their claim, which was done, and, in due course, the trustee sent plaintiffs a cheque for their share of the amount available, and asked an acknowledgment of the receipt of same "in full of account," the cheque also being marked "in full claim R. A. Copeland & Co." Plaintiffs struck out the words on the cheque, and notified the trustee that they would not accept the amount in full, but retained the cheque. In action for the balance of the claim, the defendants pleaded acceptance of the amount paid in full:—Held, (1) that, in order to establish accord and satisfaction of a debt by a payment of less than the amount due, it must be shown that such payment was made in pursuance of an agreement for that purpose or was so accepted by the creditor, and that there was no evidence that the payment in question was so made or accepted. (2) That, following Day v. McLea (1889), 22 Q.B. 610, the keeping of a cheque marked "in full" is not conclusive evidence of accord and satisfaction, but it may be shown that, as a matter of fact, the creditor did not accept the cheque in full.

McPherson v. Copeland, 1 Sask. R. 519.

—Assignment for creditors—Lien of execution creditor for costs.]—The lien of an execution creditor for his costs given by s. 11 of the Executions Act, R.S.M. 1902, c. 58, when the writ of fieri facias is placed in the sheriff's hands is not taken away by sec. 8 of the Assignments Act, R.S.M. 1902, c. 8, upon the making of an assignment for the benefit of creditors under said Act; but, on the contrary, such lien is expressly recognized in both secs. 8 and 9 of the Act. The assignee, therefore, has no right to demand possession of property seized by

the sheriff without payment to him of his own and the execution creditor's costs. Gillard v. Milligan (1898), 28 O.R. 645, and Ryan v. Clarkson (1890), 17 S.C.R. 251, followed.

Thordarson v. Jones, 18 Man. R. 223.

— Action for deceit — Assignments Act, R.S.M.]—Plaintiff sued for damages for deceit upon the sale of defendant to him of a business fraudulently represented to be of much greater value than it was. Defendant counterclaimed for the balance of the purchase money. After the trial but before judgment plaintiff made an assignment for the benefit of his creditors under the Assignments Act, R.S.M. 1902, c. 8, and the assignee was added as a co-plaintiff. In giving judgment the trial Judge awarded $750 damages to the plaintiff with the costs of the action, but he found also that the defendant was entitled to recover a much larger sum on his counterclaim which was not disputed. The Judge also ordered a set-off and that judgment be entered for defendant for the balance and refused to allow the plaintiff's solicitor any lien for costs:—Held, on appeal, (1) The plaintiff's claim against the defendant did not pass to the assignee by virtue of the Assignments Act, not being covered by any of the expressions, "real and personal estate, rights, property, credits and effects," used in s. 6 of the Act, and being something which could not be reached by creditors under ordinary legal proceedings. (2) Such a right of action is not assignable under sub-s. (e) of s. 39 of the King's Bench Act. Blair v. Asseltine (1893), 15 P.R. 211, and McCormick v. Toronto Railway Co. (1906), 13 O.L.R. 656, followed. (3) Even if the plaintiff's claim had been validly transferred to the assignee, the defendant would be entitled to maintain his counterclaim and to have the plaintiff's damages paid by deducting them from it, as both claim and counterclaim rose out of the same transaction, and Rule 293 of the King's Bench Act expressly provides that the Judge may order such set-off to be made. (4) The discretion of the Judge in making such order should not be interfered with, although the effect was to deprive the plaintiff's solicitor of any lien of costs on the amount awarded to his client whether for damages or costs.

McGregor v. Campbell, 19 Man. R. 38.

BARBERS.

Barbers' Association — Annual fee — Breach of by-law—Penalty.]—By its charter the plaintiff association has the power to impose by by-law payment by its members of an annual fee and also a fine for every infraction of the by-laws. In virtue of these powers a by-law was passed fixing the annual fee of members at $2.00 and imposing a fine of $10.00 for every infraction. The defendant took out his license and paid the fee for one year, but afterwards carried on his business for three years without further payment:—Held, that under these circumstances the Association could only recover from the defendant the amount of the fine that he had incurred by his breach of the by-laws and not the arrears due for fees.

Barbers' Association of Quebec v. Charlebois, Q.R. 23 S.C. 287 (Cir. Ct.).

BASTARDY.

Filiation—Inquiry into paternity—Oral evidence.]—On the inquiry into the paternity of a natural child oral evidence in corroboration will be admitted if the defendant, when interrogated sur faits et articles or as a witness, makes admission by his answers of facts, which constitute presumptions or indications sufficiently strong to make probable the allegation that he has had carnal relations with the mother of the child and that he is the father; and in this case the facts admitted by the defendant constitute a series, or succession, of circumstances which, taken together, give rise to a strong presumption that the defendant has had such relations with the mother at the date of the conception of the child and nearly to the time of its birth. The facts so admitted became then "ascertained facts" within the meaning of Art. 232 C.C. and sufficient to allow of corroborative oral evidence of the paternity attributed to the defendant. —The question whether the facts admitted constitute presumptions or indications sufficiently strong to allow of such evidence is for the appreciation of the Court. Arts. 232-4 and 241 C.C., which modify the mode of proof in an inquiry into paternity adopted up to the date when the Code came into force, leave unchanged what, up to that time, had been considered as constituting strong presumptions or indications of a nature to render probable the fact of carnal relations between the mother and imputed father of the child and, consequently, that of the paternity attributed to the defendant. Although the sole corroborative evidence in the case may be that given by the mother, plaintiff in her capacity of tutrix of her child, who swears positively that the defendant is its father, while on his side the defendant swears no less strongly that he never had carnal relations with the plaintiff, yet the uncontested fact of the child's birth, joined with the admissions of the defendant when examined as a witness, gives to the evidence of the plaintiff a preponderating force sufficient to justify the judgment rendered

in her favor. In the absence of evidence to contradict that of the plaintiff, evidence of the identity of the child of which she is the mother, and the paternity of which she attributes to the defendant, constitutes sufficient proof and that notwithstanding the fact that, in the certificate of baptism the child is represented as being "born of unknown parents."

Rattigan v. Robillard, Q.R. 26 S.C. 222 (Ct. Rev.).

—Affiliation order—Corroboration.]—

Overseers v. McGillivray, 7 E.L.R. 121 (N.S.).

— Filiation order — Imprisonment for failure to obey—Form of commitment—Ambiguity.]—

Rex v. Duff, 1 E.L.R. 320 (N.S.).

BENEFIT SOCIETY.

By-law for arbitration — Expulsion of member for non-compliance.]—A by-law of a benefit society, ordering the expulsion of a member who had sued the society instead of submitting his claim to a board of arbitration established by its charter, is neither against public order, oppressive nor unreasonable and the expulsion of the member is lawful.

Union St. Joseph v. Cabana, 10 Que. K.B. 325.

See INSURANCE (LIFE).

BEQUEST.

See WILL.

BETTING.

Common betting house—Betting booth—Racecourse of incorporated association.]—(1) A moveable booth used on the racecourse of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in section 227 of the Revised Criminal Code, and the bookmaker using it is properly convicted of keeping a common betting house. (2) Sub-s. 2 of s. 235 of the Revised Criminal Code, which exempts from the provisions of the main section (dealing with the recording or registering of bets, etc.) bets made on the race-course of an incorporated association does not apply to the offence of keeping a common betting-house. The King v. Saunders, 12 Ont. L.R. 615, 12 Can. Cr. Cas. 33, affirmed.

Saunders v. the King, 38 Can. S.C.R. 382, 12 Can. Cr. Cas. 174.

And see DISORDERLY HOUSES.

BIGAMY.

Certificate of marriage—Evidence.]—A certificate of marriage given by a district registrar of the province of Ontario in virtue of ss. 7, 9, 11 and 20 of c. 44 of the Revised Statutes of Ontario may perhaps be considered proof of what is entered in the book kept by him, but is not proof of the celebration of the marriage, or, at least, is not the best evidence of it.

The King v. Lafrenière, 12 Que. P.R. 83.

Mens rea.]—(1) A guilty mind is an essential ingredient of the offence of bigamy, and if a woman, after obtaining information that the man with whom she has gone through a form of marriage is already married, leaves him and marries another man, her honest and reasonable belief that the man she left had a wife living, is a good defence to a charge of bigamy. (2) Semble, the fact of such honest and reasonable belief may be found from the circumstances of the case without strict proof of the man's former marriage.

The King v. Sellars (N.S.), 9 Can. Cr. Cas. 153.

—Foreign divorce — Domicile — Mens rea.]—A woman married in Canada in 1897 to a person who was at the time and always remained a domiciled Canadian, in 1903 went to the State of Michigan intending to separate from her husband and thenceforth to make her home there, and in 1906 obtained a divorce in Michigan, her husband, however, not being served with any notice of the divorce proceedings, nor taking any part therein:—Held, that the divorce was of no validity or force in Ontario. Shortly afterwards the husband, having obtained a copy of the divorce decree, and legal advice that the same was valid and that he was at liberty to marry again, went through a form of marriage with another woman in Detroit in the State of Michigan. Held, that he was guilty of bigamy under section 295 of the Criminal Code, 55-56 Vict. c. 29 (D.). Held, also that paragraph (a) of sub-s. 1 of s. 295 of the Criminal Code, which defines bigamy as the act of a person who being married goes through a form of marriage with another person in any part of the world, is intra vires of the Dominion Parliament when read with the limitation imposed by sub-s. 4, that no person shall be so convicted in respect of having gone through a form of marriage in a place not in Canada unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage. The decision re Criminal Code Sections Relating to Bigamy (1897), 27 S.C.R. 461, held binding.

The King v. Brinkley, 14. O.L.R. 434 (C.A.).

BILLS AND NOTES.

Ontario.

—Promissory notes — Company—Signature —Abbreviations—Powers of officers.]—To an action upon four promissory notes made by the defendants, an incorporated company, the defence was that the defendants had received no money by way of loan; that the notes were not binding; that they were made without consideration; that the plaintiff and one D. had agreed to deal together in real estate, and that any money advanced by the plaintiff had been advanced to D.; that the notes had been procured by the plaintiff from the defendants by conspiracy with D., under the representation that the defendants owed the plaintiff; that the plaintiff and D. and D.'s wife, having agreed to purchase and deal in real estate, used the pretended loan and other moneys and assets of the defendants for such purposes; and the defendants counterclaimed against the plaintiff and D. and his wife, as defendants by counterclaim, for an account of all moneys wrongfully used by them, for a refund, and for further and other relief: —Held, that the counterclaim was properly pleaded, and should not have been struck out at the trial, either under Con. Rule 261 or Con. Rule 254; it was not made to appear that the claim and counterclaim could not be conveniently tried together. Held, also, that, even if an order striking out the counterclaim could be supported, it would be proper to stay the execution of the judgment obtained at the trial against the defendants until the dealings of the plaintiff with the property of the defendants should be investigated; and that relief should be given to the defendants upon appeal from the order striking out the counterclaim, the judgment at the trial in favor of the plaintiff upon his claim being affirmed; and that judgment to stand for the protection quantum valeat of the plaintiff. Auerbach v. Hamilton (1909), 19 O.L.R. 570, followed. The notes were signed with the name of the defendant company, the words "Company" and "Limited," which were both part of the name, being abbreviated to "Co." and "Ltd.:"— Held, that the notes were signed in the name of the company. Held, also, that the plaintiff, having received the notes in good faith, and having nothing to do with the management of the company, was not affected by the alleged absence of proof that the persons who appeared to have affixed the name of the company to the notes were those having power to do so. Held, also, upon the evidence, that the company were liable upon the notes.

Thompson v. Big Cities Realty and Agency Co., 21 O.L.R. 394.

—Promissory note — Holder for value — Fraud — Onus.] — Where the maker and one of the indorsers of the promissory note sued on, in answer to a motion by the plaintiff for summary judgment under Rule 603, swore that they were induced to become parties to the note by fraudulent misrepresentations made by their co-defendants, particulars of which they set out, whereof they had reason to believe the plaintiff had notice:—Held, having regard to s. 30, sub-s. 2, of the Bills of Exchange Act, that they were entitled to unconditional leave to defend, notwithstanding the plaintiff's affivadit that he was a holder for value. Fuller v. Alexander (1882), 47 L.T.N. 443, followed.

Farmer v. Ellis, 2 O.L.R. 544.

—Promissory note—Instrument payable on demand.]—A promissory note payable on demand was indorsed to the plaintiffs on the day it bore date:—Held, that it was not overdue when negotiated so as to affect the plaintiffs as holders with defects of title of which they had no notice. Sections 70 and 182 of the Bills of Exchange Act considered. In re George (1890), 44 Ch.D. 627, and Edwards v. Walters, [1896] 2 Ch. 157, distinguished.

Northern Crown Bank v. International Electric Co., 22 O.L.R. 339.

—Blank promissory note—Fraudulently filled in.]—Defendant signed a note in blank and handed it to his agent to be filled in and discounted should it become necessary for defendant to raise money to make repairs on certain property. The agent fraudulently filled in the note for $1,000 and pledged it with a bank as collateral security for agent's personal account. This was done long after the note had been left with the agent. Defendant never required to use the note for said repairs and received no consideration:—Held, that defendant was not liable; that he never intended or authorized the paper sued on to be filled up as a promissory note; that the circumstances never arose upon which only the agent was authorized to fill the same up; and that what was done by agent was without authority and in fraud of the defendant; and that the paper sued on never in fact by the defendant's authority became a promissory note. Smith v. Prosser [1907], 2 K.B. 735, followed. Lloyd's Bank v. Cooke [1907], 1 K.B. 794, distinguished.

Ray v. Willson, 1 O.W.N. 1005, 16 O.W.R. 578.

—Patent right note—Action on—Unconditional leave to defend.]—In an action on a promissory note the defendant set up, in answer to a motion for summary judgment under Rule 603, that the consideration for the note consisted in whole or in part of the purchase money of a patent right, and that the note had not the words "given for a patent right" written or printed across the face, and was, therefore, void under the Bills of Exchange Act, s. 30, sub-s. 4, in the hands of

the plaintiff, who was alleged to have notice of such consideration. The plaintiff denied that the note was given for such consideration:—Held, that the defendant was entitled to unconditional leave to defend.

Davey v. Sadler, 1 O.L.R. 626.

Incomplete instrument—Delivery—Holder in due course—Fraud—Suspicion—Duty to inquire.] — The defendant gave his agent, one T., a printed document in the form of a promissory note signed by him (the defendant) with blanks left for the amount, etc., to be used for a specific purpose in a certain event. T. filled it up for $1,000, and indorsed it to the plaintiffs (bankers) as collateral security for his own debt. The defendant never intended or authorized the paper sued on to be filled up as a promissory note; the circumstances never arose upon which only T. was authorized to fill up the note; what was done by T. was without authority and in fraud of the defendant; the paper never in fact by the defendant's authority became a promissory note:—Held, upon these facts, that the plaintiffs were not entitled to recover upon the note: Bills of Exchange Act, ss. 31, 32. Smith v. Prosser, [1897] 2 K.B. 735, followed. Held, also, upon the evidence, that the plaintiffs had a suspicion of the fraudulent holding of T., and were guilty of negligence in not making inquiry as to the validity of the alleged note.

Ray v. Wilson, 1 O.W.N. 1005 (Clute, J.).

—Alteration—Joint and several liability—Principal and surety.]—The insertion by the holder of a promissory note signed by several persons, some of whom are sureties for the others, of the words "jointly and severally" before the words "promise to pay" is a material alteration which avoids the note, and the subsequent cancellation of the words by the holder does not do away with the effect of the alteration, even though the makers of the note do not know of the alteration until after the cancellation. A promissory note made by several persons, some of whom are sureties, given to the holder after such alteration in renewal of the original promissory note, and in ignorance thereof, cannot be enforced as against the sureties, there being no consideration to support it. Accepting in renewal of a promissory note, some of the makers of which are to the knowledge of the holder sureties, of a promissory note not signed by one surety discharges the co-sureties. A judgment recovered against debtors in their firm name for a firm debt is not a bar to the recovery of judgment against them individually upon a promissory note given by them as collateral security for the same debt. Judgment of Street, J., varied.

Banque Provinciale v. Arnoldi, 2 O.L.R. 624 (C.A.).

—Equitable assignment—Trust—Cheque on private banker—Bills of Exchange Act, ss. 72 (2), 74.]—The owner of a certain lands, subject to a mortgage made by him, conveyed the property on certain conditions, among which were that the grantee should pay him an annuity, and pay a certain proportion of the mortgage, the mortgagor remaining liable for the balance. Subsequently, and in order to pay his share of the mortgage money, the mortgagor signed an order on a private banker with whom he had a deposit account, payable to the mortgagee or bearer, which he then delivered to the banker, who, although he informed the mortgagee that he had the money of the mortgagor to pay him, did not tell him of the existence of the order. On being shown the order and informed of what the mortgagee had done, the grantee paid the amount of the annuity then due. Afterwards, and before the money was paid over by the banker to the mortgagee, the mortgagor died:—Held, by Falconbridge, C.J.Q.B., that under s. 72, sub-s. 2 and s. 74 of the Bills of Exchange Act, 53 Vict. c. 33 (D), the document being drawn on a private banker, was not a cheque but a bill of exchange, and that it was not revoked by the drawer's death. On appeal to a Divisional Court, the judgment was affirmed on the ground that the transaction amounted either to an equitable assignment of the amount or a trust to pay over the same to the mortgagee, which became irrevocable on its being communicated to the parties and assented to by them.

Trunkfield v. Proctor, 2 O.L.R. 326.

—Notice of dishonour—Husband wife's agent—Knowledge of husband—Form of notice.]—Notice is merely knowledge, and notice to an indorser who is also agent for another indorser, at once becomes in law the knowledge of the principal with all its consequences. In an action against husband and wife, indorsers on a promissory note, given as one of a series of renewals during some years under an agreement of which the husband had knowledge, in which the notice of dishonour given was a letter in the words: "I beg to advise you that Mr. ———'s note for $3,500 in your favour and indorsed by yourself and wife and held by our estate was due yesterday. As I have not received renewal, you will kindly see that the same is forwarded with cheque for discount, as there is no surplus on hand," addressed and sent to the husband only:—Held, on the evidence that the husband was agent for the wife, and that such letter was sufficient notice of dishonour to both. Paul v. Joel (1858), 3 H. & N. 544, followed. Judgment, 2 O.L.R. 582, affirmed.

Counsell v. Livingston, 4 O.L.R. 340 (C.A.).

—Conditional delivery—Notice—Innocent holders—53 Vict. c. 33, s. 21, sub-s. 3 (D.).]—On a motion for summary judgment under Con. Rule 616 by the payee of a promissory note against the maker, who alleged on his examination for discovery that he made and delivered the note to a trading company for a purpose other than that for which the company deposited it with the plaintiffs, but did not state that the plaintiffs had notice thereof:—Held, that the plaintiffs were entitled to judgment.

Ontario Bank v. Young, 2 O.L.R. 761.

—Cheque—Stoppage of—Money in Court.]—A vendor of goods, after receiving payment therefor, fraudulently sold them to another purchaser who bought in good faith, giving his cheque in payment. This cheque was drawn on a bank at T., but cashed at a bank in O., on payment being guaranteed by an indorser. The second purchaser, on being served with garnishee proceedings by the first, stopped payment of the cheque, and paid the amount into Court. The indorser, meanwhile, paid the bank at O., and now claimed the money in Court:—Held, that he was entitled to it.

Wilder v. Wolf, 4 O.L.R. 451.

—Promissory note—Irregular indorsement—Bills of Exchange Act, 1890, s. 56.]—Under s. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee is liable as an indorser to the latter, overruling on this point 2 O.L.R. 63; 37 C.L.J. 413.

Robinson v. Mann, 31 Can. S.C.R. 484.

—Material alteration.] — The plaintiff's claim was on a note made by the defendant payable to the plaintiffs at three months after date. When produced in Court the words "Extended to November 28th, '02," were found written in the lower left hand corner of the note with the initials W.H.R. below. These added words were in the handwriting of Mr. Riddell, the secretary of the plaintiff company. The defendant denied all knowledge of or assent to the extension:—Held, that the words added were more than a mere memorandum giving time for payment, and must be read into the note, and had the effect of changing the note from one at three months to one at four months, and being thus a material alteration the note became void in the hands of the plaintiffs as against the defendants.

Mutual Life Assurance Co. v. McLaughlin, 39 Can. Law Jour. 630.

—Bills of exchange—Accommodation maker—Renewed note obtained by fraud — Right to sue on original note.]—The defendant joined in a promissory note, as the payees knew, for the accommodation of his co-maker. When it became due, the latter tendered a renewal note, purporting to be signed by the defendant, which the payees accepted and gave up the original note stamped "paid." The primary debtor became insolvent and died, and the payees afterwards sued the defendant on the renewal note only in a Division Court, when the defendant swore he never signed it, but, nevertheless, there was verdict and judgment for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the Judge, at the trial, allowed the plaintiffs to claim in the alternative upon the original note, as well as on the renewal, and to amend his claim accordingly. A verdict was then returned for the plaintiff on the original note:—Held, that the Division Court Judge had jurisdiction under Rule 4 of the Division courts, to amend the plaintiff's claim as he had done. Held, also, that the renewal note being a forgery, so far as the defendant's signature was concerned, and the plaintiffs, therefore, having been induced by the fraud of the primary debtor to give him up the original note, the plaintiffs retained a right to recover in equity on the latter. Held, also, that a witness was entitled to refer to entries in the books of the primary debtor, made by him or under his direction, to refresh his memory.

Matthews v. Marsh, 5 O.L.R. 540 (D.C.), 2 Commercial L.R. 399.

—Money paid under mistake of fact—Marked cheque fraudulently altered—Negligence—Notice of dishonour—Reasonable delay.]—A cheque for $5 certified by the respondent bank's stamp was fraudulently altered to $500, and paid by the respondent to the appellant, a holder for value, under a mistake of fact, which was not discovered till the next day. In an action by the respondent to recover back $495 from the appellant:—Held, (1) that the respondent was at liberty to prove, as between itself and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified. Scholfield v. Earl of Londesborough (1896), A.C. 514, followed. (2) No negligence was imputable to the respondent in cashing the cheque without examining the drawer's account; and even if it were, it did not induce the appellant to treat the cheque as good. Kelly v. Solari (1841), 9 M. & W. 54, approved. (3) Notice of forgery was unnecessary, and the cheque for $5 was not dishonoured; and, accordingly, the stringent rule laid down in Cocks v. Masterman (1829), 9 B. & C. 902; 33 R.R. 365, to the effect that notice of dishonour of a bill of exchange must be given on the due date, does not apply.

The rule will not be extended to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by delay.

Imperial Bank of Canada v. Bank of Hamilton, [1903] A.C. 49, affirming 31 Can. S.C.R. 344.

Promissory note—Accommodation indorsers—Co-sureties—Contribution — Order of indorsements.]—The plaintiff and defendant were both accommodation indorsers of a promissory note. The plaintiff was the payee, but, when the instrument was given to him to indorse, the defendant's name was already on the back of it, and the plaintiff indorsed under the defendant's indorsement. Each testified that his liability was to be secondary to that of the other—not that they so agreed with each other, but that the maker so agreed with each of them respectively:—Held, that, being sureties for the one debt, the rule of equitable contribution applied, and the plaintiff having paid the debt, was entitled to recover only half of it from the defendant. Macdonald v. Whitfield (1883), 8 App. Cas. 733, discussed.

Steacy v. Stayner, 7 O.L.R. 684, (D.C.).

—Bills of exchange—When provincial legislation applies—Joint contract—R.S.O. 1897, c. 129, s. 15.]—The Bills of Exchange Act does not deal with the consequences which are to flow from the character which it attaches to the promise which a bill or note contains; and, therefore, these consequences fall to be determined according to the law of the Province in which the liability is sought to be enforced.

Cook v. Dodds, 6 O.L.R. 608 (D.C.).

—Forged note—Ostensible makers lying by—Laches—Estoppel — Liability.] — A bank on August 15th, 1900, by letter, informed the ostensible makers of a promissory note that it had that day discounted the note for the payees. The makers' name had been forged. They, however, did not reply or inform the bank of the forgery until December 10th, 1900, having in the meanwhile been corresponding with the forger, urging him to settle the matter. A large part of the proceeds of the discount was not paid out by the bank until after the time when they could have had notice from the defendants that the note was a forgery:—Held, that the defendants' silence, coupled with the resulting damage, estopped them from denying their signature; and that they were liable for the full amount of the note.

Dominion Bank v. Ewing, 7 O.L.R. 90 (C.A.).

—Bills of exchange—Indorsement in blank—Alteration to special indorsement—Subsequent substitution of name of new special endorsee.]—A bank, being the holders in due course as collateral security to the account of a customer of a promissory note indorsed in blank, put their name with a stamp immediately above the indorser's name, thus converting the indorsement into a special one. Subsequently, and after maturity of the note, the account was taken over by the plaintiff bank, the intention being that the note in question and other collateral notes should pass with the account. The manager of the transferring bank handed the notes to the manager of the plaintiff bank, who, with a stamp, superimposed upon the name of the transferring bank the name of the plaintiff bank, the manager of the transferring bank authenticating the change by his initials:—Held (Street, J., dissenting), that there had been a valid transfer, and that the plaintiffs were holders of the note in due course. Judgment of Morgan, C.J., affirmed.

Sovereign Bank v. Gorden, 9 O.L.R. 146 (D.C.).

—Promissory note — Negotiability — Indorsement—Liability of maker.]—H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favour of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the bank that discounted it and paid over the proceeds to the company. H. knew that the note was discounted, and before it fell due he had in writing acknowledged his liability on it. In an action on the note by the bank against H.:—Held, affirming the judgment of the Court of Appeal and of the trial judge (Strong, J., dissenting), that although the note was non-negotiable on its face, this afforded no defence to the plaintiffs' action in view of what took place between the defendant and his co-makers and between the defendant and the bank. Held, per Gwynne, J., although, in fact, the note was not negotiable, the bank, in equity, was entitled to recover, it being shown that the note was intended by the makers to have been made negotiable, and was issued by them as such, but, by mistake or inadvertence, it was not expressed to be payable to the order of the payees.

Harvey v. Bank of Hamilton (1888), 1 S.C. Cas. 129.

—Bill of exchange—Forgery—Ratification—Estoppel.]—Y., who had been in partnership with the defendants, trading under the name of the H. C. Co., but had retired from the firm and become the general manager for the defendants, but with no power to sign drafts, drew a bill

of exchange for his own private purposes in the name of the defendants on a firm in Montreal, which was discounted by the plaintiff bank. Before the bill matured, Y. wrote to defendants informing them of having used their name, but that they would not have to pay the draft. The bill purported to be endorsed by the company, per J. M. Y. (one of the defendants) and the other defendant having seen it in the bank, examined it carefully and remarked that "J. M. Y.'s signature was not usually so shaky." J. M. Y. afterwards called at the bank and examined the bill very carefully, and in answer to a request from the manager for a cheque he said that it was too late that day but he would send a cheque the day following. No cheque was sent and a few days before the bill matured the manager and solicitor of the bank called to see J. M. Y., and asked why he had not sent the cheque. He admitted that he had promised to do so and at the time he thought he would. Y. afterwards left the country, and in an action against the defendants on the bill they pleaded that the signature of J. M. Y. was forged, and on the trial the jury found that it was forged, and judgment was given for the defendants. The defences set up were ratification and estoppel. The Court of Appeal held there could be no ratification of a forgery, and that the plaintiffs had failed to show any injury by reason of the alleged representations, which was an essential element in a claim of estoppel by representation:—Held, that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed with costs. Held, per Sir W. J. Ritchie, C.J., that though fraud and breach of trust can be ratified, forgery cannot, and that the bank could not recover against the defendants on the forged bill. La Banque Jacques Cartier v. La Bank d'Epargne (13 App. Cas. 111) and Barton v. London and North Western Ry. Co. (62 L.T. 164), followed.

Merchants Bank v. Lucas (1890), 1 S.C. Cas. 275.

—Renewal of note—Total failure of consideration.]—On the strength of an agreement for the formation of a mining company, setting out its objects and purposes, including the proposed transfer to it by the plaintiff of two mining locations, the defendant subscribed for 60,000 shares of stock in the plaintiff company at 10c per share, giving two promissory notes therefor of $3,000 each to the plaintiff company, one of which he duly paid, and the other, after being twice renewed, remained unpaid. The objects and purposes of the company, through no fault of the defendant, were never carried out, and became utterly impracticable; no transfer of the mining locations was ever made, and all expectations of ever successfully carrying out the agreement were abandoned:—Held, that there was a total failure of consideration, and not only was the defendant not liable on the unpaid note—the fact of its renewal in no way affecting his position—but that he was entitled to recover back the amount he had paid on the other note.

Bullion Mining Co. v. Cartwright, 10 O.L.R. 438 (D.C.).

—Illegality—Unduly lessening competition—Trade association.]—All the porters of coal in a certain town combined themselves into an association and bound themselves not to sell below fixed prices, and that any member who did so should become liable to the association for $1 for every ton of coal so sold:—Held, that the association was an illegal one, being a combination, conspiracy or agreement "to unduly prevent or lessen competition in the . . . . purchase, barter, sale, or supply of an article or commodity which might be the subject of trade or commerce," within the meaning of s. 520 (d) of the Criminal Code; and that the plaintiff acting as agent of the association, could not recover on a cheque given by a member of the association in pursuance of one of the articles of the association. Semble, that evidence is necessary in such a case to show that competition in the sale of the articles concerned has, as a fact, been unduly prevented. The cheque in question was marked "cheque conditional deposit," being intended, as the drawer, a member of the association, explained, to be conditional on his obtaining a certain contract. Held, that it was not an unconditional order to pay, and therefore not a cheque within the requirements of ss. 3 and 72 of the Bills of Exchange Act, 53 Vict. c. 33, ss. 3, 72 (D.).

Hately v. Elliott, 9 O.L.R. 185 (D.C.).

—"Cheque"—Conditional deposit.]—See CONTRACT.

—Joint and several note—Release of co-maker—Reservation of rights.] — One of the five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, from liability upon the note, and there was no reservation of rights against the other makers, but the holder sought to recover against one of them, the defendant:—Held, upon the construction of the release and a subsequent instrument under seal, to which the maker who had been released was not a party, that the rights of the holder against the defendant had been effectively preserved. Decision of a Divisional Court, 8 O.L.R. 261, reversed. Per Moss, C.J.O.:—The whole arrangement of which the release formed part was

come to and carried out with the knowledge and consent of the defendant, and that knowledge and consent were sufficient to prevent the release of his co-maker operating as a discharge of his liability. Per Osler, J.A.:—Even if the release did in law operate from the moment of its execution, as a discharge of the defendant, there was nothing to prevent the latter, after its execution, from acknowledging and ratifying, by a proper instrument, his continuing liability to pay, just as a surety may do who has been discharged by time given to his principal or by the release of a co-surety. Co-contractors and co-debtors stand in these respects in the same position as co-sureties. The release of one operates in general as a release of all, but the legal operation of such a release may be restrained by the express terms of the instrument, or the co-debtors may reaffirm and ratify their liability notwithstanding the release.

Bogart v. Robertson, 11 O.L.R. 295 (C. A.).

—Promissory note—Indorsement by third party without indorsement by payee — Valuable consideration—Liability.]—The defendant became the endorser of two promissory notes without the payees having indorsed same, being so indorsed by the defendant in pursuance of an agreement with the payees for valuable consideration that he should indorse them and become liable thereon:—Held, that the defendant was liable. Robinson v. Mann (1901), 31 S.C.R. 484 followed. Steele v. McKinley (1880), 5 App. Cas. 754, and Jenkins v. Coomber, [1898] 2 Q.B. 168, not followed. It is the duty of the Courts of the Province to follow the decision of the highest Court in Canada, being the latest decision on the subject, without questioning whether or not it is in accordance with previous cases.

Slater v. Laboree, 10 O.L.R. 648 (D.C.).

—Bills of exchange—Absence of consideration—Evidence, admissibility of.]—In an action upon two promissory notes for $3,000 and $4,000 respectively, the defendants set up want of consideration and that the plaintiff was not a bona fide holder for value. At the trial the defendants tendered evidence, which was refused, to show that the notes were given merely as receipts for stock which had been delivered to defendants for sale as agents, that there was no consideration for the notes, and that the plaintiff, who was a clerk in the office of his solicitors, had given no value therefor; also that a written agreement for the transfer of the stock made between the payee of the note and another, and one of the defendants' firm, had never been acted upon, or had been abandoned:—Held, that whether or not evidence was admissible to show that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this having been denied them, a new trial was directed.

Clarke v. Union Stock Underwriting Co., 13 O.L.R. 102 (D.C.), 14 O.L.R. 198 C.A.).

—Erasure of word "renewal"—Material alteration—Holder in due course.]—By the proviso to section 145 of the Bills of Exchange Act, R.S.C., c. 119, "where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill, as if it had not been altered, and may enforce payment according to its original tenor." The defendant gave N. a promissory note intended as a renewal of and to retire a former note for the same amount which N. had discounted at a bank. When the defendant made the note, the word "renewal" was, at his instance, written near the lower left-hand corner N. erased the word "renewal," the erasure not being apparent without the use of a magnifying glass, and discounted the note with the plaintiffs without taking up the original note, which the defendant had to pay. In an action on the renewal note:—Held, that, the alteration, not being apparent, and the plaintiffs, having taken a note complete and regular on its face in good faith and for value without actual notice, were holders in due course and entitled to recover the amount according to the original tenor, the word "renewal" not forming part of the contract to pay.

Maxon v. Irwin, 15 O.L.R. 81.

—Action against guarantors of a promissory note—Dispute between makers and payee as to amount due—Adding makers as defendants.]—In an action against the guarantors of a promissory note for $1,935.46, given by a company for machinery bought from the plaintiffs, it appeared that the company before the maturity of the note was claiming from the plaintiffs $953.68 for breaches of the contract of sale, and it was alleged that when the note was given it was agreed that the exact amount should be adjusted during its currency. The defendants paid into Court $1,195.01 as the amount justly due, and moved for an order adding the company as defendants:—Held, that the defendants were entitled to the order.

Reid v. Goold, 13 O.L.R. 51.

—Promissory note—Instalments of interest—Transfer after default to pay interest—"Overdue" bill—Notice — Holder in good faith.]—Where interest is made payable

periodically during the currency of a promissory note, payable at a certain time after date, the note does not become overdue within the meaning of ss. 56 and 70 of the Bills of Exchange Act, merely by default in the payment of an instalment of such interest. The doctrine of constructive notice is not applicable to bills and notes transferred for value.

Union Investment Company v. Wells, 39 Can. S.C.R. 625.

—Promissory note—Fraud in procuring—Discount—Good faith.]—L. and others signed promissory notes each for the amount of ten shares in a company formed to manufacture rotary engines under an invention of the payee who fraudulently misrepresented to them the prospects and intentions of such company. At the same time each maker signed an application for ten shares. The payee and T., the assignee of his patent of invention, induced W. to discount these notes and received a portion of the proceeds, part being retained by W. in payment of debts due him from these two parties. On the trial of actions by W. on the notes the evidence of T., who had absconded, was taken under commission and he swore that the form of application signed by the respective defendants had been shown to W. before the notes were discounted. W. denied this and swore that he had been told that the notes were given in payment of stock held by the payee:—Held, that the evidence of W., on whom the onus of proof rested, could not be accepted; that the whole testimony and attendant circumstances showed that W. suspected that the proceeds of the notes belonged to the company; and, having discounted them without inquiry as to the right of the payee and T. to receive these proceeds, he was not in good faith and could not recover.

Lockart v. Wilson, 39 Can. S.C.R. 541.

—Promissory note—Past due—Signature by third party—Agreement not to sue—Release of original makers—Insufficient consideration.]—Where a promissory note made by two persons in favour of plaintiff was, after maturity, signed by defendant at plaintiff's request, without any agreement or understanding for extension of time or forbearance:—Held, following Ryan v. McKerral (1888), 15 O.R. 460, that the procurement by the plaintiff of the signature of the defendant was not equivalent to an agreement not to sue, and that no change has been made in the law in this respect by the Bills of Exchange Act. (2) Held, also, that even if the original makers were released by the execution of the note by the defendant, such release would not be a sufficient consideration to support the promise of the defendant, inasmuch as there was no evidence of a desire, or request or consent on her part that the other parties to the note should be released.

Stack v. Down, 15 O.L.R. 331 (D.C.).

—Cheque—Consideration — Part payment under unenforceable contract—Statute of Frauds.]—A definite oral bargain (good except for the Statute of Frauds) for the sale by the plaintiff to the defendant of an ascertainable and definite parcel of land is a sufficient consideration for a cheque drawn by the defendant upon a bank in favour of the plaintiff for a part of the purchase money; and, the cheque being dishonoured, the plaintiff was held entitled to recover the amount thereof from the defendant, the latter not being in possession, and the plaintiff not having made or tendered a conveyance, but being able and willing to perform his contract.

Kinzie v. Harper, 15 O.L.R. 582 (D.C.).

—Promissory note — Irregular endorsement—Liability.]—On the back of certain promissory notes given by S. to the order of H. appeared the signatures of K. and B., underneath the words, "We guarantee payment of the within note":—Held, that K. and B. were liable as endorsers. Locke v. Reid (1842), 6 O.S. 295, not followed as no longer representing existing law, having regard to the course of decision, and the effect of s. 131 of the Bills of Exchange Act.

Lehigh Cobalt Silver Mines Co. v. Heckler, 18 O.L.R. 615.

—Promissory note—Irregular indorsement—"Holder in due course"—Collateral agreement.]—The plaintiff brought actions on two promissory notes, for $6,000 and $2,000 respectively, made by G. J. C. and W. C. K. as makers, and payable to the order of the plaintiff as payee. The notes were indorsed by the defendant J. S. C. before they were delivered to the plaintiff, who subsequently indorsed them. The notes were given in renewal of a note for $8,000 between the same parties, which also had been indorsed by the plaintiff subsequently to the indorsement by J. S. C. By a sealed agreement of the same date as the $8,000 note (21st May, 1907), which was executed by J. S. C. and the other parties, it was stated that the note was given as security for the price of certain mining claims purchased by him in company with G. J. C. and W. C. K. from the plaintiff, and that J. S. C. was "the indorser of the note":—Held, that the J. S. C. was liable on the notes. Per Osler and Maclaren, JJ. A., that J. S. C. was liable to the plaintiff as "to a holder in due course," within the meaning of R.S.C. 1906, c. 119, s. 131, Robinson v. Mann (1901), 31 S.C.R. 484, followed. J. S. C. was also liable to the plaintiff

on the ground of estoppel, inasmuch as he was bound by the agreement of the 21st May, 1907, and it was not open to him to raise any defence based upon the irregular indorsement of the notes. Per Meredith, J.A., that, upon the evidence adduced, J. S. C. had an interest in the lands as a principal as regards the plaintiff, and was liable to pay the contract price; and, even if his liability were only that of a surety for his co-defendants, the deed of the 21st May, 1907, was sufficient evidence of his contract under the Statute of Frauds.

McDonough v. Cook, 19 O.L.R. 267.

Quebec.

Transfer of note by general transfer of assets without indorsement—Service of transfer.]—1. Where the payee and the maker of a promissory note agreed that it should be released, but the note was afterwards transferred by the payee with other assets to a company incorporated to take over the business of the payee, the maker may prove the release of the note by entries made in the company's books, with the knowledge and under the direction of the payee, and by corroborative verbal evidence of other officers of the company. 2. When a promissory note is transferred after maturity, not by indorsement, but by being included in a general transfer of the assets of a business, the person acquiring the note must have the transfer served on the maker before a right of action exists in favour of such transferee. Prowse & Nicholson, M.L.R., 5 Q.B. 151, followed.

Clonbrock Steam Boiler Company v. Browne, 18 Que. S.C. 375 (Archibald, J.)

—Misapplication of cheque—Agency—Liability to account to maker.]—The appellants made their cheque for $400, payable to the order of respondents, intending that it should be applied as a deposit on account of a purchase of material which they wished to obtain from respondents through the intervention of A. They handed the cheque to A. for this special purpose, and the word "deposit" appeared on the face of the cheque. The respondents endorsed and used the cheque, and applied the amount on an old claim which they had against A. Another cheque of appellants, for $100, made payable to respondents or bearer, was treated in the same manner:—Held, that by using the cheque for $400, payable to their order, the respondents became accountable to the appellants for the amount; they became trustees of the makers of the cheque, with the usual liability attaching to such relationship. And the subsequent cheque, although payable to respondents or bearer, being part of the same transaction, and being used after notice that it had been obtained by false representations, the respondents should also be accountable therefor.

Leipschitz v. Montreal Street Railway Co., 9 Que. Q.B. 518.

—Want of security for lost note—Rejection of plea—Art. 202 C.P.—Costs.]—Held: —That in an action on a promissory note alleged to have been destroyed by error, where the plaintiff declares that he has offered to the defendant and is still ready to give him security against any liability thereon, and where the defendant, after having denied all the allegations of the action further pleads want of security, and sets up facts tending to establish that he is not liable, a motion to set aside such defence will be dismissed, but without costs.

Rowan v. Ross, 3 Que. P.R. 391.

—Procedure—Election of domicile—Place of payment—Art. 85 C.C.—63 Vict. c. 36 (Que.).]—Though the provision of Art. 85 C.C., by which the indication of a place of payment in a promissory note or any writing whenever it was made is equivalent to an election of domicile at the place so indicated, has been repealed by 63 Vict., c. 36 (Que.), such repeal does not affect the election of domicile thus made in a note signed before it came into force. Therefore, defendant could be sued at Montreal on a note dated at and payable there though it had, in fact, been signed by him in the Province of Ontario where he had his domicile.

Merchants Bank of Halifax v. Graham, 19 Que. S.C. 319 (S.C.).

—Action to nullify promissory note—Summary proceeding—Art. 1150 C.P.Q.]—An action by which plaintiff asks that a certain note be given up or declared null and without effect is of a summary nature.

Ekenberg v. Mousseau, 3 Que. P.R. 348 (S.C.).

—Promissory note—Indorser — Warranty.] —The indorser of notes made by an incorporated company who claims to have paid the amount of the same to the maker which he summons en garantie in an action on the notes cannot set up the defence that the plaintiff in warranty was not capable of signing them.

Ball v. Atlantic & Lake Superior Railway Co., 3 Que. P.R. 315 (S.C.).

—Promissory note of married woman — Exception to form.]—A married woman separated as to property may be sued alone on a promissory note made by her, and an exception to the form, based on the fact that the husband was not summoned to give her authority is not well founded

Fraser v. Ogilvie, 3 Que. P.R. 424 (S.C.).

—Promissory note—Prefixing the word "endorser" to signature.]—Where a note runs "we jointly and severally promise to pay," is signed by A. and B. on its face, and B. prefixes to his signature the word "endorser," it is deemed to be the note of A. endorsed by B. Hence, in this province, in default of protest for non-payment and of notice thereof, B. is discharged from liability on the note.

Tapley v. Paquet, 38 Que. S.C. 292.

—Promissory note—Payment by indorser—Recourse over.]—The indorser of a negotiable instrument becoming the holder on retiring it has a right of action to be reimbursed only against prior indorser, sureties, if any, and the maker.

Lachance v. Duval, Q.R. 37 S.C. 475.

—Promissory note—Retirement by payee.]—Where a negotiable promissory note, indorsed by the payee and another, was discounted in a bank and retired on maturity by the payee without protest as against the indorser and without demand of payment from the maker for nearly three years, there is a strong presumption in favour of the maker's claim that the note was given without consideration and for accommodation of the payee, and proof of this fact by witnesses is admissible.

Rousseau v. Nadeau, Q.R. 19 K.B. 97.

—Promissory note—Holder in good faith.]—(1) A pledge of a promissory note given as collateral security, is a holder in good faith. (2) A promissory note given in exchange for another note which had been handed over by the owner for collection, is the property of the person who owned the note for which it was given in exchange.

Belanger v. Robert, 21 Que. S.C. 518. (Andrews, J.)

—Want of protest—Payment by endorser.]—Where no proof of protest or of the waiver of protest is made, the endorser of a promissory note who pays, cannot recover, and he must be held to have paid without any obligation to do so.

Savaria v. Paquette, 20 Que. S.C. 314 (Lynch, J.)

—Promissory note—Billet de brevet—Prescription—Art. 2260 C.C.]—A promissory note executed en brevet given for a commercial debt is prescribed by five years.

Guimond v. Blanchard, 21 Que. S.C. 106 (Sup. Ct.)

—Promissory note—Mutual assent—Holder in good faith—Imprudence.]—A promissory note being a contract, mutual assent of the parties is necessary as in other contracts. If a person signs a note when he intends to sign, and believes that he is signing, an order for goods, the note is completely void even in the hands of a third party holder in good faith. Quære. If a person who has signed a note in error has acted imprudently, could he be sued in damages for a quasi-delit by a third party who acquired the note in good faith?

Banque Jacques-Cartier v. Lalonde, 20 Que. S.C. 43 (Sup. Ct.).

—Promissory note—Right of holder denied—Note held for collection—Motion to reject answer.]—In an action based upon a promissory note where the defendant pleads that plaintiff is not a regular holder for value, the latter may answer that he holds the note for collection on behalf of the last indorser, and such answer will not be rejected on motion, as changing the basis of the action.

Legal and Financial Exchange v. Cameron, 5 Que. P.R. 98 (Pagnuelo, J.).

—Promissory note—Acte de Commerce—Joint condemnation—Arts. 1105, 1854 C.C.] Signing a negotiable bill, even non-commercial, is a commercial transaction, and if the person signing it contracts in connection with others he may be condemned jointly with them.

Gauthier v. Drouin, 5 Que. P.R. 63 (Sup. Ct.).

—Promissory note—Prescription of note payable on demand—When it begins to run—Parol evidence of payments—Endorsement of payments, effect of.]—1. A note in these terms, "12 Janiver, 1896. A demande je promets de payer à . . . la somme de . . . d'ici au 15 février sans intèrêt, et après le 15 avec intérêt à 6 per cent," is payable on demand from the day of its date. (2) Where a promissory note is payable on demand, prescription runs from the date of the note, and not from the date of the demand of payment. (3) Proof by parol is inadmissible of payments alleged to have been made by the maker on account of the note, for the purpose of establishing interruption of prescription. (4) Endorsements on a note of payments on account have no effect against the maker as regards proof of interruption of prescription.

Bachand v. Lalumière, 21 Que. S.C. 449 (Archibald, J.).

—Promissory note—Consideration—Note given as renewal—Proof.]—The company respondents sued on a promissory note signed by the appellant and payable to the order of the respondents for value received. The respondents admitted that they paid no cash consideration to the appellant for this note, but stated that it was given in partial renewal of a previous note for a similar amount, which appellant executed in favour of one S., and which was

indorsed and transferred to respondents, with another of like amount, in settlement of the overdrawn account of S., who was their general manager:—Held (affirming the judgment of the Superior Court, Taschereau, J.): (1) Where the connection between the first note, for which valid consideration was received, and the notes given in renewal thereof is clearly established, want of consideration is not a valid defence to an action by the payee against the maker on a renewal note in which the latter acknowledges to have received value. (2) Such connection may be proved, as in this case, by a consecutive and uninterrupted series of dates in the payee's books in regard to the transaction, together with the probability that the payee would not have surrendered a valid note without receiving a valid renewal. (3) Even in the absence of positive proof that the first note was indorsed by S. to the company, the Court may reasonably presume that such was the case from the fact that it was delivered to the company and was in the custody of the company's cashier, together with the fact that the note now sued upon was given by appellant for the value received and was payable directly to the company.

Ross v. Western Loan & Trust Co., 11 Que. K.B. 292.

—Bank—Set-off of deposit against—Bill or note—Waiver.]—A deposit in a bank is a loan to said bank, and Art. 1190 C.C. which makes the debt resulting from a deposit incapable of compensation does not prevent the sum deposited from being set off against a debt due to the bank by the depositor. The compensation between a debt due to a bank and that arising from a deposit may have effect until service of a petition for winding-up the bank inasmuch as the two debts are equally clear, and exigible. But the term of a letter of credit or a note is deemed to have been arranged in favour of both creditor and debtor, and therefore the maker or indorser of a note discounted by a bank only cannot, by waiving the benefit of the time which the note has to run, set off against the debt arising therefrom a sum on deposit to his credit in the bank. The indorser of a note discounted by a bank only becomes a debtor to the bank when the note is protested and notice of protest served on him. Although a creditor of a bank in liquidation has a right to intervene in an action pending between the liquidators and a debtor of the bank who claims that his debt has been discharged by compensation, to watch the proceedings and take the steps necessary to protect his rights, such creditor will be condemned to pay the costs incurred by the debtor if he files, against the claim of the latter, a useless contestation based on grounds already invoked by the liquidators.

Vanier v. Kent, 11 Que. K.B. 373, affirming 20 S.C. 545.

—Promissory note—Funds obtained for election purposes — Dominion Elections Act. c. 8, sec. 131.]—There is no action for the recovery of the amount of a promissory note or of a renewal, originally given for the purpose of raising funds to promote an election.

St.-Pierre v. L'Ecuyer, 23 Que. S.C. 495 (Lynch, J.).

—Promissory note—Waiver of protest by curator.]—The curator to a cession de biens has no authority to waive the protest of a note of which the insolvent is endorser.

Molsons Bank v. Steele, Q.R. 23 S.C. 316. 5 Que. P.R. 184.

—Promissory note—Insolvency of indorser—Waiver of protest by curator to insolvent.]—(1) The curator appointed upon an abandonment of property under the Code of Procedure has no authority, without leave of a Judge of the Superior Court or the advice of the creditors or inspectors, to waive on behalf of the insolvent, protest of a promissory note indorsed by him, and a waiver under such circumstances does not bind the indorser. (2) The right of renunciation is a personal one belonging to the indorser.

Denenberg v. Mendelsohn, 22 Que. S.C. 474. Affirmed on review, 23 Que. S.C. 128.

—Promissory note—Indorser.] — The obligation of the indorser of a note is conditional, the condition being that on default by the maker, the note shall be protested and notice given to the indorser. In consequence he cannot maintain an action against the maker to be indemnified against his obligation, even though the note is due and unpaid if it has not been protested and notice given.

Trottier v. Rivard, Q.B. 23 S.C. 526 (Sup. Ct.).

—Promissory note—Action against indorser—Waiver of protest.]—The words "I hold myself responsible for my note" indorsed upon a promissory note, amounts to waiver of protest and a declaration alleging this fact is sufficient in law.

Ranger v. Aumais, 5 Que. P.R. 450.

—Promissory note of non-trader—Prescription.]—A note en brevet made by an agriculturist in favour of a non-trader for money lent, is only prescribed by thirty years.

Robert v. Charbonneau, Q.R. 22 S.C. 466 (Ct. Rev.).

—Lost note—Security.]—The holder of a lost note cannot maintain an action for its amount by offering merely to reimburse the maker if it should be found, but he should offer to give security that the maker should not be troubled by the note. This rule applies as well to the case of a non-negotiable note merely mislaid.

Pillow & Hersey Co. v. L'Esperance, Q.R. 22 S.C. 213 (Ct. Rev.).

—Law partnership — Promissory note — Joint liability.]—The members of a firm of lawyers are jointly and not severally liable for the payment of a note signed in the name of their firm.

Drouin v. Gauthier, 12 Que. K.B. 442.

—Promissory note—Loss of note—Indemnity to be given by plaintiff.]—(1) Where, in an action on a loan, the defendant admits the loan, but alleges that he gave a promissory note for the amount, and this admission constitutes the sole proof of the loan, it cannot be divided. (2) A person who, on making a loan of money, receives a promissory note for the amount, cannot maintain an action upon the loan without producing and tendering to the debtor the note so given; or, in the event of its being lost, without proving the loss and obtaining an order that its loss shall not be pleaded by the defendant upon plaintiff giving security to the satisfaction of the court or judge against the claim of any other person upon the note. (3) Although the defendant is entitled, in the absence of compliance with the above conditions, to ask for the dismissal of an action, brought simply for the recovery of the loan, yet where he has declared his readiness to pay on proof of loss being made, and indemnity given, the Court, in order to avoid further litigation, may treat the case as an action on a lost note, and give judgment for the plaintiff on condition that security be given according to law—the defendant's costs in such case to be paid by the plaintiff.

Tessier v. Caillé, 25 Que. S.C. 207 (C.R.).

—Promissory note—Art. 85 C.C.—Art. 94 C.P.Q.]—An action on promissory notes dated at one place but signed in another cannot, in the absence of other circumstances conferring jurisdiction, be brought in the district in which the notes were dated.

Cardinal v. Picher, 7 Que. P.R. 147 (Sup. Ct.).

—Promissory note—Indorsement—Renewal.]—A power of attorney to administer the affairs of the principal confers no authority to indorse a note for the accommodation of the maker even when such note is only a reneyal of another already indorsed by the principal. The indorser of a note is entitled to the benefit of time given to the maker.

Molsons Bank v. Cooke, Q.R. 27 S.C. 130 (Ct. Rev.).

—Cheque—Stopping payment—Holder in due course.]—The defendant R. having given his cheque for $491.25 to the defendant D., the latter indorsed it to the order of defendant G., who deposited it to her credit in the Banque d'Epargne and drew $450 on account of such deposit. The day after the cheque was signed payment of it was stopped by the maker and when, in the ordinary course of the bank's business, and within a reasonable delay, it was presented to the bank on which it was drawn payment was refused. Plaintiff, the official who had received the deposit by G. without requiring the cheque to be first marked "accepted" contrary to rule was held responsible for the amount to the Banque d'Epargne and the plaintiff, holding cheque over to him, with subrogation of all their rights as to it that he might exercise his recourse against the parties. To his action against them the maker and indorsers pleaded that he was not a holder in due course since he did not become holder until after payment was refused and he was given notice of such refusal:—Held, that the indorsers could not raise the question whether or not he was a holder in due course, the cheque not being a nullity. That G. was a holder in due course, having become holder before it was presented for payment and, consequently, the Banque d'Epargne and the plaintiff, holding their title from her, possessed, as against the makers and indorsers, all the rights of a holder in due course. That the maker and prior indorser should pay the full amount of the cheque although the Banque d'Epargne had retained the balance of the deposit made by G., which was a personal affair between the latter and the bank.

Gauthier v. Reinhardt, Q.R. 26 S.C. 134 (Ct. Rev.).

—Promissory note—Legal consideration—Renewal of forged paper—Liability of indorser.]—A promissory note given in payment, or renewal, of notes of the maker bearing indorsements forged by him, to the bank which discounted and holds the latter paper and is aware of the forgery on it, is valid, and, as a consequence, the indorser of such a note is liable to the bank for the amount, more particularly if, at the time he indorsed it, he was not aware of the forgery and fraud in question.

La Banque Nationale v. Drolet, 28 Que. S.C. 146 (C.R.).

—Promissory note—Warranty against the indorser.]—A party becoming holder of a

note after maturity, is subject to all the equities between the original parties to said note, and the defendant, sued as the maker of the note may, by dilatory exception, have delay to call in warranty the indorser as his garant, to take up his fait et cause.

Levinoff v. Richard, 8 Que. P.R. 72.

—Contract—Election of domicile—Promissory note—Tribunal of competent jurisdiction.]—Where a promissory note has been made and signed in the District of Three Rivers and the contract in virtue of which said note was given was executed there and contains, moreover, an election of domicile in the said district in respect of every dispute that might arise in consequence thereof, an action instituted thereon in the District of Montreal will be dismissed on declinatory exception.

Cie. de Laiterie St. Laurent v. Trottier, 7 Que. P.R. 428 (Fortin, J.).

—Promissory note—Suretyship—Parol testimony—Imputation of payments—Indorsement—Onerous obligation.]—A promissory note in favour of a bank, made as collateral security for payment of a cheque accepted by it, is subject to the ordinary rules of suretyship, and the maker is discharged by repayment of the amount of the cheque to the bank. (2) Parol testimony is admissible to show the circumstances attending the making of the note and repayment of the cheque, as they are matters of a commercial nature. (3) The indorsement of a promissory note by a third person makes it a more onerous debt for the maker within the meaning of Art. 1161 C.C. The holder must, therefore, impute towards such note all moneys received upon the account of the maker by preference over all other notes signed by the latter alone.

Banque d'Hochelaga v. MacDuff, Q.R. 14 K. B. 390.

—Promissory note—Alteration — Acquiescence—Promise to pay.]—One of the joint makers of a promissory note payable to order is considered as acquiescing within the meaning of 53 Vict. c. 33, s. 63 (D.), in an essential alteration made therein when, with knowledge of such alteration, he promised to pay the amount of the note and renews such promise for the purpose of procuring time.

Hébert v. La Banque Nationale, Q.R. 16 K.B. 191.

—Fraudulent consideration — Fraudulent preference to inspector of insolvent estate.]—A promissory note in favour of a creditor and inspector of an abandoned estate to procure his assent to the sale of the abandoned assets to the maker is fraudulent, null and void, and no action will lie to recover on it.

Evans & Sons v. Tracey, 29 Que. S.C. 97.

—Promissory notes—Rights of holder—Knowledge of nullity at time of transfer.]—The holder of a note who, at the time of its transfer, had actual knowledge that it was originally obtained by false representations and without consideration, has no action to recover the amount from the maker.

Guimond v. Batalon, 29 Que. S.C. 8 (Curran, J.).

—Promissory note signed and payable outside of the Province of Quebec—Service upon defendant domiciled in Ontario.] — Art. 103 C.P. does not authorize the holder of a note made out of the Province of Quebec by a non-resident, and payable out of the province, to sue the maker thereof before the Courts of the Province of Quebec, because a subsequent endorser of the note, co-defendant, is domiciled therein.

Hackett v. Ryan, 8 Que. P.R. 380 (Davidson, J.).

—Promissory note by husband and wife.]—(1) A contract whereby a wife separate as to property binds herself with her husband is, as regards her, a nullity, and the party who knowingly acquires such an obligation cannot claim to be a creditor in good faith. (2) When two parties sign a note together, their obligation is joint, not joint and several. (3) The bearer of a note which is not endorsed cannot claim thereunder.

Dagneau v. Decarie, 8 Que. P.R. 141.

—Material alterations—Forgery—Partnership—Liability of indorser.]—R. induced H. to become a party to and indorser of a demand note for the purpose of raising funds and agreed to give warehouse receipts as security to the bank on discounting the note. It was arranged that the goods covered by the warehouse receipts were to be held and sold on joint account, each sharing equally in the profits or losses on the transaction. Subsequently R. altered the note, without the knowledge or consent of H., by adding thereto the words "avec intérêt à sept par cent. par an." and falsely represented to the bank that H. held the warehouse receipts as collateral security for his indorsement. A couple of months later H., for the first time, became aware that the goods had never been purchased or placed in warehouse, that no warehouse receipt had been assigned to the bank and did not, until some months later, know that the alteration had been made in the note. There was some evidence that H. had asked for time to make a settlement of the amount due to the bank upon the note after he had be-

come aware of the fraud and the alteration so made:—Held, that the instrument was a forgery and could not be ratified by an ex post facto assent. The Merchants Bank v. Lucas, 18 Can. S.C.R. 704; Cam. Cas. 275, and Brook v. Hook, L.R. 6 Ex 89, followed. Per Idington, J.:—The circumstances of the case did not show that there had been any assent to the alteration within the meaning of s. 145 of the Bills of Exchange Act. Per Maclennan, J.:—The assent required to bring an altered bill within the exception provided by s. 145 of the Bills of Exchange Act, R.S.C. (1906), c. 119, must be given by the party sought to be bound at the time of or before the making of the alteration. Held, also, that in the special circumstances of the case, there was no partnership relation between the parties to the note for the purposes of the transaction in question and there could be no implied authorization for the making of the alteration in the note. Judgment appealed from, Q.R. 16 K.B. 191, reversed.

Hebert v. La Banque Nationale, 40 Can. S.C.R. 458.

—Blank paper signed to be converted into a bill—Conditional authority—Holder in due course.]—A party who signs and delivers a blank paper in order that it may be converted into a bill, on a certain condition, is liable, for the amount of the bill into which the paper is converted, to the holder in whose presence the conversion or filling in takes place, and, a fortiori, to a subsequent holder in due course.

Bacon v. Dècarie, 34 Que. S.C. 103.

—Transfer after default to pay interest—"Overdue" bill—Notice—Holder in good faith.]—Where interest is made payable periodically during the currency of a promissory note, payable at a certain time after date, the note does not become overdue within the meaning of ss. 56 and 70 of the Bills of Exchange Act, merely by default in the payment of an instalment of such interest. The doctrine of constructive notice is not applicable to bills and notes transferred for value.

Union Investment Company v. Wells, 39 Can. S.C.R. 625.

—Cheque—Uncertain amount—Rights of indorser.]—A cheque written as follows: "Pay V. N. or bearer $2.50, two-fifty 00/100 dollars," signed "E. N.," is not an order to pay two hundred and fifty dollars. The holder who cashed it for two dollars and fifty cents only is not in fault and incurs no liability to the indorsers. The holder cannot claim that before it was presented he had taken it from a debtor for the larger amount for which the debtor had himself received it from the indorser. Knowledge of the debtor that the holder had made a mistake, followed by an agreement between them, deprives the indorser of the recourse over that he claims to exercise against the holder in the name of the debtor according to Art. 1031 C.C.

Nadeau v. Bank of Toronto, Q.R. 32 S.C. 178 (Ct. Rev.).

—Cheque on a bank endorsed by the payee—Presumption.]—A cheque on a bank indorsed by the payee is not evidence of a loan to him by the drawer. Of itself and unexplained it is a proof of a payment by the drawer to the payee.

Allaire v. King, 33 Que. S.C. 343 (C.R.).

—Evidence—Signature to promissory note—Denial on oath—Onus of proof—Expert evidence.]—(1) The denial of his signature to a promissory note, made on oath by a defendant under Art. 208 C.P., casts upon the plaintiff the onus of proving it, which he must do by positive evidence, as for any other matter of fact. The unsupported opinion of experts will not avail against the testimony of the party himself, especially when circumstances lend probability to his denial. (2) A party who is not clearly proved to have known of the existence of his forged signature to a note, is not estopped on the ground of neglectful standing by, from setting up the forgery against the holder.

Ethier v. Labelle, 33 Que. S.C. 39.

—Holder for collection only—Death of such holder during pendency of suit—Continuance.]—The rights of a holder, for collection only, of a bill of exchange, against acceptor and parties liable, are personal to himself, as the prete-nom of the owner, and are not transmitted, upon his death, to his heirs. When, therefore, such a holder dies during the pendency of a suit brought by him on the bill, his heirs have no right to continue it in his stead.

Marson v. Taylor, 34 Que. S.C. 37.

—Promissory note—Joint makers—"I promise," etc.—Joint and several liability.]—When two persons sign a note which reads "I promise," etc., they are jointly and severally bound pursuant to the terms of s. 84 of the Bills of Exchange Act, 1890, R.S.C. [1906] c. 119, s. 179.

Congregation of Roumanian Jews, Seth David v. Backman, Q.R. 31 S.C. 23.

—Proof of payment of note at maturity—Production of note by the promissor.]—The production by the promissor or maker, of a promissory note payable on a given date, without any indication upon its face or proof aliunde that it remained due after maturity, is prima facie evidence that it was paid and redeemed at, or before that time.

Coristine Company v. Accident Guarantee Company, 32 Que. S.C. 359.

—Assignment of chose in action—Discount of note for benefit of assignor—Liability of assignor.]—The assignment of an hypothecary claim as the consideration for the assignee's discounting the note of a third party for the benefit of the assignor creates no indebtedness by the latter to the assignee.

Buchanan v. Napier, 16 Que. K.B. 347.

—Promissory notes—Parties jointly liable—Holder of redeemed note.]—When A., B., C. & D., shareholders in a company, by way of accommodation to it, become jointly liable for a promissory note, and at maturity it is paid out of the proceeds of a second note signed by A. & B., but not by C. & D., which is ultimately redeemed by the company, no relation of creditor and debtor arises between A. & C. and the former cannot claim to have paid part of C.'s indebtedness. The fact that he holds the note, to which the latter was a party, is no evidence of such a relation, especially when the signatures of all the parties to it have been cancelled and his position of manager of the company makes it likely he is possessed of the note as such. He cannot therefore set up a plea of compensation, founded on the above recited facts, to an action for debt brought against him by C.

Lafontaine v. Leveille, 16 Que. K.B. 515.

—Bank—Cheque payable to order—Irregular indorsement.]—A bank upon which a cheque payable to order is drawn and accepted is obliged to pay the amount to a lawful holder though it had previously paid it to a third party on an irregular and insufficient indorsement. And this though such third party has remitted funds to the holder not specifically to cover the amount of the cheque but for what he owed on a current account.

Canadian Pacific Railway Co. v. La Banque d'Hochelaga, Q.R. 18 K.B. 237.

—Promissory note—Payments.]—In an action on a promissory note payable to order, evidence is admissible, it being a commercial transaction, to prove that payments claimed by defendant and established by cheques and receipts bearing dates subsequent to that of the note were in fact made to retire a prior note.

Renaud v. Beauchemin, Q.R. 35 S.C. 193.

—Note signed in blank—Holder in due course.]—The payee of a promissory note made in the manner set forth in s. 31, c. 119, R.S.C. 1906, may, in the same manner as an indorsee, be the party to whom it is negotiated, as well as issued, and a holder in due course, within the meaning of the following s. 32, and of s. 56.

Lilly v. Farrar, 17 Que. K.B. 554.

—Banking.]—See that title.

Eastern Provinces.

—Husband and wife—Separate property of wife—Married Woman's Property Acts (N.S.)—Action by wife against husband.]—Under the Married Woman's Property Acts of Nova Scotia, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband.

Michaels v. Michaels, 30 Can. S.C.R. 547, reversing 33 N.S.R. 1.

—Promissory note—Joint and several makers—Action against makers jointly—Recovery of judgment against one.]—The defendants G. and N. were sued jointly as makers of a note for $25. The writ, which was issued in January, 1885, was served on the defendant N., and the defendant G. accepted service. N. appeared and pleaded, but, by arrangement, nothing was done in relation to the claim against the defendant G. In November, 1885, N. withdrew his defence, and confessed the action, and final judgment was entered against him, on which some payments were made. In 1899, plaintiff commenced proceedings against the defendant G., who, under an agreement reserving his rights, appeared and pleaded:—Held, reversing the judgment of the County Court Judge for District No. 6, that the judgment entered on confession against the defendant N., was an answer to the claim subsequently made against the defendant G. McLeod v. Power (1898), 2 Ch. 295, followed. Held, further, that the action having been brought against defendants as joint debtors only, the position of G. in the suit was not affected by the fact that the note in question was a joint and several one, and that plaintiff, in another suit, might have some claim against G. alone.

McDonald v. Gillis, 33 N.S.R. 244.

—Accommodation acceptances—Authority of secretary of company to make—Knowledge of party claiming under.]—The secretary of defendant company, whose authority was limited to the acceptance of drafts, indorsed, in the company's name, a number of drafts in which the company had no interest, for the accommodation of C. The learned trial Judge found that the plaintiff bank, where the drafts were discounted, had knowledge that indorsements were made for the accommodation of C.:—Held, dismissing plaintiff's appeal with costs, that defendant was not liable. Semble, that where the directors might, under the power given them, delegate to the secretary power to indorse for the company, the bank, taking the paper bona fide, would be entitled to assume that the secretary had such power, although it had not, as a matter of fact, been delegated.

Union Bank v. Eureka Woolen Manufacturing Co., 33 N.S.R. 302.

— Promissory note—Presentation—Waiver.]—Plaintiffs inserted defendant's advertisements in two of their publications for the sums of $10 and $15 respectively. Separate agreements were made in respect to each publication, but the agreements were made at the same time, and defendant, at the same time that the agreements were made and signed, gave plaintiffs his promissory note for the sum of $25 payable four months after date at defendant's office. Plaintiffs' statement of claim contained claims based upon the note and upon the original consideration:—Held, that the claim based upon the original consideration was within the jurisdiction of the Court. Held, that the defence that the note was not presented for payment and that, while it was current, the remedy upon the consideration was suspended must be pleaded. Held, that if defendant were allowed to amend by pleading such defence plaintiffs should also be allowed to amend by alleging that presentment was waived by subsequent promises in writing to pay. Held, that something was to be inferred from the duty of a clerk whose duty it was to make presentments, and who testified that he had done so in the case in question.

Sharp v. Power, 33 N.S.R. 371.

—Draft—Liability of acceptor for accommodation of third party—Not discharged for payment made by drawer.]—Plaintiff agreed to sell certain cattle to M. on condition that M. would procure someone to accept a draft for the price. Defendant, at the request of M., accepted a draft for the amount, and a second draft given in renewal of the first, and agreed to accept a third draft in renewal of the second, but afterwards refused to do so at the instance of M., who in the meantime had become insolvent. Plaintiff furnished all the money used to retire the second draft with the exception of the sum of $10 paid by M.:— Held, affirming the judgment of the County Court Judge with costs, that defendant was not relieved from his liability on the second acceptance by the payment made by plaintiff, and that plaintiff was entitled to judgment for the amount of the acceptance less the sum of $10 paid by M. Held, that the case was distinguishable from one where the acceptor accepts for the accommodation of the drawer, who takes up the bill at maturity and negotiates it to someone who sues the acceptor.

Dill v. Wheatley, 34 N.S.R. 526.

—Conditional indorsement—Principal and agent—Knowledge by agent—Constructive notice—Deceit.]—A promissory note indorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the indorser where the condition has not been fulfilled. Pym v. Campbell (6 E. & B. 370) followed. The principal is affected by notice to the agent unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the holder to show that the agent had an interest in deceiving his principal. Kettlewell v. Watson (21 Ch. D. 685), and Richards v. The Bank of Nova Scotia (26 Can. S.C.R. 381) referred to.

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

— Promissory note — Accommodation maker—Conditional delivery—Bank—Notice to agent.]—In an action brought by the plaintiff bank against the defendant M., as indorser of a promissory note made by S., and as joint and several maker with S., of two other promissory notes, the defence chiefly relied on was that the notes were signed by M., and delivered to plaintiff's agent under a special agreement, of which plaintiff had notice, that they were not to be used until they had been indorsed or signed by certain other parties, as co-sureties. The evidence showed that the defendant S. was largely indebted to plaintiff for advances made by plaintiff's agent, for which plaintiff was anxious to obtain collateral security, and that the notes were taken for that purpose, and not as ordinary discounts. Also, that the signature of the defendant M. to the notes was obtained by plaintiff's agent under instructions from the cashier of the bank. Also, that, at the time the notes were signed, plaintiff's agent was told by M. not to take them unless the other signatures were obtained, and replied, "that is all right." Also, that the notes were signed in defendant's office, and that no part of the transaction took place in the office of the bank:—Held, setting aside the findings of the jury, that the signature of M. was clearly obtained in the course of the business of the agency, and within the scope of the agent's authority, and that his knowledge of the condition upon which the signatures were obtained must be held to be to the knowledge of the bank. Held, also, that if the agent, acting under the authority of the cashier, applied to the defendant M. to sign the notes, and, in order to induce him to do so, agreed to any condition, or did anything to lead M. to believe that they would not be used by the bank until another person had signed them, the bank would be bound, although the conduct of the agent was unauthorized, and knowledge thereof was concealed from its officers.

The Commercial Bank of Windsor v. Smith, 34 N.S.R. 426.

Promissory note—Payment after action brought — Collateral security.]—The M. Company owed the plaintiff $4,000 for which he held as collateral security the defendant's note for $3,000, made for the accommodation of the company, and some other collateral. After action brought on the note the plaintiff received a dividend from the company, which had gone into liquidation, and realized on some of the other collateral, but these facts were not pleaded. Verdict having been entered for the full amount of the note:—Held, that the plaintiff was entitled to judgment for the full amount of the note, but the amount realized upon the collateral and some portion of the dividend should be credited upon the execution.

Gorman v. Copp, 39 N.B.R. 309.

—Estoppel — Forgery — Promissory note—Duty to notify holder.]—On July 15, 1907, defendant received notice of dishonour of a note purporting to be endorsed by him and on October 7 this action was begun against him on the note. On November 26 defendant notified the plaintiff that his endorsement was forged by G. the maker. G. died on December 12 following. There was a genuine endorsement on the note by W. Co. and W. Co. was solvent:—Held, that the defendant was not estopped from denying his signature as the plaintiff had his remedy against W. Co. and against G.'s estate, and the loss of costs in this action was not such damage as would ground an estoppel. Ewing v. Dominion Bank, 35 S.C.R. 133, distinguished.

Connell v. Shaw, 39 N.B.R. 267.

—Promissory note—Consideration—Collateral security.]—M., being indebted to the bank in a large amount upon a note of which plaintiff was indorser, and being about to leave the province, arranged with the defendant to assume the debt, which he did by making a note payable to plaintiff, who, on defendant's assurance that M. had secured him and had arranged for money to meet the note, discounted the note and used the proceeds to discharge M.'s liability. When the note given by defendant fell due he made several payments on account, but ultimately plaintiff had to take it up:—Held, that under these circumstances plaintiff was entitled to recover. One of the grounds of defence was that plaintiff promoted the passage of an Act through the Legislature under which certain stock which M. deposited as security for his indebtedness was rendered valueless. Held, that if the Act had the effect contended for plaintiff could not be held responsible for it, and, further, that if the promoters of the Act were guilty of an improper action defendant was equally guilty with plaintiff.

Hobrecker v. Sanders, 44 N.S.R. 14.

—Defence of illegal consideration.]—The defence to an action on a promissory note was that the note in question was given for money advanced by the plaintiff with knowledge that it was to be used in an illegal stock jobbing transaction:—Held, by Russell and Drysdale, JJ., that, in order to succeed in this defence, it was necessary for the defendant to show that he was engaged in an illegal transaction and that plaintiff knew, when he advanced the money, that it was to be used for the furtherance of such transaction, and that, in the absence of such evidence, there should be judgment for plaintiff for the amount claimed with costs.

Dean v. MacLean, 44 N.S.R. 147.

—Promissory note given in settlement—Right to recover notwithstanding subsequently discovered error.]—Defendant was agent of plaintiff to collect rents and profits of a wharf property. On the termination of defendant's agency, plaintiff brought an action for an accounting, which was settled by defendant agreeing to pay plaintiff the sum of $376, by paying $125 in cash and giving his note for the balance, and by plaintiff agreeing to assign to defendant all debts due in respect to the property during the period covered by the agency. Defendant refused payment of the note given by him on the ground that, before it became due, it was discovered that $100 had been paid plaintiff on account of one of the debts assigned to defendant, and that defendant was entitled to credit for this amount on the note:—Held, per Meagher, J., Ritchie, J., concurring, Weatherbe, J., concurring in result, and Graham, E.J., dissenting, that as defendant's attorney had knowledge of the error, before the compromise, which resulted in the giving of the note, was effected, and as by the compromise plaintiff was prevented from going fully into the accounts, and perhaps establishing a greater liability on defendant's part, she was entitled to recover the full amount of the note.

Worrall v. Peters, 35 N.S.R. 26.

—Promissory note—Holder.]—Where a promissory note was delivered by McG., the holder, to P., whose name McG. wished to use in the collection of the note, and subsequently and before the note was due, McG. got it from P., telling him that he was going to place it with a banker, and he had better direct him to collect it. P. never gave any direction to collect it, and did not, before commencement, authorize the action, but he subsequently ratified it, stating he would have authorized it in the first instance if he had been asked to do so:—Held, in an action on the note in the name of P., that he was entitled to recover as holder.

Potter v. Morrisey, 35 N.B.R. 465.

—Promissory note—Collateral agreement—Admissibility of evidence to vary terms.] —To plaintiff's claim against the defendant, as maker of a promissory note for $28.58, the defence was set up that, in consideration of defendant's forbearance to commence proceedings, in the Probate Court for proof, in solemn form, of the will of A.C., plaintiff agreed to advance defendant, on account of a legacy to which she was entitled, as guardian of her infant children, a sum of money to be expended in repairs to property of her said children, and that plaintiff, not having the money required for that purpose, requested defendant to sign a note for the amount, which note was indorsed by plaintiff, to a firm which had done a portion of the repairs, and that said note was given on the understanding that plaintiff would pay it when it became due, and would deduct the amount from the amount payable to defendant, as guardian of her said children:—Held, reversing the judgment of the County Court Judge, in defendant's favour, that defendant, having violated her agreement, by commencing proceedings in the Probate Court, and having succeeded in setting the will aside, could not set up the agreement as a defence to plaintiff's action on the note. In an action on a second note, for the sum of $150, defendant, on the trial, sought to give evidence to show that the note, although expressed to be payable on demand, was made subject to a condition that defendant should not be called upon for payment, unless her children should die before a legacy, to which they were entitled, under the will of A. C., should become payable. Held, affirming the judgment of the County Court Judge, that the note being absolute on its face, evidence could not be given to vary its terms, there being no evidence to show that it was given on condition, or as an escrow, or only to be treated as a note in a certain event.

McNeil v. Cullen, 37 N.S.R. 13.

—Promissory note—Plea of material alteration—Conflict of evidence.]—To an action on a promissory note defendant pleaded that the note sued on was given in renewal of a prior note for a larger amount, and that the original note was rendered void by being materially altered by the addition thereto of a charge for interest, of which alteration defendants had no knowledge at the time of making the renewal note. There was a conflict of evidence as to the alteration referred to, but plaintiff's version was supported by the appearance of the note itself, which appeared, on the face of it, to have been all written at one time, with the one ink, and in the one handwriting, and bore no evidence of having been altered. The appearance of the note being consistent with plaintiff's evidence, and hardly reconcilable with that of defendants, and the trial Judge, after seeing and hearing the witnesses, having accepted plaintiff's version:—Held, dismissing defendant's appeal with costs, that there was no reason for interfering with his decision.

Brennan v Sutherland, 37 N.S.R. 370.

—Promissory note—Illegal consideration—Burden of proof.]—In an action by plaintiff as indorsee of a promissory note against defendants as makers, the defences relied on were that the note was made for the accommodation of plaintiff, and that it was given in connection with a smuggling transaction, and for other illegal purposes. Plaintiff's evidence was unsatisfactory to the learned trial Judge and there was failure on his part to produce the books of account showing how the consideration for the note was made up. There was evidence to support the plea of illegality, and the learned Judge holding that under these circumstances, the burden of proving consideration was upon plaintiff, dismissed the action with costs. On appeal there was an equal division of opinion and the appeal was dismissed without costs.

Ross v. Gannon, 39 N.S.R. 65, affirmed 39 Can. S.C.R. 675.

—Promissory note—Giving time — Good consideration.]—Defendant gave his promissory note to plaintiff for $100, in part payment of a larger sum which he agreed to pay for the transfer of the interest of F. in the Bedford Electric Co., upon which plaintiff held an option. At the time the note was given plaintiff signed an agreement in which he undertook to transfer the interest bargained for to defendant upon payment of the balance of the purchase money as agreed. An action on the note was defended, among other grounds, on the ground that it was made subject to a condition, alleged to be contained in the agreement signed by plaintiff, which had not been fulfilled. The trial Judge having found, as a fact, that the condition relied upon was not contained in the agreement when it was signed by plaintiff, the Court refused to disturb his finding:—Held, that as plaintiff, at the time he agreed to transfer the interest of F., was entitled to receive a portion of the consideration in cash, and, instead, gave defendant time for the payment, taking his note for the amount, this constituted good consideration for the note.

Soulis v. McNeil, 37 N.S.R. 525.

—Gift — Promissory note—Promise by accommodation indorser to pay—Want of consideration—Involuntary payment by payee — Recovery.]—Semble, that where

the payee (deceased) on indorsing a promissory note for the accommodation of the maker, promises without consideration to pay it, and the holder compels payment by the payee's estate, an action for the recovery of the amount lies by the estate against the maker.

Johnston v. Hazen; Re Woodford Claim, 3 N.B. Eq. 341.

—Bill of exchange—Action by drawer—Indorsement after action—Second action by indorsee — Stay of proceedings.]—An action by the transferee of an overdue bill, upon which an action has been already brought by the transferor, wherein an offer to suffer judgment has been made and accepted, was stayed on an application to the equitable jurisdiction of the Court, the transferee having knowledge of the pendency of the first action. An application to compel the plaintiffs to sign judgment on their acceptance of the defendant's offer to suffer judgment in the first action was refused.

Kennedy Company v. Vaughan, 37 N.B. R. 112.

—Deposit receipt — Action on as note—Payable after notice—Demand for immediate payment.]—A writing, signed by the defendant, admitting the receipt of a sum of money, and agreeing to be responsible for the same with interest at the rate of seven per cent. per annum upon production of the receipt and after three months' notice, may be recovered upon a promissory note. A demand for immediate payment made more than three months before the commencement of the action is sufficient proof of the notice called for by the receipt.

Babineau v. LaForest, 37 N.B.R. 156, affirmed 37 Can. S.C.R. 521.

—Bill of exchange—General acceptance — Lex loci.]—A bill of exchange dated and drawn at Halifax by the Dominion Antimony Co., Ltd., and addressed to the St. Helens Smelting Co., Manchester, England, was accepted at Manchester, payable at the Manchester and Liverpool District Banking Co., London. An order having been made for service out of the jurisdiction, and judgment given refusing to set the same aside:—Held, that, under the Bills of Exchange Act (1890), s. 71 (1) (b), the interpretation of the acceptance was to be determined by the law of the place where the contract was made, i.e., the place where the bill was accepted, and that as so interpreted the acceptance was not qualified but general, and the acceptor must seek his creditor.

Sanders v. St. Helens Smelting Co., 39 N.S.R. 370.

—Imperial Bills of Exchange Act—Notice of dishonour under — Reasonable time — Direct and regular mail.]—Under the Imperial Bills of Exchange Act, 1882, which provides (s. 49, sub-s. 12) that "notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter," and further provides that "in the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless, where the person giving and the person to receive notice reside in different places the notice is sent off the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and, if there be no such post on that day, then by the next post thereafter." Notice of dishonour of a note payable in London, England, by a person in this province sent the third day after protest by the first Canadian mail from London is not sufficient where there are mails leaving London for the United States between the date of protest and the leaving of the Canadian mail by which the notice would have sooner reached its destination. An agreement by the holder of past due promissory notes made with the maker, without the knowledge or consent of the indorser to extend the time for payment to a fixed date, and accept in full satisfaction a compromise if paid at the date fixed, will discharge the indorser, although the compromise was not paid, and it was expressly agreed that in that event the holder's rights against all parties should be preserved.

Fleming v. McLeod, 37 N.B.R. 630.

—Consideration—Forbearance.] — Plaintiffs recovered judgment against defendant and obtained an order from a commissioner of the Court under the Collection Act, after examination, for payment of the debt by instalments. Defendant paid the instalments for a time as required by the order, and then failing to pay, an order was obtained under the Act for an execution to take the body. Defendant having been arrested applied to a Judge of the Court under the Judgment Debtors' Act for his discharge. On the recommendation of the Judge in favour of a settlement defendant gave the note sued on:—Held, that the forbearance by plaintiffs in respect to their judgment, and in respect to asking for a remand, constituted good consideration for the making of the note. At the time of the making of the commissioner's order defendant was in the employ of the Dominion Government as Inspector of Weights and Measures, and it was claimed that the order was illegal and that the arrest was invalid and constituted duress, and that the giving of the note under the circumstances was illegal. Held, that, in the absence of statutory provisions in the province expressly protecting the salaries of government of-

ficials, it was a question of fact with the commissioner whether or not the making of the order requiring payment by instalments would impair the usefulness to the Crown of the official, and that as his order, made under these circumstances, was not a nullity, the note was not illegal for duress or other cause.

Smith v. Frame, 41 N.S.R. 20.

—Note given in substitution — Principal and surety—Discharge by giving time.]—In an action on a joint and several promissory note made by the defendants, W. and P., the defences chiefly relied on were that W. was surety for P. and was discharged by the giving of time to the principal, and that the note sued on was discharged by the acceptance in substitution therefor of another note made by P. and one D. R. The evidence showed that W. paid one-half of an original note made by himself and P., and signed the note sued on on the understanding that payment was to be enforced from P. at maturity. When the note became due P. was not in a position to pay in full and offered a renewal note for the balance due, which plaintiff agreed to accept provided P. would furnish another name approved of by plaintiff. Before the note was made plaintiff expressed his willingness to accept the name of C.R., but P. failed to get that name and sent to plaintiff instead a note signed by himself and D. R. Plaintiff did not return this note but told P., verbally, that he would not accept it:—Held, per Graham, E.J. (Townsend, J., concurring), that the retention of the note by plaintiff was not under the circumstances an acceptance. Also, assuming W. was only a surety for P., it was his duty to see that the obligation of his principal was satisfied. Also, that in the absence of evidence that ought reasonably to satisfy a jury that the note made by P. and D. R. was accepted by plaintiff in lieu of the note upon which W. was liable, there was no necessity for sending the case back for a new trial. Per Russell, J., assuming that the directions of the trial Judge to the jury were erroneous, there need not be a new trial if a verdict for defendant would be set aside as unreasonable.

Rockwell v. Wood, 39 N.S.R. 423.

—Foreign protest—Notice of dishonour to indorser in Canada—Knowledge of address—First mail leaving for Canada—Notice through agent—Agreement for time—Discharge of surety.]—Notes made in St. John, N.B., were protested in London, England, where they were payable. The indorser lived at Richibucto, N.B. Notice of dishonour of the first note was mailed to the indorser at Richibucto, and, at one same time, the protest was sent by the holders to an agent at Halifax, N.S., instructing him to take the necessary steps to obtain payment. The agent, on the same day that he received the protest and instructions, sent, by post, notice of dishonour to the indorser at Richibucto. As the other notes fell due, the holders sent them and the protests, by the first packet from London to Canada, to the same agent, at Halifax, by whom the notices of dishonour were forwarded to the indorser, at Richibucto:—Held, that the sending of the notice of dishonour of the first note direct from London to Richibucto, with the precaution of also sending it through the agent was an indication that the holders were not aware of the correct address of the indorser and the fact that they used the proper address was not conclusive of their knowledge or sufficient to compel an interference imputing such knowledge to them. Therefore, the notices in respect to the other notes, sent through the agent, were sufficient. The maker of the note gave evidence of an offer to the holders to settle his indebtedness, on certain terms and at a time some two or three years later than the maturity of the last note, and that the same was agreed to by the holders. The latter, in their evidence, denied such agreement and testified that, in all the negotiations, they had informed the maker that they would do nothing whatever in any way to release the indorser. Held, that the evidence did not show that there was any agreement by the holders to give time to the maker and the indorser was not discharged. If the existence of an agreement could be gathered from the evidence, it was without consideration and the creditors' rights against the sureties were reserved. Judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 630) reversed.

Fleming v. McLeod, 39 Can. S.C.R. 290.

—Promissory note—Instalments of interest—Transfer after default to pay interest—"Overdue" bill—Notice — Holder in good faith.]—Where interest is made payable periodically during the currency of a promissory note, payable at a certain time after date, the note does not become overdue within the meaning of ss. 56 and 70 of the Bills of Exchange Act, merely by default in the payment of an instalment of such interest. The doctrine of constructive notice is not applicable to bills and notes transferred for value.

Union Investment Company v. Wells, 39 Can. S.C.R. 625.

—Promissory note—Fraud in procuring—Discount—Good faith.] — L. and others signed promissory notes each for the amount of ten shares in a company formed to manufacture rotary engines under an invention of the payee who fraudulently misrepresented to them the prospects and intentions of such company. At the same time each maker signed an application for

ten shares. The payee and T., the assignee of his patent of invention, induced W. to discount these notes and received a portion of the proceeds, part being retained by W. in payment of debts due him from these two parties. On the trial of actions by W. on the notes the evidence of T., who had absconded, was taken under commission and he swore that the form of application signed by the respective defendants had been shown to W. before the notes were discounted. W. denied this and swore that he had been told that the notes were given in payment of stock held by the payee:—Held, that the evidence of W., on whom the onus of proof rested, could not be accepted; that the whole testimony and attendant circumstances showed that W. suspected that the proceeds of the notes belonged to the company; and, having discounted them without inquiry as to the right of the payee and T. to receive these proceeds, he was not in good faith and could not recover.

Lockart v. Wilson, 39 Can. S.C.R. 541.

—Note delivered conditionally — Indorsement—Liability of partner of payee.] — Plaintiff purchased from C., a member of the firm of R. & C., a quantity of hay, and gave in payment therefor his promissory note, which C. undertook should not be used until the hay was delivered. The hay was never delivered and C., in violation of his agreement, indorsed plaintiff's note to T. for value. An action brought by T. against plaintiff to recover the amount of the note was defended by plaintiff at the instance of R., who practically joined in the defence and acted as if the cause were his own:—Held, affirming the judgment of the trial Judge, that plaintiff was entitled to recover against R. not only the amount of the note for which judgment was recovered against him but the amount of the costs taxed as well.

Ross v. Reid, 42 N.S.R. 232.

—Promissory note—Agreement to release indorser—Sufficiency of consideration.] — Plaintiffs sold a wagon to H., for which they took notes indorsed by defendant. H. absconded without making payment and defendant agreed with plaintiffs to deliver up to them the wagon in question, together with another wagon which H. had purchased from plaintiffs and not paid for, both being in his possession, upon being released from liability upon his indorsements. Plaintiffs assented to this, and left the wagons, temporarily, in defendant's possession:—Held, that the change of defendant's position with respect to the wagons was good consideration for plaintiff's agreement to release him, and that whether defendant's agreement was of any benefit to plaintiffs or not was immaterial.

DeWolfe v. Richards, 43 N.S.R. 34.

—Presentment—Waiver—Knowledge of default.]—An offer made after its maturity by an endorser of a promissory note to pay the amount of the same will not operate as a waiver of presentment in the absence of evidence that at the time of the offer he knew there had been default in presentment.

Ayer v. Murray, 39 N.B.R. 170.

— Consideration — Illegality — Loan for gambling transactions.]—

Allan v. Robert, 2 E.L.R. 556 (Que.).

— Accommodation maker — Subsequent endorser with notice paying holder—Summary judgment.]—

Lownds v. Clay, 2 E.L.R. 287 (N.S.).

— Return of bill to drawer by payee — Indorsement by payee not essential.]—

Nova Scotia Carriage Co. v. Lockhart, 1 E.L.R. 76 (N.S.).

— Endorsement of payments by payee — Statute of Limitations — Set-off — Action by administrator of payee—Admissibility of evidence.]—

Peck v. Robinson, 3 E.L.R. 381 (P.E.I.).

— Promissory note — Condition as to passing of title to property — Acceleration of payment — Negotiable instrument.]—

Canadian Bank of Commerce v. Livingston, 6 E.L.R. 459 (P.E.I.).

— Jurisdiction of stipendiary magistrate — Principal and interest together amounting to more than maximum within magistrate's jurisdiction—Right of plaintiff to reduce.]—

Hall v. Veinot, 4 E.L.R. 374 (N.S.).

— Consideration — Compromise of claim — Immateriality of validity of claim.]—

Power v. Power, 6 E.L.R. 498 (N.S.).

—Promissory note — Conditional sale — Special lien — Title retained by vendor — Purchaser's agreement to pay balance in case of deficiency on sale — Collateral security — Account stated — Debt payable in future — Jury — General verdict — Separate issues—Contradictory evidence.]—

International Harvester Company v. Grant, 4 E.L.R. 1 (P.E.I.).

— Action on lost note — Striking out plea of loss — Indemnity — Costs.]—

Palmer v. Reilly, 2 E.L.R. 308 (P.E.I.).

—Promissory note—Joint-maker—Collateral security.]—

Hobrecker v. Sanders, 6 E.L.R. 567 (N.S.).

— Promissory note — Presentation.]—

Sinclair v. Deacon, 7 E.L.R. 222 (P.E.I.).

Western Provinces.

—Evidence to vary written contract—Promissory note—Indorsement—Bills of Exchange Act, s. 55, sub-s. 2.]—Parol evidence will not be received to show that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not liable on the indorsement, as that would be contradicting the contract which such indorsement by sub-s. 2 of s. 55 of the Bills of Exchange Act, 1890, imports. Abery v. Crux (1869), L.R. 5 C.P. 37; Henry v. Smith (1895), 39 Sol. J. 559; and New London Credit Syndicate v. Neale, [1898] 2 Q.B. 487, followed. Pike v. Street (1828), Moo. & M. 226, dissented from.

Smith v. Squires, 13 Man. R. 360.

—Accommodation note—Holder in due course—Equities attaching to note—Defects in title—Agreement for renewal—Parol evidence.]—Action by endorsee of a note against the maker. The trial Judge found that the note was made by the defendant for the accommodation of K., the payee, subject to the conditions that (1) it was not to be used at all except in a certain stated event; (2) it was to be negotiated, if at all, only at a certain named bank; and (3) it was renewable for a stated period, which had not expired at the commencement of the action. He also found that the second and third of these conditions had been broken; that the plaintiff acquired the note, though for value, after maturity from one C., the trustee for the benefit of the creditors of K., and not from a certain bank which. at the time of the arrangement whereby he acquired the note, actually held it as a collateral security for an indebtedness of K.:—Held, that these conditions were "equities attaching to the note," and their breach "defects in the title of the person who negotiated it"; that the note was affected by them in the hands of both C. and the plaintiff; and that therefore the plaintiff could not recover. Where a note is subject to an agreement for renewal, if the renewal is not contemplated, except on the happening of an event not within the knowledge of the holder alone, the obligation of offering to renew is on the party entitled to renew. Where it is made to appear that a note, transfer or other writing is merely an incident in or part of a larger agreement, and there is no writing in which the parties professed to set down all the terms of their agreement oral evidence of the agreement is admissible. Signature is a conventional mode of declaring a writing to be the record of an agreement; but it is not essential, except where made so by statute. The fact that such a writing is directed to a third party does not prevent its being taken as the record of such an agreement. At the close of the plaintiff's case, a defence, that the plaintiff was not the holder of the note at the commencement of the action being on record, a motion to dismiss on this ground was made. The trial Judge held that this defence was established, it appearing that the note had been deposited with a certain bank as a collateral security and had not been returned to the plaintiff until after the commencement of the action; but on the plaintiff's application an amendment was allowed adding the bank with its consent as a co-plaintiff on the terms that the bank stand on the title of plaintiff.

MacArthur v. MacDowall, 1 Terr. L.R. 345.

— Promissory note—Partnership—Signature of individual name with descriptive words—Liability of firm—Extrinsic evidence.]—In an action against the members of a partnership carrying on business under the name of the O. T. L. Co., on a promissory note reading as follows:—"Sixty days after date we promise to pay D. & B. or order $407.29 at the Imperial Bank here; value received," and signed "W. D. R., Manager, O. T. L. Co.":—Held, (1) That evidence of the circumstances surrounding the making and accepting of the note was admissible for the purpose of showing who was intended to be liable on the note. (2) That, on the terms of the note and the evidence of the surrounding circumstances in this case, the defendants were liable. The defendants carried on a lumbering business in partnership. R. was their manager at the place of operations. The partnership kept in the vicinity of their mill a boarding-house, at which their workmen boarded, and a store for the sale to them of supplies. R. ordered goods which were used in the boarding-house, the store or the mill. Held, that the ordering of the goods was within the scope of R.'s authority and that the defendants were therefore liable.

Ferguson v. Fairchild, 1 Terr. L.R. 329.

—Trading company — Promissory note signed by managing director.]—The defendant company was incorporated by Letters Patent under the Manitoba Joint Stock Companies Act, R.S.M., c. 25, for the purpose of carrying on a trading business, and plaintiffs sued as indorsee of three promissory notes given by the managing director of the company in its name to one Crighton for tea ordered from him but never delivered. There was no by-law, resolution or other act expressly defining the powers or duties of the managing director, but the evidence showed that the course of business of the company was such that he had frequently

given similar promissory notes which had been paid by the company's cheques without objection on the part of the other directors or the auditors:—Held, that the notes sued on had been made in general accordance with the powers of the managing director within the meaning of s. 62 of the Act and were binding on the company.

Imperial Bank v. Farmers' Trading Co., 13 Man. R. 412.

—Promissory note—Holder in due course—Transfer—Indorsement.]—The claim of the plaintiff was set out in the statement of claim as follows: "The plaintiff claims against the defendants for the payment of the sum of $249.84, the amount of a promissory note and interest thereon, dated the 2nd December, 1907, and made by the defendants, payable two years after date, to the order of C. H., at . . ., which said promissory note was duly transferred by the said C. H. to the plaintiff, for valuable consideration, before maturity." The evidence at the trial showed an indorsement and delivery, and that the plaintiff was a holder in due course:—Held, that the pleading was insufficient to establish a right of action under the Bills of Exchange Act. The plaintiff was allowed to amend and to allege that the note was duly transferred or indorsed to the plaintiff, and the plaintiff thereby became the holder for value in due course; and the plaintiff was allowed to enter judgment for the amount of the note, with costs of a default judgment, less the defendants' costs of defence—as it was admitted that they would not have defended had the pleading been properly framed at first.

Heon v. Bonnet, 14 W.L.R. 534 (Sask.).

—Promissory note—Accommodation comaker—Knowledge of holder—Extension of time.]—In an action by the payee of a promissory note against the two joint makers, it appeared that the defendant D. signed as maker entirely for the accommodation of the defendant K. and without receiving any consideration therefor, and that the plaintiff knew at the time of taking the note that D. was an accommodation maker only. The plaintiff placed the note with his bankers as collateral security for his indebtedness to them, and the bankers indorsed upon it the words "extended for 9 months." D. was not notified of this extension. There was no evidence that the time was extended for K.'s benefit, either by the bankers or the plaintiff, or that K. was ever informed by either of them that he could have 9 months more in which to pay:—Held, that D. was not released by the extension of time without notice to him. Held, also, that D., as an accommodation maker to the knowledge of the plaintiff, was not entitled under the law merchant or the Bills of Exchange Act to notice of dishonour. The note fell due on the 20th October, 1907; the plaintiff took no proceedings against D. or K. until more than 14 months after that date; D. was never notified that the note had not been paid until the 6th October, 1908; at some time—the evidence did not shew when—K. made an assignment for the benefit of his creditors; the evidence did not shew whether the plaintiff proved his claim against the estate or not, or whether D. might not have done so and obtained some benefit, if he had known that K. had not paid the note:—Held, that there should be a new trial so as to give D. an opportunity of proving that he was in some way prejudiced by the omission to notify him of K.'s default—the position being that the plaintiff, the creditor, had failed to proceed promptly against K., the principal debtor, and failed to give D., the surety, notice of K's default, and upon these facts, if damage were shewn, D. would be discharged from his liability.

Hough v. Kennedy, 13 W.L.R. 674 (Alta.).

—Cheque—Procurement by misrepresentation—Indorsement to third person.]—Plaintiff, who was a confidential clerk of a director of the defendant company, and had been himself a director of the company, accepted from the said director a cheque of the company for $2,663.59. The cheque had been issued on the understanding that it was to be used only for the purpose of exhibiting it to a tax collector to secure to the said director further time for the payment of taxes on his own property. On the disappearance of the director the defendant company stopped payment of the cheque, and plaintiff brought action, claiming he was a holder in due course:—Held, on the evidence, that plaintiff had given no value for the cheque and that he had notice of the defect in title when the cheque was indorsed over to him.

Campbell v. National Construction Co., 14 B.C.R. 444.

—Promissory note—Indorser—Holder in due course—Estoppel.]—(1) Under s. 131 of the Bills of Exchange Act, R.S.C. 1906, c. 119, a person who indorses a promissory note not indorsed by the payee at the time may be liable as an indorser to the payee. Robinson v. Mann, 1901, 31 S.C.R. 484, and McDonough v. Cook (1909), 19 O.L.R. 267, followed. (2) Although the defendant company had made the note in question in pursuance of an agreement to assume the debt of another to the plaintiff company; yet, as there was a good and valuable consideration given for that assumption, the plaintiffs were holders in due course and the defendant company was liable upon the note. (3) The other defendants being directors of the defendant company, having indorsed the note and induced the plaintiffs to enter into and perform the agreement in

consideration of which the note was given, were estopped from disputing the validity of this transaction or setting up that the defendant company had not power to give the note; Bills of Exchange Act, s. 133.

Knechtel Furniture Co. v. Ideal House Furnishers, 19 Man. R. 652.

—Promissory note—Presentment for payment—Waiver.]—Action by indorsees of promissory note given by defendant company to the payees for value. The plaintiffs took the note during its currency as security for an advance to the payees. The note was payable at the Bank of Hamilton, Winnipeg. At its maturity the secretary-treasurer of defendant company went to the office of the payees and gave them a renewal note without inquiring for the original. The payees then negotiated the renewal note and the defendant company afterwards paid it. The trial judge was satisfied upon the evidence that the original note had been presented for payment before action, but he nonsuited the plaintiffs on the ground that they, being shareholders in the payee company, were personally bound by the wrongful action of that company in taking the renewal note:—Held, per Perdue and Cameron, JJ.A.:—(1) That the nonsuit was wrong, as there was nothing to show that the plaintiffs were not holders in due course. (2) That the action of the defendants in giving the renewal note and subsequently paying it amounted to an acknowledgment that the original note was made with their authority and that they were liable on it. Per Cameron, J.A.:—(1) That, under s. 183 of the Bills of Exchange Act, presentment of the note for payment before action was not necessary. (2) That the defendants were liable on the note although it was not duly made under their by-laws, as innocent holders of negotiable securities are not bound to inquire whether certain preliminaries which ought to have been gone through have actually been gone through. Per Richards, J.A.:—That it was necessary to prove presentment before action and this had not been done. Per Perdue, J.A.:—That there was sufficient evidence of presentment before action. Appeal allowed and verdict entered for plaintiffs with costs.

Robertson v. Northwestern Register Co., 19 Man. R. 402, 13 W.L.R. 613.

—Bill drawn to order of bank—Action by drawer.]—Plaintiff, the drawer of a bill of exchange accepted by the defendant, brought action thereon. The bill was drawn payable to the order of the Dominion Bank, and was not indorsed by the bank, but in the statement of claim it was alleged that upon dishonour the bill was returned by the bank to the drawer, who was then the holder thereof. The defendant appeared and filed a defence which was struck out on a motion for speedy judgment. On such motion the defendant filed no affidavit, but relied on the objection that the bill had not been indorsed to the plaintiff, who could not, therefore, maintain the action:—Held, per Wetmore, C.J., and Johnstone, J., that as the defendant had, in answer to the motion, raised a difficult question of law which might be an answer to the plaintiff's claim, he should be permitted to defend. Per Newlands and Prendergast, JJ., that it was not necessary for the plaintiff in pleading to allege any facts which would be presumed in his favour, and it was therefore unnecessary to allege that the Dominion Bank were the holders for value, and it might be presumed that when they returned the bill to the plaintiff they were paid by him, and it was therefore unnecessary to allege payment in order to entitle the drawer to recover. (2) That it was not necessary for the Dominion Bank to indorse the bill to the drawer, as when the bank was paid the bill ceased to be negotiable, and the only right of action which exists is the right of action against the acceptor by the drawer, which he acquires not through the payee but by virtue of his original position as drawer. The Court being evenly divided, appeal dismissed.

Velie v. Hemstreet, 2 Sask. R. 296.

—"Marked" cheque—"Certified" cheque—Unauthorized acceptance by clerk of bank.]—A junior clerk employed by the Canadian Bank of Commerce obtained by fraud possession of the defendant Yuen's cheque for $350 in favour of the defendant Jacques, endorsed by Jacques, dated 9th June, 1906, and on the 30th October, 1906, placed the acceptance stamp of the Canadian Bank of Commerce, his initials and the ledger folio thereon and negotiated the cheque for cash to the plaintiff. In an action by the plaintiff against the drawer and the endorser of the cheque and the Canadian Bank of Commerce as acceptor:—Held, the plaintiff could not recover against the drawer and endorser, for the reason that the plaintiff was not the holder in due course, the cheque having come into possession of the plaintiff on the 30th October, nearly four months after it was drawn,—it being held that the cheque having been in circulation an unreasonable length of time was overdue. In order to constitute estoppel by negligence, it is essential for the negligence to be in or immediately connected with the transaction itself, which is complained of; and while there may be a duty to be careful not to facilitate any fraud in connection with the transaction, it is essential, in the event of a breach of that duty to show that the fraud was the natural and ordinary result of the breach of that duty. Held, therefore, that although the bank may have been negligent in leaving the acceptance stamp and the ledger where it would be possible for an authorized person to make use of them with apparent

authority; yet the clerk's fraud did not flow as a natural and ordinary result of such want of care; and the bank was therefore not precluded from setting up want of authority for the acceptance. Held, also, that a cheque after acceptance is subject to all the rules applicable to negotiation of an unaccepted cheque. The distinction explained between a "marked" cheque, according to the English custom of bankers, and "certified" cheque.—The customary certification of a cheque constitutes an acceptance within the meaning of the Bills of Exchange Act. Such an acceptance makes the bank directly liable to the holder. If the payee or a subsequent holder procures the certification of a cheque, the drawer is discharged.

Northern Bank v. Yuen, 2 Alta. R. 310.

— Bill of exchange—Acceptance—Stated count—Opening account.]—Acceptance of a bill of exchange is evidence of an account stated to the amount of the bill. In order to open a settled account it is necessary to particularize specific errors in the account. In an action by the drawer of bills of exchange against the acceptor, the defendant pleaded generally that he accepted the bills under a mistake as to the state of the account. This defence was struck out, with leave to the defendant to amend on terms of filing an affidavit verifying the facts to be set out in the proposed amended defence. The proposed amended defence alleged that when the defendant accepted the bills he did so under the mistaken idea that he was indebted to the plaintiff in the amount whereof; that such mistaken belief was occasioned by the plaintiff having represented to him, by statements of account in writing and by drawing the bills, that he justly owed the plaintiff that amount, whereas, in fact, he was not indebted to him in any amount; that the defendant had dealt extensively with the plaintiff for over six years; that in course of such dealings plaintiff had, without defendant's knowledge or consent, made many exorbitant and illegal charges, and that if accounts were taken it would be found that the defendant was not indebted to the plaintiff in any amount. This proposed defence and a counterclaim, based on the same allegations, for an account, were held bad; and were not allowed to be filed, and there being, therefore, no defence on file, judgment was given for the plaintiff.

Clark v. Hamilton (No. 2), 5 Terr. L.R. 178.

—Bill of exchange—Unincorporated body—Officers—Acceptance — Personal liability.]—Plaintiff brought an action on the following document, "The Board of Managers, Presbyterian Church, Moose Jaw. Please pay H. McDougall the sum of $817.85 on my account and oblige me. James Brass," and accepted as follows: "Accepted. D. McLean, Chairman; A. E. Potter, Treasurer." It was found as a fact that McLean and Potter were members of the board, an unincorporated body: —Held, that (1) the document was a bill of exchange, and (2), that McLean and Potter were personally liable thereon. Brass was the contractor with the board for the erection of a manse. If the contract had been completed $817.85 would have been owing to him; but the trial Judge found that it had been left uncompleted to the value of $80. This was allowed to be set off against the amount of the plaintiff's claim; but it was also claimed that the defendants were entitled to retain 10 per cent. of the contract price for thirty days after the completion of the contract, under the provisions of the Mechanics' Lien Ordinance. Held, that the defendants were not so entitled.

McDougall v. McLean (No. 1), 1 Terr. L.R. 450.

—Collateral security — Accommodation indorser—Principal and Surety—Extending time for payment.]—T. B. L. and A. C. S. being indebted on several promissory notes to the plaintiffs who demanded security, the defendant H. A. S., the wife of A. C. S., at his request and without knowledge of the purpose for which he proposed to use it, indorsed a blank form of note, which was afterwards filled out as a note made by T. B. L., payable to H. A. S., and indorsed by her and A. C. S., and was then given to the plaintiffs. This note was afterwards renewed, H. A. S. again indorsing a blank form, A. C. S. being made payee and indorsing ahead of H. A. S. While the plaintiffs held this latter note, they kept the several notes, as security for which they held it, renewed, the renewals extending beyond the date of the maturity of the note held as security. In an action on the latter note, H. A. S. pleaded that she was discharged, by reason of the plaintiffs having given time by a binding agreement to T. B. L. and A. C. S., the principal debtors, without her consent:—Held, by Rouleau, J., the trial Judge, and by the Court in banc, McGuire, J., dissenting, that the renewal of the notes constituted such an agreement and that the rule invoked—that giving time to a principal debtor by a binding agreement without the surety's consent, discharges the surety—was applicable; and that H. A. S. was entitled to a dismissal of the action. Semble, per Macleod, Rouleau and Wetmore, J J.: (1) The fact that T. B. L. falsely stated to the plaintiffs, when they demanded security, that H. A. S. was indebted to him, and asked them if they would accept her

indorsement, to which they consented; could not bind H. A. S., as T. B. L. had no authority from her to make the statement. (2) If notice to the plaintiffs that H. A. S. was merely an accommodation indorser were necessary, the mere fact that she was second indorser on the second note would be sufficient evidence of such notice. (3) The case was distinguishable from that of a party, who being asked for collateral security, brings paper founded on actual indebtedness to himself. In that case, giving him time would in no case relieve the parties to the paper given as security. Per McGuire, J., dissenting:—(1) There can only be two views of the contract entered into by H. A. S.: (a) Her contract was simply that which the law implied from her indorsement of the note, that is, she thereby became surety for the payment of that note only—not of any notes as security for the payment of which it might be pledged. Her obligation was complete when she delivered the note, and oral evidence was not admissible to attach conditions to her liability as indorser beyond what the law implied. (b) If such evidence were admissible for the purpose of showing that the note she had indorsed was given as collateral security for certain other notes, the evidence was to the effect that she had appointed her husband agent to use it as he wished, and that he, in the exercise of that authority, had pledged it to the plaintiffs as a continuing pledge, and she must in this view of it be held to have agreed to it being security until the other notes were paid. In either view, the giving of time to the principal debtors on the other notes, did not affect the question of the liability of H. A. S. to the plaintiffs. (2) The defence of coverture and a reply of separate property having been pleaded, and the evidence having shown that H. A. S. was the owner of separate property when she indorsed, it would be presumed that she contracted with reference to it.

Le Jeune v. Sparrow, 1 Terr. L.R. 384.

—Bill of lading with draft attached—Surrender of bill of lading before acceptance of draft—Right to examine goods—Liability of drawee.]—(1) Where a consignor of perishable goods draws through a bank upon the consignee at sight for the amount of the contract price and attaches the bill of lading to the draft the consignee is entitled to examine the goods before accepting them or paying the draft. (2) If it is necessary to obtain the bill of lading from the bank and surrender it to the carriers in order to make the examination, the fact that the consignee does so, and thereby makes it impossible to return the bill of lading to the bank does not render him liable to pay the draft. (3) Under s. 73 of the Bank Act the bank has no other or higher rights than the consignors. (4) The fact that the bank indorses the bill of lading to the consignee in order to enable him to examine the goods does not transfer the right of property in them to the consignee and if the latter deals with the goods as his own by reshipping and selling them he becomes liable to the bank, in an action for conversion, for the goods or their value. Where, therefore, the bank, in such circumstances, sued for the amount of the draft, and the defendant pleaded that a large portion of the goods were worthless, and paid into Court, the invoice price of the portion sold by him, and it appeared in evidence that the portion unsold were absolutely worthless, the Court directed an amendment of the statement of claim so as to make it an action of detinue, and gave judgment for the amount paid into Court, but without costs.

Imperial Bank v. Hull, 4 Terr. L.R. 498.

—Promissory note—Indorsement—Evidence to vary written contract.]—Parol evidence will not be received to show that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable on the indorsement. Smith v. Squires (1901), 13 Man. R. 360, followed.

Emerson v. Erwin, 10 B.C.R. 101.

—Stamp Act, 1853, s. 19 (Imperial) not applicable to British Columbia—Bills of Exchange Act (Can.).]—Section 19 of the Stamp Act, 1853 (Imperial), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act. Even if it were brought into force, it was annulled by the repugnant legislation of the Bills of Exchange Act, although not mentioned in the repealing schedule to the Act. The Canadian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques and promissory notes. A local manager of an incorporated company, who was authorized only to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the company drawn on that bank:—Held, the Bank of Montreal was liable to the company for the amount of the cheques so cashed.

Hinton Electric Co. v. Bank of Montreal, 9 B.C.R. 545 (Hunter, C.J.).

—Promissory note—Irregular indorsement—Presentment—Notice of dishonour—Waiver.]—The defendant, A. M., put his name on the back of a promissory note made by M. M. in favour of the plaintiff, which was then delivered to the plaintiff:—Held,

that defendant, A. M., was an endorser of the note, liable as such to the payee, and entitled to notice of dishonour. M. M. died before maturity of the note, and defendants A. M. and H. were appointed two of his administrators; after their appointment and before maturity, they had a conversation with the plaintiff in respect of the note, and plaintiff swore that he told them when it would be due, and one of them asked for an extension of time, which was granted. Defendant A. M. swore that plaintiff told him not to worry, that he would not look to him for payment, but take whatever the estate was able to pay, and he did not ask for an extension, nor did he hear defendant H. ask for any. Defendant H. could not remember what took place. Held, insufficient to prove that defendant A. M. waived presentment or notice of dishonour. The plaintiff also, before maturity, pursuant to administrators' advertisement for creditors, filed with their solicitor a copy of the note and a statutory declaration that it was unpaid. Held, that this is not such a presentment as is required by s. 45 of the Bills of Exchange Act, 1890. Held, also, that, notwithstanding the endorser became one of the deceased maker's administrators before maturity of the note, presentment and notice of dishonour were nevertheless necessary.

Fraser v. McLeod, 2 Terr. L.R. 154.

—Promissory note—Signature of maker obtained by false representation—Holder in due course.]—According to findings of fact at the trial, the evidence did not clearly show that the promissory notes sued on had been signed by the defendants, and it was proved that, if they had signed them, they did so without knowing that they were promissory notes and in the belief, induced by the false representations of the agent of the payee, that the documents they signed were petitions to the Government for a road:—Held, following Foster v. McKinnon (1869), L.R. 4 C.P. 704, and Lewis v. Clay (1897), 77 L.T. 653, that, notwithstanding the language of ss. 29 and 38 (b) of the Bills of Exchange Act, 1890, the defendants were not liable to the plaintiffs, although they were holders in good faith, for value, and without notice of any defect or fraud and had acquired the notes during their currency.

Alloway v. Hrabi, 14 Man. R. 627 (Perdue, J.).

—Promissory note—Endorsement without value—Fraud.]—Action by an endorsee against the maker and the endorser of a promissory note. Defence that the endorser, for whose benefit the note was made, and who had received the consideration, endorsed it to the plaintiff's brother, who when he was indebted to the endorser, in collusion with the plaintiff, and for the purpose of defrauding the endorser, and preventing him from collecting the sums due by the plaintiff's brother, endorsed the note to the plaintiff without consideration:—Held, that the plea was no defence to the action and must be struck out as embarrassing.

Caldwell v. McDermott, 2 Terr. L.R. 249 (Scott, J.).

—Promissory notes—Partial failure of consideration.]—The defendants bought cattle from the plaintiff, gave her the promissory notes sued on for the price and took and kept the cattle, all parties believing that the plaintiff had an absolute title to them. It was subsequently ascertained that the plaintiff had only a life interest in the cattle. After learning this fact, defendants paid a year's interest on the notes and neither returned nor offered to return the cattle:—Held, that defendants were liable on the notes, as there was no fraud and no total failure of consideration. They were bound to repudiate the transaction at once on learning of the defect in plaintiff's title, if they wished to object, and must by their conduct be held to have elected, with knowledge of the facts, to affirm their purchases.

Primeau v. Mouchelin, 15 Man. R. 360, (Richards and Perdue, JJ.).

—Principal and surety — Note of debtor—Days of grace.]—

See PRINCIPAL AND SURETY.

McDonald v. Bucholtz, (N.W.T.), 2 W. L.R. 10.

—Promissory note—Holder for value without notice—Delivery on condition of signature by another joint maker.]—The defendants, thirteen in number, and one Lee, formed a syndicate for the purchase of a stallion. The vendor's agent afterwards induced the defendants to sign an agreement for the purchase and promissory notes for the price on the representation that he would get Lee to put his name also on the notes. The defendants then took possession of the horse and used him for one season and part of another, when he died. Shortly before signing the notes the defendants became aware that Lee had refused to sign the notes. They did not ask then for a return of the notes or do anything to indicate that they did not intend to be bound by them. On the contrary, they acted from that time as though the syndicate was composed of themselves alone, ignored Lee in the matter and collected and retained the earnings of the horse for themselves until he died. The vendor discounted the notes with the plaintiffs, who proved that they had no notice or knowledge of any fraud or irregularity in obtaining them:—Held, that

the defendants, by their course of conduct, had elected to affirm the purchase, and could not now repudiate their liability on account of any fraud or misrepresentation in obtaining their signatures. Per Dubec, C.J.:—The plaintiffs, being holders for value without notice of any fraud or irregularity, were entitled to recover against the defendants, notwithstanding the defence set up that they were only to be liable on condition that Lee joined with them.

First National Bank v. McLean, 16 Man. R. 32.

—Demand note—Notice of dishonour to indorser.]—It is necessary before action to give notice of dishonour to an indorser of a demand note.

Royal Bank of Canada v. Kirk, 13 B.C. R. 4.

—Promissory note—Holder—Equitable set-off against drawee.]—One Maloney, to secure a claim of $867.00, endorsed to the administrators of the estate of John S. Ewart, a promissory note made in his favour by the defendant. At the same time it was arranged that the administrators should hold the balance of the proceeds in trust, first to pay certain other claims against Maloney and the residue to pay over to him. Subsequently, but before the note became due, Maloney executed an assignment to the plaintiff of all of his interest in the moneys secured by the note in trust to pay the claims previously arranged for and certain additional claims amounting to more than sufficient to exhaust the proceeds. The administrators before action endorsed the note to the plaintiff, taking from him an agreement to protect their interest. The defendant claimed to be entitled to deduct from the amount payable by him certain indebtedness of Maloney to him incurred in some collateral transaction, on the ground that the assignment was void under Rev. Ord. (1888), c. 49, or that it was no more than an assignment of a chose in action, and that the plaintiff took subject to the equities between the maker and the payee: —Held, affirming the judgment of Rouleau, J., that the assignment, having been procured by pressure, was not void; that the administrators at all events were holders in due course, and the plaintiff could rest upon their title; and that there could, therefore, be no set-off against the plaintiff.

O'Brien v. Johnston, 3 Terr. L.R. 50.

—Holder in due course—Rescission of contract—Plea of fraud.]—(1) The indorsee of a promissory note made payable with interest, payable annually, who acquired the note after default in payment of one of the annual interest instalments and with knowledge of the default, is not a holder of the note in due course as defined by s. 29 of the Bills of Exchange Act, 1890, and the defences of fraud and misrepresentation set up by the makers of the note against the payees are available as against such indorsee. Defendants, who had given their promissory notes for the price of a horse purchased by them, had been defrauded in the transaction, but did not acquire certain knowledge of the fraud until after the death of the horse:—Held, (1) That they were not too late in exercising their right to rescind the contract, although they took no steps to do so until they set up the plea of fraud in this action. (2) Defendants had a right to rescind without restitution in this case, as the horse had died without any default or neglect on their part.

Moore v. Scott, 16 Man. R. 492.

—Promissory note—Instalments of interest —Transfer after default to pay interest— "Overdue" bill—Notice — Holder in good faith.]—Where interest is made payable periodically during the currency of a promissory note, payable at a certain time after date, the note does not become overdue within the meaning of ss. 56 and 70 of the Bills of Exchange Act, merely by default in the payment of an instalment of such interest. The doctrine of constructive notice is not applicable to bills and notes transferred for value.

Union Investment Company v. Wells, 39 Can. S.C.R. 625.

—Promissory note—Fraud in procuring — Discount—Good faith.] — L. and others, signed promissory notes each for the amount of ten shares in a company formed to manufacture rotary engines under an invention of the payee who fraudulently misrepresented to them the prospects and intentions of such company. At the same time each maker signed an application for ten shares. The payee and T., the assignee of his patent of invention, induced W. to discount these notes and received a portion of the proceeds, part being retained by W. in payment of debts due him from these two parties. On the trial of actions by W. on the notes the evidence of T., who has absconded, was taken under commission and he swore that the form of application signed by the respective defendants had been shown to W. before the notes were discounted. W. denied this and swore that he had been told that the notes were given in payment of stock held by the payee:—Held, that the evidence of W., on whom the onus of proof rested, could not be accepted; that the whole testimony and attendant circumstances showed that W. suspected that the proceeds of the notes belonged to the company; and, having discounted them without inquiry as to the

right of the payee and T. to receive these proceeds, he was not in good faith and could not recover.

Lockart v. Wilson, 39 Can. S.C.R. 541.

—Promissory note—Garnishment.]—An instrument in the following form:—"Winnipeg, June 20th, 1907. Received from A. B. the sum of five hundred dollars advance to be repaid at expiration of 9 months. C. D." is a negotiable promissory note, and the money payable under it is not attachable by garnishment proceedings before its maturity.

Halsted v. Herschmann, 18 Man. R. 103.

—Promissory note given for goods to remain property of payee — Memorandum thereon—Endorsement.]—In an action by an endorsee of a document in the form of an ordinary promissory note, but having on the face of it a memorandum, "Given for Suffolk stallion 'Hs Grace,' same to remain the property of J. H. Truman until this note is paid":—Held, that the document was not a promissory note and that the rights of the parties under it could consequently not be assigned by the simple endorsement. Bank of Hamilton v. Gillies (1899), 12 Man. R. 495; Kirkwood v. Smith (1896), 1 Q.B. 582, applied.

Frank v. Gazelle Live Stock Association, 6 Terr. L.R. 392.

— Estoppel—Failure to defend action on prior note forged by same person — Forgery.]—A person whose indorsement on a promissory note has been forged is not estopped from denying his signature by the fact that he had allowed judgment to go against him by default in a previous action by the same plaintiff on an indorsement of his name on a prior promissory note forged by the same person, although the forger negotiated the second note after such judgment.

Simon v. Sinclair, 17 Man. R. 389.

—Proof of presentment of promissory note payable at a particular place.]—Although a promissory note is payable at a particular place, it is not necessary, in an action upon it in a County Court, to allege presentment at that place in the particulars of claim, or to prove presentment at the trial unless the defendant has expressly set up non-presentment in his dispute note.

Teague v. Scoular, 17 Man. R. 593.

—Promissory note—Collateral security — Fraud—Holder in due course.]—A bank or person, to whom the promissory note of a third person is endorsed by way merely of collateral security, for an indebtedness then current, but which has not yet matured, takes such promissory note without giving consideration therefor (at any rate in the absence of a new agreement, and provided there is no right in the principal debtor to anticipate the date of payment), and such an endorsee is not a holder in due course. W. was induced by fraudulent misrepresentation and concealment on the part of the company to subscribe for shares in a limited company. In payment he made promissory notes payable to the company, the notes were endorsed to the bank of C., as collateral security for advances made by the bank to the company, not yet due or matured. After such endorsement, but prior to the maturity of the indebtedness of the company to the bank, A. notified the bank of the fraud:—Held, that under the facts as stated the bank gave no consideration, was not a holder in due course, and that the maker could successfully plead fraud as a defence in an action by the bank on the notes. A defendant is, under such circumstances, entitled to rely on the defence of fraud, and to bring in the company as third parties, notwithstanding that the company is in liquidation and the defendant has not taken steps to have his name removed from the list of shareholders, if the defendant has repudiated his contract to take shares with reasonable promptitude, and the action is begun before the commencement of winding-up proceedings. In such a case non constat that the third party notice is not issued until after commencement of winding-up proceedings.

Canadian Bank of Commerce v. Wait, 1 Alta. R. 68.

— Association or syndicate—Liability of subscribers where full number not complete—Promissory note—"Holder in due course"—Interest appearing on face of note to be overdue.]—Where, at the instigation of the seller of certain goods, a number of persons agreed to form an association and to subscribe for shares of stock, and it was represented that the association should consist of a definite number of subscribers, unless the full number of bona fide subscribers were secured, and the stock all taken up by them, the subscribers who have taken shares are not liable on a joint (?) promissory note, not indorsed to and held by a holder in due course, made by them in payment of the goods sold and delivered, at least, under the circumstances in this case. When a promissory note shows on its face that interest thereon was overdue at the time of its transfer, the transferee is put upon inquiry before purchasing, and it is a circumstance which, coupled with other suspicious circumstances, will prevent the transferee being deemed a holder in due course.

Peters v. Perras, 1 Alta. R.1.

—Expiration of time for payment of promissory note.]—Held, following Kennedy v.

Thomas (1894), 2 Q.B. 759; 63 L.J.Q.B. 761, that a promissory note does not become due when it is presented for payment and dishonoured on the last day of grace and the holder thereof cannot take action for the recovery of the amount of such note until the expiration of such day of grace, and a seizure under a chattel mortgage given as collateral security to a promissory note effected after dishonour of the note, but before the complete expiration of the last day of grace, is premature and unlawful. Held, also, that the measure of damages in an action for unlawful seizure is the value of the goods seized less the amount due to the party making the seizure by virtue of the security under which the seizure was made.

Westaway v. Stewart, 1 Sask. R. 200.

—Bill drawn to order of bank—Not indorsed—Action by drawer.]—Plaintiff, the drawer of a bill of exchange accepted by the defendant, brought action thereon. The bill was drawn payable to the order of the Dominion Bank, and was not indorsed by the bank, but in the statement of claim it was alleged that upon dishonour the bill was returned by the bank to the drawer, who was then the holder thereof. The defendant appeared and filed a defence which was struck out on a motion for speedy judgment. On such motion the defendant filed no affidavit, but relied on the objection that the bill had not been indorsed to the plaintiff, who could not therefore, maintain the action:—Held (per Wetmore, C.J., and Johnstone, J.), that as the defendant had, in answer to the motion, raised a difficult question of law which might be an answer to the plaintiff's claim, he should be permitted to defend. Per Newlands and Prendergast, JJ., that it was not necessary for the plaintiff in pleading to allege any facts which would be presumed in his favour, and it was therefore unnecessary to allege that the Dominion Bank were the holders for value, and it might be presumed that when they returned the bill to the plaintiff they were paid by him, and it was therefore unnecessary to allege payment in order to entitle the drawer to recover. (2) That it was not necessary for the Dominion Bank to indorse the bill to the drawer, as when the bank was paid the bill ceased to be negotiable, and the only right of action which exists is the right of action against the acceptor by the drawer, which he acquires not through the payee but by virtue of his original position as drawer.

Velie v. Hemstreet, 2 Sask. R. 296.

—Indorsement of note payable to order of an unincorporated non-trading association.]—The indorsement of a promissory note payable to the order of an unincorporated non-trading association such as a trade union with the name of the association and the signatures of two or more of its officers will not enable the person to whom it is delivered so indorsed to sue the maker upon it. There is no valid method of indorsement of such a note, so as to pass a title to it under the law merchant, except by the signature of all the members of the association.

Cooper v. McDonald, 19 Man. R. 1.

—Promissory note obtained by fraud—Transfer.]—Decision 1 Alta. R. 201, reversed and action maintained.

Peters v. Perras, 42 Can. S.C.R. 244.

—Promissory note—Directors of company—Descriptive signature.]—A promissory note signed with the name of an incorporated company, followed by the signatures of the various persons, with the description "Dir." or "Mgr." is the promissory note of the company and not of the persons so signing.

Union Bank of Canada v. Cross, 2 Alta. R. 3.

—Promissory note—Small debt procedure—Protest fees.]—Protest fees are recoverable under the Small Debt Procedure, as a liquidated demand.

Cavanagh v. Gilroy, 3 Terr. L.R. 300.

— Promissory notes — Hand-writing — Drunkenness — Incapacity to contract.] — In an action by endorsees of promissory notes against the maker, there was no evidence that the endorsees were holders in due course. The defence set up that the defendant was to the knowledge of the payee so drunk at the time of signing the notes as to be incapable of transacting business:—Held, (1) That knowledge on the part of the payee of the defendant's state of mind was immaterial. (2) That the fact that defendant was drunk at the time the notes were signed was prima facie evidence that the payee did have such knowledge, so as to cast on the plaintiffs the onus of proving want of knowledge on the part of the payee. (3) That in the absence of evidence on the part of the plaintiffs that they were holders in due course, they cannot under the circumstances recover.

Alloway v. Hutchison (No. 2), 6 Terr. L. R. 425.

—Promissory note — Assignment — Plaintiff's right to sue.] — The statement of claim was based on an alleged promissory note made by defendant, payable to the order of one Bertrand and assigned to the plaintiff. The defendant denied such assignment. The evidence disclosed that the alleged assignment was not written on the note, but on a separate piece of paper, and purported to assign a "promissory note":—Held, that the assignment, not being written on the note, was invalid and bad; and

that, assuming the instrument sued on not to be a promissory note, the assignment was invalid and bad, as it did not contain apt words as required by R.O. 1888, c. 50.
Hamilton v. Bjarnason, 3 Terr. L.R. 398.

—Bills of exchange—Order for payment—Notice of dishonour—Verbal agreement to give a reasonable time for payment.]—Defendant being indebted to plaintiff, gave to the plaintiff at his request on account, an order for $31.50 on one Thompson payable to plaintiff or order on the understanding that the plaintiff would give the defendant a "reasonable time" to pay the balance of his indebtedness. The plaintiff duly presented the order to Thompson, who refused to accept for more than $20.00, claiming that was all he owed the defendant. The plaintiff thereupon, without returning the order or giving any notice of dishonour, issued a writ for the full amount of his claim:—Held, that notice of dishonour was necessary to support the action quoad the amount represented by the order. Held, further, that a promise to give a "reasonable time" for payment is not too indefinite. Held, further, that the agreement to give the defendant a reasonable time was a binding agreement, under the circumstances.
Smith v. Clink, 3 Terr. L.R. 229.

—Promissory note — Signature — Signed in blank — Note overdue — Indorsees — Innocent holder.] — The plaintiffs were indorsees of an overdue promissory note signed in blank by defendant and given by defendant in payment of certain indebtedness. By error the note was filled up for more than the amount of defendant's indebtedness. Plaintiffs were innocent holders: Held, that notwithstanding the provisions of s. 20, sub-s. 1, and l. 30, sub-s. 1 of the Bills of Exchange Act, 1890, this constitutes an equity to which the note was subject, and plaintiffs could not recover anything more than the payee could had he sued on the note, but that, as plaintiffs were innocent holders, and defendant had set up numerous defences that failed, thus driving the plaintiffs to trial, the plaintiffs were entitled to costs of suit.
Fraser v. Ekstron, 6 Terr. L.R. 464.

—Lien notes — Not equivalent to promissory notes.]—
New Hamburg Manufacturing Co. v. Weisbrod, 4 W.L.R. 125 (N.W.T.).

—Alteration in indorsement of promissory note—Holder for value without notice — Partnership for non-trading purposes.]—A bank, with knowledge that the partnership is a non-trading one, has no right to discount for one of the partners for his own purposes a promissory note made in favour of the firm, although indorsed in the name of the firm, and will be liable to account to the other partners for his share of the proceeds in the absence of circumstances creating an estoppel. (2) The conversion of a special indorsement on a promissory note into an indorsement in blank by striking out the words "pay to the order of the Home Bank of Canada," above the signatures by the firm and the individual partners on the back, was a circumstance sufficient to put the defendant bank on its inquiry as to the right of one of the partners to discount it for himself.
Pickup v. Northern Bank, 18 Man. R. 675.

—Holder in due course—Suspicious circumstances—Notice—Absence of enquiry—Evidence of previous similar transactions between the payee and endorsee.]—It being shown that a maker of a promissory note has been induced to sign it by fraud, if there is evidence sufficient to raise a doubt in the jury's mind as to the good faith of an endorsee, though the evidence may not conclusively establish bad faith on his part, the Court will not interfere with the finding of the jury that the endorsee had not satisfied the burden cast on him by s. 58—Bills of Exchange Act,—of establishing good faith. Evidence that the endorsee had on previous occasions bought promissory notes from the same payee under similar suspicious circumstances, and had heard rumours of their fraudulent nature, is admissible to prove notice or suspicion in the mind of the endorsee, and that he deliberately refrained from enquiry.
Oldstadt v. Lineham, 1 Alta. R. 416.

—Verbal agreement for extension.]—The date of payment expressed in a promissory note cannot be varied by parol evidence.
Vachoe v. Straton, 2 Sask. R. 72.

—Banking.]—See that title.

—Holder in due course—Defect in title — Indorsement after maturity.]—
Smith v. Galbraith, 1 W.L.R. 227 (Man.).

—Fraud and misrepresentation — Notice — Inquiry — Failure of consideration.]—
Lerner v. Dawson, 11 W.L.R. 677 (Man.).

—Fraud or duress—Holder in due course.]—
Gibson v. Coates, 1 W.L.R. 556 (Man.).

— Demand note — Notice of dishonour—Indorser.]—
Royal Bank of Canada v. Kirk, 5 W.L.R. 432 (B.C.).

—Indorsement by payee to agent for collection.]—
Jones v. England, 5 W.L.R. 83.

—Action on, by curators of insolvent estate of payee—Claim of set-off—Payments made by defendant at request of payee.]—
Kent v. Specter, 6 W.L.R. 14 (Man.).

—Instrument in form of note with additional provisions — Interest — Accelerating clause.]—
Davis v. Butler, 7 W.L.R. 85 (Man.).

—Indorsement by debtor to creditor—Question whether as payment or security—Presentment — Waiver.]—
Foster v. Woodworth, 8 W.L.R. 688 (Sask.).

—Action on—Goods re-taken — Contract — Interest — Application of payments—Statute-barred debt — Claim under lien.]—
Carswell Co. v. Hagel, 9 W.L.R. 462 (Man.).

— Acceptance — Condition — Notice to holder of bill—Equity affecting negotiability—Liability of acceptor.]—
Goldstein v. Gillis, 10 W.L.R. 109 (B.C.).

— Promissory note — Payment — Retirement — Subsequent reissue under new arrangement, to secure existing debt.]—
Vachon v. Lefebvre, 12 W.L.R. 203 (Y. T.).

—Payment by plaintiff — Liability of defendant as joint maker—Contribution.]—
Duncan v. Tobin, 2 W.L.R. 396 (B.C.).

—Accommodation notes — Evidence — Set-off.]—
Ladue Gold Mining & Development Co. v. Prudhomme, 2 W.L.R. 482 (Y.T.).

— Note — Consideration — Purchase of seed grain — Warranty, implied or express —Breach.]—
Lawton v. Reid, 2 W.L.R. 240 (Terr.).

—Indorsement for limited purpose—Failure of purpose—Fraudulent use by maker for another purpose.]—
Stirton v. Harvey, 8 W.L.R. 185 (Man.).

BILLS OF LADING.

See RAILWAY; SHIPPING.

BILLS OF SALE AND CHATTEL MORTGAGES.

Ontario.

Chattel mortgage—Renewal statement—Statement of payments.] — A renewal statement filed by a chattel mortgagee was not signed, but on the back was an affidavit, signed and sworn by the mortgagee, referring to the statement:—Held, a sufficient compliance with R.S.O. 1897, c. 148, s. 18. Barber v. Maughan (1877), 42 U.C.R. 134, followed. The statement of payments made did not set forth in detail the date and amount of each payment, but only the total sum paid. It went on to state "that no payments have been made upon the said mortgage;" but it clearly showed that payment of a certain sum had been made on account of interest, and no other payments:—Held, that the statute had been sufficiently complied with.
Christin v. Christin, 1 O.L.R. 634.

—Agreement to give mortgage—Mortgage subsequently given — Right to rely on agreement—R.S.O. 1897, c. 148, s. 11.]—Where an agreement to give a chattel mortgage is duly made and registered under R.S.O. 1897, c. 148, s. 11, and subsequently a mortgage is made and registered, the giving of such mortgage whereby the legal title becomes vested in the mortgagee does not revest in the mortgagor the equitable title, which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee is enabled to rely on it where the mortgage is ineffectual for any reason. Judgment of Boyd, C., 2 O.L.R. 128, affirmed.
Fisher v. Bradshaw, 4 O.L.R. 162 (C.A.).

—Chattel mortgage—Executed in blank—Filled in.]—Plaintiff as assignee of the estate of H. M. Craig, of Huron county, brought action to recover damages for alleged illegal seizure and sale of Craig's goods. Defendants seized the goods, before plaintiff's assignment, on chattel mortgages, which Craig had signed in blank and which were filled in later according to Craig's instructions. Teetzel, J., held, that the mortgages were valid, despite the manner in which they were made. Counterclaim was also dismissed. The Divisional Court affirmed above judgment on the ground that the statute was sufficiently complied with.
Wade v. Bell Engine & Thresher Co., 1 O.W.N. 1052, 16 O.W.R. 636.

—Chattel mortgage — Consideration.] — Under s. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee may be liable as an indorser to the latter. The provisions of the Ontario Chattel Mortgage Act required the consideration of a mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated, not their legal effect.
Robinson v. Mann, 31 Can. S.C.R. 484, affirming in result 2 O.L.R. 63 (C.A.).

—Chattel mortgage—Statement of rate—Interest Act (Can.) 1897—Waiver.] — A chattel mortgage provided for the payment of $125, the principal money, in consecutive monthly instalments of $5 each, and for payment of $5 more with each instalment for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897:—Held, that this being an Act passed on grounds of public policy for the benefit of borrowers, its application could not be waived and that the mortgagee was entitled to interest only at the legal rate.

Dunn v. Malone, 6 O.L.R. 484 (D.C.).

Affidavit of bona fides—Mistake in statement of amount advanced—Limitation of security—After-acquired goods — Description of premises.]—In an action against a bank for conversion of goods covered by a chattel mortgage to the plaintiffs, an incorporated company, it appeared that the affidavit of bona fides was made by the president of the plaintiffs, and stated that the mortgagor was justly and truly indebted to the mortgagee in the sum of $5,000, instead of $5,066.74, which was the amount stated in the mortgage. The mortgage was given in good faith, and was intended to secure $5,066.74 actually advanced:—Held, that the mortgage was not invalidated by the mistake, but should be considered as so limited as to be a security for $5,000 only. —It was not necessary to consider whether a document asserted by the bank to be a security under s. 88 of the Bank Act was of any value in view of s. 90 of the same Act; but semble, that, if it should be held to be in contravention of that section, the bank, as simple contract creditors of the mortgagor, semble, that, if it should be held to be in contravention of that section, the bank, as simple contract creditores of the mortgagor, would have no status to attack the plaintiffs' chattel mortgage.—Held, that the chattel mortgage covered the goods converted by the bank, being sufficiently worded to cover after-acquired goods, and the premises whereon the goods were or were to be brought being specifically described. Held, also, that an assignment of book debts by the mortgagor to the bank, without notice of the assignment of the same to the company under the chattel mortgage, followed by notices to and collections from the debtors, vested the debts and the proceeds thereof in the bank against the claim of the company, who had given no notice to the debtors: Judicature Act, s. 58 (5).

A. E. Thomas, Limited, v. Standard Bank of Canada, 1 O.W.N. 379, 548 (D.C.).

—Chattel mortgage—Renewal statements —Payments on account—Repetition in subsequent statements.]—Successive renewal statements of a chattel mortgage need not show all the credits on account of the mortgage; it is sufficient if each statement contains the payments made since the last renewal. Christin v. Christin (1899), 1 O.L.R. 634, specially referred to, Kerr v. Roberts (1897), 33 C.L.J. 695, overruled.

Rogers v. Marshall, 7 O.L.R. 291 (D.C.).

—Bills of sale—Security in form of absolute sale—Non-compliance with Chattel Mortgage Act—Invalidity.]—When a transaction is, as it was in this case, in fact, a security for an existing debt, the parties cannot evade compliance with ss. 2 and 3 of the Bills of Sales and Chattel Mortgage Act, R.S.O. 1897, c. 148, relating to such a transaction, merely by adopting the form of an absolute sale. If, however, the real transaction is a sale with a right of repurchase upon certain terms, the vendor can only be required to observe the requirements of s. 6 of that Act.

Hope v. Parrott, 7 O.L.R. 496 (C.A.).

—Sale of goods—Agreement for chattel mortgage or hire receipt.]—B. sells to P. on time, a quantity of machinery, and the agreement of sale contains a provision by which P. agrees to give B. a hire receipt or a chattel mortgage as security. A few days after L. had brought an action against P. for the price of goods sold and delivered, P. gives B. a chattel mortgage:—Held, that the mortgage in question was given with intent to delay, hinder and defraud creditors, and was void. Held, per Taschereau, J., approving the judgment of Hagarty, C.J.O., that the equitable doctrine under which the mortgage was unheld in Clarkson v. Sterling (15 Ont. App. R. 234), did not apply, first, because there was no absolute contract to give a chattel mortgage—the contract was alternative, either a hire receipt, or a chattel mortgage;—and, secondly, the mortgage given was not that contracted for but included additional goods.

Brown v. Lamontagne (1889), 1 S.C. Cas. 20.

—Chattel mortgage—Renewal—Time of filing—Computation of year.]—In computing the year within which the renewal of a chattel mortgage must be filed under s. 18 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, c. 148, the day on which the mortgage was filed is to be excluded.

McCann v. Martin, 15 O.L.R. 193 (D.C.).

—Chattel mortgage — Affidavit of bona fides—Affidavit upon renewal—President of incorporated company.]—Under s. 10 of the Bills of Sale and Chattel Mortgage Act, as enacted by 3 Edw. VII. c. 7, s. 30

(O.), the affidavit of bona fides and the affidavit required upon the renewal of a chattel mortgage, where the mortgagees are an incorporated company, if made by the president, vice-president, manager, assistant manager, secretary, or treasurer of the company, need not state that the deponent is authorized by resolution of the directors in that behalf, nor (Riddell, J., dissenting) that he is aware of the circumstances connected with the mortgage and has personal knowledge of the facts deposed to; the words "officer or agent" in the section, according to its proper construction, being confined in their application to an officer or agent who is not one of the principal officers above enumerated. Bank of Toronto v. McDougall (1865), 15 C.P. 475, and Freehold Loan and Savings Co. v. Bank of Commerce (1879), 44 U.C.R. 284, applied and followed, notwithstanding the amendments to the statute. Per Mabee and Riddell, JJ., that the statute does not make it imperative that the position of the deponent should be sworn to:—Semble, per Britton, J., that a creditor, although suing on behalf of himself and all the creditors of his debtor, the latter not having made an assignment for the benefit of creditors not having been declared an insolvent, cannot follow the proceeds of goods taken under a conveyance not void for fraud in fact, but simply declared invalid by reason of non-compliance with the Bills of Sale and Chattel Mortgage Act.

Universal Skirt Manufacturing Co. v. Gormley, 17 O.L.R. 114.

Quebec.

—Transfer of ownership of movables as security for debt, without transfer of possession—Title of transferee as against other creditors—Articles 583, 1025, 1027 C.C.]—The defendant, by an agreement in writing, transferred to the opposant, his creditor, the ownership of his furniture, as security for opposant's claim. The transfer was made subject to a right on the defendant's part to recover the ownership on paying the amount of his indebtedness, for which he had given the opposant a demand note. By the contract transferring the effects, it was agreed that the opposant should have the right to take possession of the effects if the note were not paid, and that the effects should be left in the defendant's possession until he had made default to pay the note. The note had not been paid, but some small payments had been made on account, and judgment had been obtained by the opposant on the note. The effects transferred having been seized in the defendant's possession by the plaintiff, a judgment creditor, the opposant claimed them as his property, under the transfer:—Held, that where there is no evidence of intention to defraud or of simulation, a debtor from whom his creditor demands security, can, for the purpose of furnishing such security, transfer to the creditor the ownership of movable effects, so as to give the latter, without his taking possession the movables transferred, a good title thereto as against other creditors of such debtor, including even a creditor anterior to the one whose claim was secured by the transfer.

Creed v. Haensel, 24 Que. S.C. 178 (Doherty, J.).

—Agreement to convey movables—Breach of contract—Revendication—Personal action.]—An agreement by which the maker of a note undertakes, in case it is not paid at maturity, to transfer to the payee, as security, certain specified movables of which he retains the possession in the meantime, does not give the payee the right to revendicate the movables after the note falls due and remains unpaid. The proper remedy in such a case is a personal action for breach of contract.

Savard v. Tremblay, 30 Que. S.C. 423.

Eastern Provinces.

—Chattel mortgage—Verbal license to mortgagor to sell or exchange mortgaged property—Ordinary course of business.]—The defendant, a farmer, executed a chattel mortgage to one M., whereby he assigned to M. all the goods, chattels and property mentioned in a schedule thereto annexed, and also any and all the property that might thereafter be brought to keep up the same, in lieu thereof and in addition thereto, either by exchange or purchase. The instrument also contained a proviso that the defendant should remain in possession of the mortgaged property until default with power to use the same in the ordinary way while so in possession, but with full power, right and authority to M. to enter and take possession of the property in case of default of payment, or on the death of the defendant, or in the event of the seizure of the property at the suit of any creditor, or in the event of the defendant disposing of or attempting to dispose of or make away with said property or any part thereof without the written consent of M. Included in the property mortgaged was a stallion "Prince Albert," which a few months after the execution of the mortgage and before any default on the part of the defendant, but without the written consent of M., he exchanged with the plaintiff for a horse belonging to him. After the exchange plaintiff, having discovered that the stallion was covered by the mortgage, attempted to avoid the transaction, sending the stallion back to the defendant and demand-

ing the return of his own horse, which the defendant refused to deliver up. The plaintiff thereupon replevied his horse, and a claim of property having been put in by the defendant, the same was decided in his favour by the County Court Judge, who relied upon a verbal license that had been given to the defendant before the execution of the mortgage by the agent of M., whereby the defendant was authorized in general terms to use the mortgaged property in the way he had. Upon an appeal being taken from this decision, it was held (per Landry, Barker and Van Wart, JJ., Tuck, C.J., and Hanington, J., dissenting), that, as the mortgage must be taken to contain the whole contract entered into between the defendant and M., the Judge of the Court below was in error in giving any effect to a mere verbal license, which preceded the mortgage and which was not in harmony with many of its provisions; and further, held (per Landry, Barker, VanWart and McLeod, JJ., Tuck, C.J., and Hanington, J., dissenting), that it was clearly a condition of the mortgage and the intention of the parties thereto that the defendant should be allowed to sell or exchange the mortgaged property, provided such sale or exchange was in the ordinary course of the defendant's business, and as to whether this exchange had been in the ordinary course of the defendant's business or not was a question of fact, which had not been passed upon by the Court below, there should be a new trial in order to have that point determined.

McPherson v. Moody, 35 N.B.R. 51.

—Conveyance from husband to wife — After-acquired property—Mistake—Fraudulent conveyance—N.B. Bills of Sale Act (1893).]—J. E. F., who was the husband of the plaintiff and a livery stable keeper, being indebted to C., in December, 1895, gave him a chattel mortgage of his stock, which was in the terms following: "All and singular the goods, chattels, and property mentioned and set out in the schedule hereunto annexed, marked A, which is to be read in connection with these presents and form a part thereof, and also any and all the property that may hereafter during the continuance of these presents be brought to keep up the same in lieu thereof, and in addition thereto, either by exchange or purchase, which so soon as obtained, and in actual or constructive possession of the said party of the first part, shall be subject to all the provisions of this indenture." The schedule was as follows: "Eight horses and harnesses now in livery stable owned by said J. E. F. Six wagons in storehouse. Four pungs, coach harness, buffaloes and robes now in said stable." In March, 1896, J. E. F. being indebted to the plaintiff, his wife, to the extent of six hundred dollars and upwards, gave her a chattel mortgage, in which the property conveyed was described in almost the same words as were used in the mortgage to C.; but the schedule thereto, after enumerating specifically a number of articles, concluded as follows: "Also all other goods, furnishings and articles and materials now or hereafter during the continuance of these presents, used in connection with the livery stable, now owned by the said J. E. F., and all property hereafter acquired therein." In July, 1896, C. assigned to the defendant his mortgage, which had been reduced to two hundred and seventy-two dollars for a consideration of two hundred and fifty dollars, but the assignment was silent as to after-acquired property. In September, 1896, J. E. F. gave a further chattel mortgage to defendant, which covered all the property he had formerly mortgaged to plaintiff, and shortly after handed him a delivery order authorizing defendant to take possession of everything connected with the livery stable business, which defendant did. Plaintiff had also given to her husband one hundred dollars with which he was to buy for her a phaeton buggy. He, without her knowledge, bought a buggy on credit for one hundred and forty dollars, which he delivered to his wife, and which was accepted by her. This buggy, though not mentioned in any of the mortgages, was seized by defendant when he took possession under the delivery order. The mortgage from J. E. F. to plaintiff was first drawn to secure the sum of five hundred dollars, but afterwards and before execution, the sum secured was changed to six hundred dollars in every place except in the recital, where the word "five" was inadvertently left in place of a six. In an action of trover for the conversion of the phaeton buggy and all the property conveyed to secure the plaintiff's debt, except such as was covered by the mortgage to C.:—Held (1) That the mortgage was not invalid by reason of its having been made by the husband directly to the wife. (2) That there was no evidence that it was made to delay or hinder creditors. (3) That it contained a sufficient description of the mortgaged property to satisfy the Bills of Sale Act (1893); and that there was no such untrue statement in the affidavit attached to the mortgage as would invalidate it, the evidence affording a satisfactory explanation of the mistake in the recital. (4) That it was sufficient to cover after-acquired property. (5) That it was not bad under the Act. 58 Vict., c. 6. (6) That the mortgage to C. and the assignment thereof to. defendant were insufficient to cover after-acquired property. (7) That the circumstances under which the phaeton buggy was purchased made it the

separate property of plaintiff, and as such not liable to seizure by defendant.

Fraser v. Macpherson, 34 N.B.R. 417. (Affirmed on appeal to the Supreme Court of Canada).

— Bills of sale—Document having the effect of—Effect of possession under in absence of filing, as against subsequent attacher.]—Plaintiffs sought a declaration that a transfer of a stock of goods and merchandise from the defendant, J. H., to his brother, G. H., was void under the provisions of c. 11 of the Acts of 1898, relating to Assignments and Preferences by Insolvent Persons, and under ss. 1, 3 and 4 of the Revised Statutes (5th Series), c. 92, "Of the prevention of frauds on creditors by secret bills of sale," because it was not filed in the office of the registrar of deeds for the county. The transfer in question was a document executed by J. H., January 12th, 1899, under which he transferred to G. H. a stock of goods in store to the amount of $1,500, and agreed to pay for the same by paying notes of B. & Co. to the amount of $500, and by giving ten notes for the balance, of $100 each, one payable every six months. The document of transfer concluded:—"The said G. H. to hold the goods in store, and whatever goods may come in shall become the property of the said G. H. until the said G. H. claim is paid in full. If I fail to pay any of the above named notes, the said G. H. can take over possession of the business, and all stock in the said store at the time of me failing to meet or pay the above or aforesaid named notes." This document was not filed in the registry of deeds for the county, and was not accompanied by any affidavit. After G. H. had taken possession of the stock of goods under the power to do so contained in the document, plaintiffs attached the goods as the property of J.H., an absent or absconding debtor, and sought to have the transfer to G. H. set aside on the grounds above mentioned. G. H. counterclaimed against plaintiffs for the conversion of his goods:—Held, affirming the judgment of the trial Judge, and dismissing plaintiff's appeal, that the document in question came within the term "Bill of Sale," as defined by R. S. (5th Series), c. 92, s. 10, and should have been filed, and was liable to be defeated for non filing up to the time that G. H. took possession under it. Held, also, that G. H. did not come within the category of a "hirer, lessor or bargainor" within the meaning of s. 3 of c. 92, and that such section had therefore no application.

Manchester v. Hills, 34 N.S.R. 512.

—Property remaining in possession of grantor—Provision for redemption not reduced to writing — Defeasance — Verbal agreement.]—Defendant, a constable, levied upon goods and chattels in the possession of S. under an execution issued on judgment recovered against S. by M. At the time of the levy the goods were covered by a bill of sale to plaintiff to secure the sum of $150. The document purported on its face to be an absolute transfer with a right to immediate possession, but it was referred to in the affidavit as a bill of sale, and the evidence showed that there was an understanding, not reduced to writing, that S. should get the property back on payment of the amount secured. After the filing of the bill of sale the property was allowed to remain in the possession of S.:—Held, that the fact of the property remaining in the possession of the grantor was not a fraud in itself, but a matter for the consideration of the trial Judge, and he having found that the amount named as the consideration was due from the grantor to the grantee, and that the transaction was not tainted with fraud, and the amount of property transferred not being excessive, there was no reason for disturbing his finding. Held, that the same principle would apply to the fact that the provision for redemption of the property covered was not reduced to writing. Held, that the verbal agreement for the return of the property was not a "defeasance" in the sense in which that term is used, and that the section of the Act which requires every defeasance to which a bill of sale is subject to be filed with it, was not applicable. The bill of sale having been made and filed prior to the passage of the Bills of Sale Act of 1899. Held, that it was validly filed, subject to the special clause as to the filing of a renewal statement, and, the time prescribed for the filing of a renewal statement not having elapsed, that the bill of sale was in no way affected by such provision.

Fraser v. Murray, 34 N.S.R. 186.

—General transfer to bank—Bank Act.]—See BANKING.

Armstrong v. Buchanan, 35 N.S.R. 559, 1 C.L.R. 506.

—Bill of sale—Absence of fraudulent circumstances—Possession—Affidavit of bona fides.]—A bill of sale of a business was held by the vendor for the benefit and protestion of plaintiff, who had indorsed certain promissory notes given by the vendee in payment of the purchase money. This bill of sale having expired, in consequence of failure to renew it under the provisions of the Act, plaintiff, in pursuance of an agreement made at the time of the sale, demanded and received a second bill of sale, to secure the amount for which he remained liable in respect

of the original indorsements, as well as certain amounts for which he had become liable as indorser of other promissory notes. There being no question of insolvency on the part of the maker at the time, the second bill of sale was given and no fraudulent purpose, and the terms of the agreement being accurately set forth:—Held, that there was no pretence for holding the bill of sale void under the Statute of Elizabeth. Held, also, that the fact that plaintiff had taken possession under his bill of sale, and was in possession at the time the sheriff made his levy, was sufficient, in the absence of fraud, to enable plaintiff to maintain his action. Held, also, following Creighton v. Reid, 27 N.S.R. 72, that the affidavit to the bill of sale was not bad because it had been sworn before the solicitor by whom the bill of sale was prepared, the rule in the Judicature Act (O. 36, r. 16) referring only to matters litigated in Court, and not to outside matters such as affidavits to bills of sale.

Mosher v. O'Brien, 37 N.S.R. 286.

—Purchase and hiring agreement—Failure to record under Bills of Sale Act—Incomplete clause.]—Plaintiffs, through their agent K., sold to F. a piano for the sum of $300, F. paying a portion of the purchase money in cash and giving his promissory notes for the balance extending over a period of thirty-four months. Immediately after the sale and after receiving delivery of the piano, F. signed a purchase and hiring agreement, under which, upon completion of the payments to be made by him, he was to become owner of the piano, the title to which, in the meantime, remained in the vendors. It was further agreed that in the event of F. becoming insolvent, or attempting to sell or part with the possession of the piano, all rights of F. should cease and the vendors should be at liberty to retake possession. F. sold the piano to the defendant while about one-half of the purchase money was still unpaid:—Held, that the agreement signed by F., having been taken by way of security should have been filed under the provisions of the Bills of Sale Act, R.S. 1900, c. 142, s. 8, in order to be valid against creditors or an innocent purchaser for value, and not having been so filed, plaintiffs could not recover. One of the clauses of the agreement contained a number of blanks which by inadvertence were not filled up at the time the agreement was executed. Held, that the Court could not give effect to the clause in question, but must deal with the agreement as if the clause were not there at all.

Miller v. Blair, 37 N.S.R. 293.

—Chattel mortgage—Approbating and reprobating transaction—Right to redeem—Oral evidence to vary deed.]—The appellants were judgment creditors of one H. and the respondents grantees under a chattel mortgage made by H. The appellants levied on and sold part of the goods described in the mortgage and became purchasers from the sheriff. Respondents claimed goods under the mortgage. The appellants then filed a bill, alleging that the mortgage was made in fraud of creditors, and was also paid off, and asked for a decree that it be set aside or declared satisfied:—Held, that the plaintiff had not made out a case of fraud and the judgment below should be affirmed; that the plaintiff was not entitled to approbate and reprobate the same transaction and that a bill so framed was demurrable; that a bill to set aside a mortgage as fraudulent under 13 Eliz. and asking for an account should be coupled with an offer to redeem; that oral evidence to show a different consideration from that expressed in the deed was admissible.

Halifax Banking Company v. Matthew (1889), 1 S.C. Cas. 251.

—Bill of sale not registered—Fraudulent attempt to defeat.]—A bill of sale of a horse, given to secure a balance due on the purchase price, although unregistered, cannot be defeated by a fraudulent sale to a third party with notice. In an action for the alleged wrongful taking and detention of a horse, defendants relied on an unregistered bill of sale given to the defendant B. by the owner M. in trust to sell the horse, retain a balance due on the purchase price, and pay the balance to M.:—Held, that the bill of sale so given, although unregistered, was not defeated by a fraudulent sale to plaintiff who was not a bona fide purchaser for value, and who had notice of the claim.

McLeod v. Doucette, 38 N.S.R. 151.

—Chattel mortgage—Staying sale—Payment into Court—Amount.]—In a suit by the mortgagor to set aside a bill of sale by way of mortgage, an interim injunction order to restrain a sale by the mortgagee was granted upon condition of the mortgagor paying into Court the amount due the mortgagee. The bill of sale was collateral security for promissory notes, some of which had been indorsed over for value:—Held, that the amount to be paid into Court should not be reduced by the amount of such notes.

Petropolous v. F. E. Williams Company, 3 N.B. Eq. 267.

—Conversion — Bill of sale — Estoppel—Misdirection.]—F. claimed to be the owner of a horse that S. had given her for the board of herself and child. S. being indebted to H., left the province, and H. seized the horse as the property of S., under an

absconding debtor's warrant. While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by persons professing to be acting for F., and a bill of sale of the horse was given by them to H., and the horse was returned to F. The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale, and F. brought an action in the Kent County Court against H. for a conversion of the horse. On the trial the Judge told the jury that the only question was, who was the owner of the horse at the time it was taken, and that the plaintiff was not estopped by the bill of sale from recovering in the action:—Held, on appeal from a judgment affirming a verdict entered on a finding on this direction, that the direction was right.

Hannay v. Fraser, 37 N.B.R. 39.

—Fraudulent misrepresentation—Party to fraud.]—Defendant, as bailiff of D., levied upon goods in premises occupied by R. as tenant of D., but which were claimed by plaintiff under a bill of sale given to secure a debt due for services rendered. The evidence showed, and the trial Judge found, that the wife of R., being entitled to a sum of money held in trust for her, D. and R. were parties to a misrepresentation to the trustee, as the result of which D. obtained possession of a portion of the money so held in trust, it being agreed between the parties that D. should retain a portion of the money in payment of a debt due to him for professional services, and that the balance should be applied by him in payment of the rent of the premises occupied by R. as tenant of D. It was further shown and found that the amount received by D. was more than sufficient to satisfy the debt due him for professional services and the rent due up to the time of the distress:—Held, affirming the judgment appealed from, that as plaintiff was not shown to be a party to the fraud, and was not a privy in any sense which would subject her to its consequences, and as her title to the property in question was founded on a bill of sale given for good consideration, defendant's principal could not be heard to make the contention that the money obtained from the trustee was received under a fraudulent proceeding to which he himself was a party.

Hains v. Leblanc, 38 N.S.R. 528.

—Chattel mortgage — Coercion — Sale of chattel — Executory contract—Return of chattel.]—A lease of store premises was obtained by plaintiffs through a guarantee of payment of the rent by defendant. Subsequently at plaintiffs' request defendant took out in his own name a lease of the premises for a further term of four years upon an agreement to assign it to them in consideration of their purchase from him of an automatic electric piano. The purchase price was $750, upon which a payment of $100 was to be made. The cash payment subsequently was waived and notes for the full amount of the purchase money given. After the purchase, plaintiffs incurred an additional indebtedness to defendant of about $400. This amount together with the notes, some of which were overdue, was outstanding when the plaintiffs asked for an assignment of the lease. This the defendant demurred to giving, desiring to retain the lease as security. The plaintiffs then, but against the defendant's advice, executed a chattel mortgage of their stock-in-trade to him, whereupon he made over the lease to them:—Held, that the chattel mortgage should not be set aside on the ground of having been obtained by coercion. While the rule, that in the absence of agreement the purchaser of a specific chattel cannot return it on breach of warranty, may not apply to a sale providing that the property shall not pass until payment of the purchase price, it will apply in such case where the vendee, in addition to keeping the chattel a longer time than reasonable or necessary for trial, has exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor.

Petropolous v. F. E. Williams Company (No. 2), 3 N.B. Eq. 346.

—Consideration — Substitution for previous bill of sale.]—On the trial of an action to set aside a bill of sale, as made with intent to hinder and delay creditors, evidence was given to show that the bill of sale in question was given in substitution for a bill of sale executed some two years previously, from which a provision as to after-acquired property was alleged to have been omitted, although it was understood and agreed that such provision should be included. Evidence was given on the other hand to show that the written memorandum of instructions for the original bill of sale contained no reference to after-acquired property; that neither the solicitor by whom it was drawn nor a witness who was present at the time, and knew of the terms of the negotiations, made any mention of it; and that on an occasion when both the defendants in this action gave evidence before a commissioner under the Collection Act touching the affairs of the defendant, by whom the bill of sale was made, no such arrangement was suggested. The trial Judge having given judgment for defendants, and the Court being of opinion that the precarious character of the evidence given by defendants at the trial had not been sufficiently considered, a new trial was order-

ed with costs. Semble, as the Collection Act requires the commissioner to file the evidence taken before him, such evidence must be taken in writing, and is the best evidence as to what was said during the enquiry.

Farlinger v. Thompson, 37 N.S.R. 513.

—Secret trade agreement—Power to seize goods and book debts of debtor.]—Plaintiffs in 1898 agreed to supply M. S., dry goods dealers, with goods under an agreement in writing that such goods should remain the plaintiffs' property, and that should the plaintiffs at any time consider that the business of M. & S. was not being conducted in a proper way or to the plaintiffs' satisfaction, plaintiffs should be "at liberty to take possession of our stock, book debts and other assets, and dispose of the same, and after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us." The agreement was not filed under the Bills of Sale Act, c. 142, C.S. 1903. Goods were supplied from time to time under the agreement. On February 17th, 1905, the business not being conducted to the plaintiffs' satisfaction, and M. & S. being insolvent, plaintiffs entered the store of M. & S. by force and took possession of all the stock and effects on the premises, and of the books of account. The stock seized was made up of goods supplied by the plaintiffs of the value of $5,000, and of goods supplied by other unpaid creditors of the value of upwards of $10,000. The account books showed debts due M. & S. of the estimated value of $2,000. Later on the same day M. & S made an assignment for the general benefit of their creditors:—Held, (1) That plaintiffs were not limited to taking possession of goods supplied by themselves. (2) That as to goods supplied by the plaintiffs, as the property therein did not pass to M. & S., the agreement was not within the Bills of Sale Act, and that as to goods not supplied by plaintiffs, as the agreement was not intended to operate as a mortgage, but as a license to take possession, the Act did not apply. (3) That while the license in the agreement to take possession of the book debts did not amount to an assignment, and the powers given by it had not been exercised by notice to the debtors, plaintiffs were nevertheless entitled to them as against M. & S. assignees.

Gault Brothers Company v. Morrell (No. 3), 3 N.B. Eq. 453.

Western Provinces.

—Security under Bank Act s. 74—Advances made to bookkeeper of sawmill owner—Right of bank as against chattel mortgagee.]—Where the bookkeeper of a mill owner, to enable the owner to carry out a contract, bought logs with advance made for this purpose by a bank, which logs were cut at such owner's mill and the bookkeeper indorsed the owner's notes to the bank:—Held, by the Full Court, that the logs, and lumber manufactured therefrom, did not come under a chattel mortgage covering all lumber which might at any time be brought on the premises, and that the bank was not prevented by the Bank Act from taking the usual security in respect of the logs.

Merchants Bank of Halifax v. Houston, 7 B.C.R. 465.

—Buildings—Chattels appurtenant to real estate—Estoppel.]—The defendant gave a chattel mortgage to the plaintiffs on certain buildings, and also a certain ferry, and "the ferry boat with cables, pulley and other machinery used therewith:—Held, 1. That detinue or replevin would not lie for the buildings, at least where the defendant was in possession of the land on which they stood; nor for the ferry boats or attachments, as they were appurtenant to the ferry, which was an easement arising in respect of land. 2. That there was no estoppel by the chattel mortgage, in such sense as to make detinue or replevin an appropriate remedy for property of the character in question.

Stimson v. Smith, 1 Terr. L.R. 183.

—Bills of sale ordinance, N.W.T.—Form of affidavit—Irregularities.] — The Bills of Sale Ordinance, C.O. 1898, c. 43, s. 7, provides that "except, etc., a mortgage . . . . may be made in accordance with Form A . . . . ." Form A, in the place intended for the witness' signature, has the words, "Add name, address and occupation of witness." No form of affidavit of execution is given:—Held, that neither (1) the omission to state the address and occupation of the witness after his signature; nor (2) the omission of the deponent's name and occupation in the body of the affidavit of execution, which was signed by him; nor (3) the omission to state in the jurat a more definite place than "the Northwest Territories"; rendered the registration of the mortgage invalid. The claimant was allowed an adjournment to amend the affidavit supporting his claim.

Commercial Bank of Manitoba v. Fehrenbach, Boake, Claimant, 4 Terr. L.R. 335.

—Chattel mortgage—Lien note—Assignment for creditors—Exemptions.] — The owner of manufactured articles, which were in his possession free from any lien for the unpaid portion of the purchase money, was induced to sign a lien note in favour of the defendant, the manufacturer, containing a description of the goods and

statement that the property in them was to remain in the defendant until paid for in full and that on default the defendant might enter and retake them:—Held, in the absence of evidence to prove that defendant had obtained the lien note by fraud or misrepresentation, that it might be treated as a chattel mortgage on the articles for the debt secured by it as against the person who had signed it. The defendant had not put on the articles his name or any other distinguishing name so as to comply with s. 2 of the Lien Notes Act, R.S.M., c. 87:—Held, notwithstanding, that the lien note was valid as against the maker of it, as the provisions of that section are only for the protection of bona fide purchasers or mortgagees without notice of the claim of the lien holder. The lien note was not registered under the Bills of Sale and Chattel Mortgage Act, 63 and 64 Vict. c. 31, and the maker of it, before maturity of the debt, became insolvent and made an assignment to the plaintiff under the Assignments Act, R. S.M., c. 7, for the benefit of his creditors. Held, that, for want of such registration, the lien note being an instrument intended to operate as a mortgage of goods which remained in the debtor's possession until the assignment, was null and void as against his creditors, including the plaintiff as his assignee by virtue of paragraph (a) of s. 2 of the Bills of Sale and Chattel Mortgage Act. It was doubtful upon the wording of the assignment whether the debtor had reserved any exemption to which he would be entitled under sub-s. (f) of s. 43 of the Executions Act, R.S.M. c. 53, viz.: "The tools . . . and necessaries used by the judgment debtor in the practice of his trade, profession or occupation, to the value of five hundred dollars," within which description the articles came, and it was not shown that the debtor had ever claimed any of them from the assignee or asked to have any of them set aside as exempt, or that he had not got out of other articles of his estate all his exemptions under that sub-section; and the articles were not shown to have depreciated in value. Held, that defendant could not claim the benefit of any such exemption even if it was reserved by the debtor in the assignment.

Cox v. Schack, 14 Man. R. 174.

—Bill of sale—Possession by grantee—Defeasance or condition—Fraudulent preference—Pressure—Authority of partner to execute bill of sale.]—Where the goods comprised in a bill of sale are within twenty-one days after execution of the bill of sale bona fide taken possession of by the grantee, the Bills of Sale Act does not apply, and it is immaterial even though the bill of sale was given subject to a defeasance not contained in it. D. B., A. O. B. and T. G. W. carried on business in partnership as hardware merchants under the name of the Greenwood Hardware Company, the money being supplied by D. B. and A. O. B., and the business being managed by W. The firm became indebted to both the McClary Company and the Howland Company, and the latter, under threat of commencing an action, obtained on the 27th of June, 1900, a bill of sale by way of mortgage of all the firm's assets, and immediately took possession. The bill of sale was executed on behalf of the firm by W., and also by W. personally, D. B. and A. O. B. both being absent; when A. O. B. returned he protested against the execution of the bill of sale, but subsequently withdrew his protest and consented to a sale of the goods on the understanding that plaintiffs and defendants should share pro rata in the proceeds. The arrangement that plaintiffs and defendants should share in the proceeds was not carried out. On the 27th of July, 1900, the McClary Company recovered a judgment in respect of their claim against the firm and obtained judgment under Order XIV., the judgment being entered up against D. B. and A. O. B., and also against the Greenwood Hardware Company, although not a party to the action, and an execution issued was returned nulla bona. The McClary Company thereupon sued to have the bill of sale set aside on the ground that it was fraudulent and void as being given with the intent to defeat and delay creditors, and that W. had no authority to give it on behalf of the firm. Under an order of Court the goods were sold and the proceeds paid into Court to abide the result of the action. The Howland Company recovered a judgment in January, 1901, against the firm for the amount of its indebtedness to them, and an execution issued thereunder was returned nulla bona. At the trial in July, 1902, Martin, J., dismissed the plaintiffs' action, holding that the bill of sale was not a fraudulent preference but was given bona fide under pressure:—Held, on appeal, affirming decision of Martin, J., that the bill of sale was not a fraudulent preference, but was given bona fide under pressure. Per Hunter, C.J., and Drake, J.: W. had implied authority to execute the bill of sale. Per Irving J.:—W. was not the agent of his partners to execute the bill of sale, but they had either ratified his act or become estopped from denying his authority. Per Hunter, C.J.: The plaintiffs had no locus standi to attack the bill of sale on the ground that it was executed without proper authority. Per Drake, J.: —The McClary Company's judgment against the firm was invalid and hence the company had no locus standi to attack the bill of sale.

McClary v. Howland, 9 B.C.R. 479.

—Share of grain grown on farm leased to execution debtor—Bills of Sale and Chattel Mortgage Act, R.S.M., 1902, c. 11, s. 39—Seizure of equitable interest.]—Interpleader issue between an execution creditor and the claimant of a quantity of grain seized in stack, unthreshed. The claimant let to the execution debtor the farm on which the grain had been grown by an indenture reserving as rent "the ——— share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth," and the lease provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes and to repay advances and other indebtedness; that the lessee, immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, conditions, provisoes and agreements therein contained should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sum retained for taxes, advances, indebtedness or guaranties previously mentioned. The grain in question had, until its seizure under the plaintiff's execution, remained on the farm in the possession of the lessee. The claimant claimed it as owner under the terms of the lease, and not for rent:—Held, 1. That the lease did not operate to prevent the lessee from ever having any property in the grain to be grown. 2. That, even if the legal ownership of the grain was to be in the lessor, it was still, as to two-thirds, held for the benefit of the lessee subject to the lessor's charge for taxes and advances, etc., and the lessee had an equitable interest in it, and the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, now chapter 11, R.S.M. 1902, s. 39, as being a charge upon crops to be grown in the future. 3. That the interest of the lessee in the grain whether legal or only equitable, was subject, under section 182 of the County Courts Act, R.S.M. 1902, c. 38, to seizure and sale under execution, and that the claimant's interest could not prevail over that of the plaintiff.

Campbell v. McKinnon, 14 Man. R. 421.

—General transfer to bank—Bank Act.]—See BANKING.

—Bill of sale—Sale of business as a going concern—Chattel mortgage by new firm covering book debts.]—V. and C. sold their grocery business, including all their stock in trade and book debts, to H. & B., who shortly afterwards gave a chattel mortgage to E. covering the stock in trade of the grocery business, and also all book debts due to H. & B. in the business carried on by them as grocers:—Held, by the Full Court, reversing Hunter, C.J., that the book debts originally due to V. & C., and assigned by them to H. & B., were covered by the chattel mortgage.

Robinson v. Empey, 10 B.C.R. 466.

—Chattel mortgage—Collateral contract—Rectification of mortgage.]—The plaintiff sued for damages for wrongful seizure and conversion of horses. The defendant alleged that the horses were seized under a chattel mortgage made by the plaintiff to him, the defendant. The mortgage contained a clause enabling the defendant to seize if he felt insecure. The defendant alleged that at the date of the seizure (14th October, 1908), the payments under the chattel mortgage were overdue, and also that the plaintiff had attempted to sell the horses, and that he (the defendant) felt insecure. The amount of the chattel mortgage was, by its terms, to be repaid in two instalments, on the 1st August, 1907, and the 1st February, 1908. The defendant counterclaimed for the balance due under the chattel mortgage, after crediting the proceeds of the sale of the horses, and also for expenses incurred for the plaintiff at his request in defending an action, and also for damages for breach of an agreement whereby the plaintiff agreed to deliver cordwood to the defendant. In reply the plaintiff alleged that the chattel mortgage was given as security for the wood agreement, under which the plaintiff was to deliver the wood before the 1st April, 1908; that he did deliver large quantities of wood, until, on the 30th January, 1908, the defendant requested him to postpone delivery of the residue until the following winter, and that he (the plaintiff) had always been willing and ready to complete. The plaintiff also asked that the chattel mortgage should be rectified so as to conform to the agreement:—Held, that, even if the mortgage were rectified, the plaintiff would still be in default, as on the 1st April, 1908, he admittedly had not wholly repaid the defendant either in wood or money; and, upon the evidence, the plaintiff had not established that the defendant had requested him to delay delivery of the rest of the wood. Held, also, that, on the evidence, the plaintiff was not entitled to succeed upon his counterclaim. Both action and counterclaim dismissed with costs.

Mayer v. Mackie, 15 W.L.R. 128 (Man.).

—Work and labour—Plant and materials of contractor to become property of employer—Security for performance of contract—Bills of Sale Act—"Complete transfer and delivery."]—The plaintiff claimed

ownership of certain goods seized by the defendants, and based his title upon two absolute bills of sale made by F. The defendants set up that the property was theirs by virtue of a contract between them and F., whereby F. agreed to perform certain work for the defendants, and one of the terms of the contract was that all the plant, materials, etc., provided by F. for the work, was to become and until the completion of the work be the property of the defendants for the purpose of the works, but upon the completion of the work, such plant, materials, etc., as should not have been used and converted, should be delivered up to F.:—Held, that the true intent and meaning of this was that the plant, materials, etc., were to be retained by the defendants as security for the performance by F. of his contract; and the contract did not come within the Bills of Sale Act so as to require registration. Since, in the nature of things, it was impossible at the time of the execution of the contract to identify the plant, materials, etc., provided under it, they could not then be articles capable of "complete transfer and delivery," and it is only a bill of sale of such articles that the Act requires to be registered. It was contended that the defendants put an end to the contract, and could, therefore, claim nothing under it; but held, upon the evidence, and the proper construction of the contract, that this contention was not sustained by the facts. Semble, that the plaintiff's bills of sale were intended as a security and not as evincing an absolute sale; but s. 8 of the Bills of Sale Act in such cases only makes the registration void; and, as to an alleged defect in the affidavits of execution of the bills of sale, as to the residence of F., s. 7 makes a bill of sale void only against the classes of persons therein named, and the defendants did not come within any of those classes. Held, that the plaintiff was entitled to the value of any goods seized by the defendants which had not been provided by F. for the works contracted for; to come within those terms they must have reached the field of F.'s operations, that is, a point beyond which they would be handled by F.'s men only; and the kitchen supplies and utensils were not plant, materials, or things provided for the work.

Clancey v. Grand Trunk Pacific R. W. Co., 14 W.L.R. 201, 15 B.C.R. 497 (B.C.)

—Chattel mortgage—Printed form—Blanks not filled in—Construction and effect.]—Lien-notes given by the plaintiff to the defendant G., the agent of the defendant company, for the price of goods sold to the plaintiff, were indorsed by G. to the company, and, after they were overdue, the plaintiff executed a document purporting to be a chattel mortgage upon some wheat in shock to secure the amount due upon the notes. The document was a long printed form of chattel mortgage, containing many blanks to be filled in, but only some of the blanks were filled in, namely, those left for the names of the mortgagor and mortgagee, the consideration for executing the document, $312.98, and the property intended to be mortgaged. The form contained what was intended to be a redemption clause, but the amount to be paid or when it was to be paid was not filled in. It appeared from extrinsic evidence that the $312.98 was the amount due upon the notes:—Held, that the instrument was a mortgage to secure $312.98, payable on demand, with interest at 5 per cent. Held, also, that, upon the evidence, the Court could not interfere with the finding of the trial Judge that the defendants seized the plaintiff's grain under the mortgage; but that the finding that the defendants agreed to allow the plaintiff to market the grain could not be supported. Held, also, that it was immaterial whether the seizure was legal or illegal; if it was illegal, the measure of damages would be the value of the goods seized, less the interest of the mortgagees therein; if it was legal, the defendants, not having sold the grain at public auction, but by private sale, would be liable to be charged with the highest price obtainable if the defendants had used reasonable and proper care, as prudent persons, to obtain the best price; and the trial Judge having found that they did not use such care, and having charged them with the highest price, the Court would not be justified in interfering with his finding; but the defendants were entitled to charge against that the amount due on their mortgage and what they paid out for carriage, etc., but not more than the amount provided for by C. O. c. 34. Held, also, that the finding that 506 bushels of wheat were delivered at the elevator, and that the defendants were chargeable therewith, ought not to be disturbed. Held, also, that the allowance of $75 as "general damages" was unwarranted. Held, also, that nothing could be allowed for special damage, as, e.g., that the plaintiff's landlord descended upon him for rent, no such damage being specifically alleged in the statement of claim; and quære, whether such damage would not be too remote. Held, also, that the defendants were not, in the circumstances, entitled to charge the plaintiff with a fee paid to a solicitor for drawing the chattel mortgage; and certain other charges should also be disallowed. Judgment of Maclean, Dist. Ct. J., 13 W.L.R. 682, varied.

Coupland v. Paris Plow Co., 14 W.L.R. 689 (Sask.).

Chattel mortgage—Exercising power of sale—Moving horses.]—A chattel mortgagee in exercising his power of sale must not be negligent and will be liable to the mortgagor for any loss occasioned to the mortgaged chattels by his negligence. It is negligence on the part of a chattel mortgagee after seizure of horses to drive a large,

mixed band of horses, mares, colts and stallions a long distance in hot weather after dipping of horses for mange. Amendment allowed at trial, after notice, setting up provisions of Bank Act, prohibiting the taking of greater rate of interest than seven per cent. Leave given to surcharge and falsify. Semble.—Where the bank contracts for a rate of interest greater than seven per cent. the rate recoverable is not seven per cent., but the legal rate of five per cent. Charges for sale made by mortgagee's agent in excess of the fees fixed by the schedule to the ordinance respecting extra-judicial seizures are illegal and may be recovered from the mortgagee. Recovery of treble the amount taken for expenses in excess of the tariff prescribed by the ordinance can only be had when the goods seized are in the judicial district where the suit was commenced at the time the action brought or (quære) where the goods were seized in the judicial district where action brought, but there is no jurisdiction where goods seized were neither in the judicial district at the time of seizure nor at the time of action.

McHugh v. Union Bank (No. 1), 2 Alta. R. 319.

—Chattel mortgage—Seizure—Negligence of mortgagee in advertising—Loss by theft.]—The defendant seized 184 horses of the plaintiff under chattel mortgage, and published on the 24th July the following advertisement in the Calgary Herald: "Auction sale of 100 horses under forced sale, at Alberta Stock Yards, Calgary, Wednesday, July 29th, 1908, at 2 p.m. sharp. For particulars apply to The Alberta Stock Yards Company, Limited, Calgary, P. O. Box 1062, 'phone 301;" also a similar advertisement in the Edmonton Bulletin of 27th and 28th July, and a considerable number of posters and hand-bills were distributed about Calgary on the 25th July and a number of letters were mailed at Calgary on the 25th July to horsemen, ranchers, livery stable keepers and others. On the 29th July 160 horses were sold, and 24 were sold on the 31st. The horses sold on the 29th realized an average price of $51. Those on the 31st realized an average price of $70:—Held, that the advertisement had not been sufficient and that the defendant was liable for the loss. A chattel mortgagee, in the absence of negligence, is not responsible for loss by theft of mortgaged goods while in his possession.

McHugh v. Union Bank (No. 2), 2 Alta. R. 326.

—Consideration for chattel mortgage.]—The consideration for a chattel mortgage, which was given to secure payment of two notes for $31,000 and $3,000 respectively, and an overdraft of $2,233, which notes were given for a past indebtedness, and which, at the time the mortgage was given, were current, was stated as follows: "In consideration of $36,233 paid by the mortgagee to the mortgagor at or before the sealing and delivery of these presents":—Held, that the mortgage truly set forth the consideration for which it was given.

Wood v. Dominion Bank, 2 Alta. R. 205.

—Interest in ore to be mined.]—See MINING.

—Interpleader issue — Admission of execution of chattel mortgage.]—An interpleader issue stated that plaintiffs are "mortgagees under a certain chattel mortgage from the said James B. Twiss to them, which said chattel mortgage is dated 7th November, 1903, and was registered on the 9th November, 1903:"—Held, that the statement of registration was an admission both of the execution and due registration, as under the Bills of Sale Ordinance, proof of due execution was necessary for registration thereunder.

Ross v. Pearson, 1 W.L.R. 338, (S.C.), N.W.T.

—Chattel mortgage—Registration—Subsequent purchaser—Removal of goods.]—For the purposes of registration of deeds the Northwest Territories is divided into districts, and it is provided by ordinance that registration of a chattel mortgage, not followed by transfer of possession, shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are removed into another district a certified copy of the mortgage shall be filed in the registry office thereof within three weeks from the time of removal, otherwise the mortgage shall be null and void as against subsequent purchasers, etc:—Held, reversing the judgment in appeal, that the "subsequent purchaser" in such case must be one who purchased after the expiration of the three weeks from time of removal, and that though no copy of the mortgage is filed as provided, it is valid as against a purchase made within such period.

Hulbert v. Peterson, 36 Can. S.C.R. 324.

— Chattel mortgage—Description—Ejusdem generis rule.]—Held, that the following description in a chattel mortgage, "all office fixtures, lamps, desks, chairs, furniture, stationery and all goods, chattels and effects now in the store and office of the mortgagors," did not include a safe, the general words being restricted by the preceding words.

Goldie v. Taylor, 2 Terr. L.R. 208, (Scott, J.).

—Chattel mortgage—Renewal—Time for filing—Identification of goods—Sufficiency of description.] — The ordinance of the Northwest Territories relating to chattel mortgages (Ordinance of 1881, No. 5),

provides by section 9 that "every mortgage filed in pursuance of this ordinance shall cease to be valid as against the creditors of the persons making the same after the expiration of one year from the filing thereof, unless a statement, etc., is again filed within thirty days next preceding the expiration of the said term of one year." A chattel mortgage was filed on August 12th, 1886, and registered at 4.10 p.m. of that day. A renewal of said mortgage was registered at 11.49 a.m. on August 12th, 1887:—Held, affirming the decision of the Court below that the renewal was filed within one year from the date of the filing of the original mortgage as provided by the ordinance. Per Patterson, J.:—In computing the time mentioned in this section the day of the original filing should be excluded and the mortgagee would have had the whole of the 12th August, 1887, for filing the renewal. Section 6 of the same ordinance provides that: "All the instruments mentioned in this ordinance whether for the mortgage or sale of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished." The description in a chattel mortgage was as follows: "All and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors, used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of said mortgagors on the north half of section six, township nineteen, range twenty-eight west of the fourth initial meridian:—Held, affirming the decision of the Court below (1 Terr. L.R. 159), that the description was sufficient. McCall v. Wolff (13 Can. S.C.R. 130) distinguished. Hovey v. Whiting (14 Can. S.C.R. 515) followed. Per Patterson, J., that although the interpleader issue did not contain an express statement that the judgment and execution on which the goods were seized were against the makers of the chattel mortgage, that fact should be inferred.

Thomson v. Quirk (1889), 1 S.C. Cas. 436.

— Chattel mortgage of growing crops—Seed grain—Affidavit of bona fides—Distress for rent.]—(1) Under a lease for a year, dated 6th April, reserving as rent one-third of the crops and providing that the lessee should thresh the grain and draw it to the elevator or cars to be stored and shipped as might be agreed between the parties in the name of the lessor but fixing no time when that was to be done, there is no rent due until the end of the year and a distress by the landlord in November following, is illegal. (2) A distress for rent is unlawful if the tenant is not in possession at the time. (3) A chattel mortgage will not be held void, under section 12 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, because the affidavit of bona fides made by an agent stated that he had "a knowledge of all the facts connected with the said mortgage," instead of saying, in the words of the section, that he was "aware of all the circumstances." (4) It is no objection to a mortgage on growing crops to secure the price of seed grain supplied, that the grain had not been sold to the mortgagor by the mortgagee himself, but was purchased by him for the mortgagor from a third party. (5) Under section 39 of the Act, it is a fatal objection to a mortgage on growing crops or crops to be grown, if it is taken for anything beyond the price of the seed grain furnished and interest thereon.

Meighen v. Armstrong, 16 Man. R. 5 (Dubuc, C.J.).

—Bill of sale—Transfer of goods in the ordinary course of business—Sale of stock en bloc.]—Plaintiff sold his stock en bloc, and defendants attacked the sale on the ground that it was part of a scheme between the vendor and purchaser to defraud certain wholesale houses. A jury found that the transaction was bona fide, but on motion for judgment, defendants questioned the validity of the bill of sale on a number of grounds, one of plaintiff's replies to which was that the Bills of Sale Act did not apply, as this was a transfer of goods in the ordinary course of business, excluded from the operation of the Act by section 2 (R.S.B.C. 1897, c. 32; B.C. Stat. 1905, c. 8, s. 3):—Held, that the words "transfers of goods in the ordinary course of business," were wide enough to include the sale of a stock in trade en bloc.

Greenburg v. Lenz, 12 B.C.R. 395.

—Chattel mortgage—Bona fides—Production of books.]—On an interpleader issue between an execution creditor and a chattel mortgagee, where the chattel mortgage has been taken to an advocate to secure his client's indebtedness to him for professional services, the books and papers of the advocate are not privileged from production so far as they are required to show the propriety and amount of the charges made.

Smith v. McKay, 3 Terr. L.R. 102.

—Chattel mortgage—Sufficiency of description of goods mortgaged—Contemporaneous agreement under seal.]—The property covered by chattel mortgage was described as all cattle and horses of whatever age and sex of a specified brand, on the left side, and all increase thereof, together with the said brand and branding irons:—Held, that the description was sufficient

for identification, and that no mention of the locality where the cattle were at the time mortgage was given was necessary. By a contemporaneous agreement under seal the mortgagor agreed for three years to give his whole time and attention to looking after the horses and cattle, and mortgagee agreeing to allow the mortgagor to sell sufficient to pay running expenses. Held, that the agreement did not affect the correctness of the statement of consideration, which was stated as $3,000, the purchase price of the cattle.

Graveley v. Springer, 3 Terr. L.R. 120.

—Chattel mortgage—Affidavit for renewal —Words having same meaning as those in form prescribed—Ownership of offspring—Removal of chattels.]—(1)The legal estate in the offspring of mares comprised in a chattel mortgage covering them and also "the increase" from them is in the mortgagee, and title to such offspring cannot be acquired by one who purchases them in good faith for value although he receives delivery from the mortgagor before the mortgagee attempts to get possession. (2) Section 20 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, is sufficiently complied with by the use of the expression "kept on foot," in the mortgagee's affidavit for renewal of a chattel mortgage, instead of the words "kept alive" used in that section, as the two expressions mean the same thing. Emerson v. Bannerman (1891), 19 S.C.R. 1, followed. (3) The "subsequent purchaser" mentioned in section 29 of the Act, against whom a chattel mortgage will cease to be valid upon goods removed out of the division where it is registered, unless a certified copy is registered in the division to which the goods have been removed within six months after the removal, must be one who purchased after the expiration of such period of six months. Hulbert v. Peterson (1905), 36 S.C.R. 324, followed.

Roper v. Scott, 16 Man. R. 594.

—Affidavit of bona fides—Jurat to affidavit—Meaning of word "sworn."]—(1) The affidavit of bona fides on a chattel mortgage is sufficient, although it purports to be the joint affidavit of two mortgagees and the jurat does not show that they were severally sworn. Moyer v. Davidson (1858), 7 U.C.C.P. 521. (2) The insertion in the affidavit of a clause reading, "That I am the duly authorized agent of the mortgagee," was an apparent mistake and did not vitiate it, although it was the affidavit of the mortgagees themselves. (3) The fact that it is stated in the jurat that the affidavit has been "sworn," whereas the deponents affirmed, is not a fatal objection, as by the Interpretation Act the expressions "swear" and "sworn" respectively include "affirm solemnly" and "affirmed solemnly." (4) The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, s. 5, does not require that the occupation of the mortgagee should be stated in the affidavit of bona fides. Brodie v. Ruttan (1858), 16 U.C.R. 297, followed.

Dyck v. Graening, 17 Man. R. 158.

—Fraudulent preference—Chattel mortgage—Exemptions.]—A chattel mortgage although given under circumstances entitling a creditor to have it set aside as a fraudulent preference under s. 41 of the Assignments Act, R.S.M. 1902, c. 8, will nevertheless, be held valid as to any goods covered by it which would, under s. 29 of the Executions Act, R.S.M. 1902, c. 58, be exempt from seizure under execution. Field v. Hart (1895), 22 A.R. 449, followed.

Bates v. Cannon, 18 Man. R. 7.

—Chattel mortgage given within the jurisdiction to non-resident — Action to set aside.]—The mere taking of a chattel mortgage, without taking possession of the mortgaged goods, although it may constitute a fraudulent preference under the Assignments Act, cannot be said to be a tort within the meaning of paragraph (e) of rule 201 of the King's Bench Act, R.S.M. 1902, c. 40, and there is no jurisdiction to serve a statement of claim out of the jurisdiction in an action against a non-resident to set aside such a chattel mortgage, although given to him by a resident debtor on goods within the jurisdiction Emperor of Russia v. Proskouriakoff, 18 Man. R. 56, followed. Clarkson v. Dupre (1895), 16 P.R. 521, distinguished.

Anchor Elevator Co. v. Heney, 18 Man. R. 96.

—Time for registration, extension of — Protection of intervening rights — Delay caused by inadvertence.] — A company, domiciled in Toronto, Ontario, took a bill of sale on goods in Grand Forks, British Columbia. It was not possible to send the instrument to Toronto and have it returned for filing with the registrar with the affidavit of bona fides within the five days required by s. 7, sub.-s. 2, of the B. C. Bills of Sale Act, 1905:—Held, that, in the order granting an extension of time for filing the instrument, there should be a provision protecting intervening rights.

Re W. P. Ellis & Co., 13 B.C.R. 271.

—Chattel mortgage — Unlawful seizure under.]—The measure of damages in an action for seizing the goods under a chattel mortgage before maturity of the debt secured is the value of the goods less the amount of the mortgage.

Westaway v. Stewart, 1 Sask. R. 200.

—Chattel mortgage—Seizure under—Private sale.] — When a mortgagee seizes chattels under a chattel mortgage, he must, if he sells the goods, realize the best price that can be obtained; and if he fails to make use of such means as may be necessary to secure such price, he must account to the mortgagor for the full value of the property.

Grimes v. Gauthier, 1 Sask. R. 54.

—Chattel mortgage to secure future advances—Affidavit of bona fides—Officer of incorporated company.]—It is not essential to the validity of a chattel mortgage to secure future advances that such advances should be made to enable the mortgagor to enter into business as well as to carry it on. A mortgage dated 8th February, 1907, whereby the time fixed for repayment is 8th February, 1909, does not extend the liability beyond two years from its date. Where the affidavit of bona fides is made by an officer of an incorporated company, the company is, like an individual, bound by the recitals in the mortgage, e.g., a recital of an agreement in writing for future advances. The affidavit of bona fides, where the mortgagor is an incorporated company, may be made by the company's vice-president, who need not be described as agent.

Newlands v. Higgins, 1 Alta. R. 18.

—Conflict of laws—Bills of Sale Ordinance (C.O. c. 43), as law of one Province —How far effective in the other Province—Chattel mortgage — Removal of goods from one Province to the other.]—The Ordinances of the Northwest Territories continued in force by the Alberta Act and the Saskatchewan Act respectively in each of these Provinces, have no different or more extensive effect than if they were Acts of the legislature of each Province respectively. Consequently, the Bills of Sale Ordinance (C.O. c. 43), as a law of one Province is effective only within the limits of that Province, and cannot affect the rights or title of persons to goods in the other Province, to any greater extent than if it were actually the law of a foreign state. The owner of goods, having executed a chattel mortgage, which was duly recorded in the proper registration district in the Province of Saskatchewan, afterwards fraudulently removed them to the Province of Alberta, where he sold them to a bona fide purchaser for value without notice of the mortgage: — Held, that such sale conferred no title to the goods as against the chattel mortgage, the mortgage being good as between the parties, and the Bills of Sale Ordinance, which requires a certified copy of the mortgage to be filed in the registration district to which the goods are removed, being inoperative as a law of the Province of Saskatchewan, beyond the boundaries of that Province. If the mortgage is good according to the law of the situs of the goods at the time of execution as between the parties, it is good in every other situs to which the goods may be removed, even as against subsequent purchasers and creditors; and if registration is only required by the law of the original situs to protect creditors and subsequent purchasers, this means creditors and subsequent purchasers, seeking to enforce their claims within the judicial territory of the original situs; and, consequently, whether registered in either jurisdiction or not, the mortgage, valid between the parties, is valid to all intents and purposes, in any foreign (including other provincial) jurisdiction. Semble, that in an action by the mortgagee for a return of the goods and damages for detention, the goods having been returned, the measure of damages is the amount of the interest on the price paid by the defendant for the goods.

Jones v. Twohey, 1 Alta. R. 267.

—After-acquired goods—Purchase of business and property subject to liabilities of vendor.]—The plaintiff company in May, 1907, in pursuance of a previous agreement purchased the business, plant and stock-in-trade of Lyone Bros., subject to their debts and liabilities. One of these was a loan of $4,000 from the defendants secured by a chattel mortgage of all the plant and stock-in-trade of Lyone Bros. This chattel mortgage contained a provision that it should cover all after-acquired goods and chattels brought upon the premises owner or occupied by the plaintiff company or used in connection with their business during the currency of the mortgage. The plaintiff company had been incorporated prior to the date of the chattel mortgage and Lyone Bros. were the principal promoters and became its president and vice-president respectively, being in fact the controlling shareholders. $2,104.64 of the money lent by the defendants to Lyone Bros. was handed over to the plaintiff company and by it applied towards payment of the debts of Lyone Bros. The plaintiff company paid an instalment of the interest due to defendants on the $4,000 loan:—Held, 1. That the provision in the chattel mortgage as to the after-acquired goods was as binding upon the plaintiff company as purchasers of the mortgaged property with notice of it as it would be upon the executors or administrators of the mortgagors, and that defendants had a good valid lien and charge upon all after-acquired goods brought upon the premises in question by the plaintiff company. 2. That the plaintiff company was under the circumstances estopped from disputing such lien and charge, and defendants were entitled to

show in evidence the facts constituting such estoppel although it had not been pleaded, as an estoppel in pais need not be pleaded to make it obligatory. 3. The mortgage was not void as to the after-acquired goods because of the generality and vagueness of the description.

Imperial Brewers v. Gelin, 18 Man. R. 283.

—Bill of sale—Consideration—Past indebtedness.]—The claimant in an interpleader issue claimed under a bill of sale whereby the goods seized were assigned to her for an expressed consideration of $1,000. In support of this consideration she proved a marriage settlement whereby the defendant in the main action, her husband, in consideration of marriage settled on her the sum of $3,000 and charged this sum on his property and she alleged that the bill of sale was given in pursuance of this settlement, which settlement was properly made and executed in accordance with the laws of the Province of Quebec:—Held, that under the provisions of s. 11 of the Bills of Sale Ordinance, c. 43, C.O. 1898, the bill of sale was void as against creditors inasmuch as the consideration therein was not truly expressed.

Saskatchewan Lumber Co. v. Michaud, 1 Sask. R. 412.

—Seizure of goods under chattel mortgage —Goods held by mortgagor under agreement for conditional sale.]—Plaintiff delivered a team of horses to his son, under an agreement for conditional sale whereby the property in the horses was reserved to the plaintiff until the purchase price was paid. Subsequently the son mortgaged the horses, and the mortgage came into the hands of the defendant company. Default being made, the company authorized its bailiff, the defendant Cornell, to seize the horses. On the seizure being made the plaintiff notified the bailiff of his lien and the registration thereof, but, by reason of a change in the boundaries of the registration district, mentioned the wrong office as the place where the note was registered. Search on two occasions at the office named failed to show the lien registered, and the defendants thereupon sold the horses. The note had in fact been properly registered before the changes in the boundaries. In an action for conversion:—Held, that although the defendants acted innocently and in good faith in selling the property in question, there was nevertheless a wrongful conversion.

Reinholz v. Cornell, 2 Sask. R. 342.

—Chattel mortgage — Collateral security for payment of promissory note—Days of grace on notes—Acceleration clause.] — Plaintiff purchased a stock of goods from defendant Stewart, giving promissory notes in payment, and as collateral security to such notes, a chattel mortgage expressed to be payable on the days when the notes were respectively payable, and to be collateral thereto. The mortgage also contained the usual acceleration clause, and a provision that the mortgagee deeming the mortgage insecure he might declare it due at any time. The plaintiff having made default in payment of one of the notes, defendant caused the goods mentioned in the mortgage to be seized, the seizure being made before the expiration of the last day of grace on the note, but after the payment became due as expressed in the mortgage. The plaintiff sued for damages for unlawful seizure and conversion of the goods:—Held, that a mortgage given as collateral security to a promissory note cannot be enforced for default in payment until after the expiration of the last day of grace for payment of such note. 2. An action cannot be maintained on a promissory note until the expiration of the last day of grace. 3. That in order to justify entry and seizure before default, under a chattel mortgage containing a clause providing for entry and seizure, provided the mortgagee deems the mortgage to be insecure before the sum payable thereunder is due, it must appear that the mortgagee did actually deem the mortgage insecure at the time he made the entry, and that such entry was made on that ground. 4 That it is a matter entirely in the discretion of the trial Judge whether he assess the damages claimed in an action himself or refer it to the local registrar to do so.

Westaway v. Stewart, 2 Sask. R. 178.

—Bills of sale ordinance—Chattel mortgage—Resolution to authorize mortgage by directors.] — Held, 1. That s. 98 of the Companies Ordinance relating to the powers of a company to borrow and mortgage, applies only to mortgages and other securities to secure money borrowed, and does not restrict the implied power of a trading company to give security for existing debts. 2. That the unanimity of the members of a company in authorizing a mortgage obviates the necessity of any meeting. 3. That the affidavit of bona fides of a chattel mortgage may be sworn before a solicitor acting for the mortgagee. 4. Where there is lacking a knowledge of insolvency and intent to prefer, delay, defeat, hinder or prejudice creditors, on the part of either the mortgagor or the mortgagee, the mortgage not being attacked within sixty days from the date of its execution, is not invalid under the Assignments Act. 5. Where a mortgagee is a director and one of the shareholders of a company mortgagor, concurrence of intention will be presumed. 6. Where there are two mortgagees named in one mortgage and

the property is mortgaged to them severally in certain ascertainable proportions, and the security to one mortgagee is declared valid and to the other invalid, the valid security will only be enforceable against the proportion mortgaged to that mortgagee.

Barthels v. Winnipeg Cigar Co., 2 Alta. R. 21.

—Chattel mortgage—Mortgagee in possession—Lien for money paid—Substituted chattels.]—The plaintiff held a chattel mortgage on a stallion called Richard the 3rd, executed on April 27th, 1893, by one McDougall, against whose goods the defendant had previously placed a fi. fa. with the sheriff, but of which the plaintiff was unaware at the time of taking the mortgage. The mortgage was taken to secure a bona fide indebtedness. The plaintiff, in September, 1893, was in possession of the stallion under his mortgage, and gave him to the mortgagor, McDougall, as agent, to be sold in British Columbia and the proceeds invested in other horses. This was done, and such horses were brought back to the plaintiff's premises at Qu'Appelle, where they were seized by the sheriff under the fi. fa. An interpleader issue having been directed and tried, held, that the property in the horses was in the plaintiff to the full extent of the plaintiff's claim.

Bell v. Lafferty, 3 Terr. L.R. 263.

—Chattel mortgage—Setting aside—Description—Possession.]—Held, (1) The execution of a chattel mortgage by the mortgagor and its delivery to and acceptance by the mortgagee or his agent constitutes such mortgage a valid and binding instrument as between the parties to it, without any further act on the part of the mortgagee. (2) A mortgagee's solicitors are his agents for accepting such delivery. (3) A mortgagee of chattels cannot validly repudiate the mortgage without giving proper notice to the mortgagor. (4) The substitution of one chattel security for another has the effect of cancelling the substituted security. (5) To constitute a chattel mortgage a preference it must be "the spontaneous act or deed" of the insolvent, and must have been given "of his own mere motive and as a favour or bounty proceeding voluntarily from himself." Molsons Bank v. Halter (18 Can. S.C.R. 88), and Stephens v. McArthur (19 Can. S.C.R. 446), applied. (6) Although a mortgagee may have no right to take possession of the mortgaged chattels, still if he does do so, and the mortgagor assents thereto, the possession is lawful quoad the mortgagor, and such assent may be implied from conduct. Dedrick v. Ashdown (15 Can. S.C.R. 227), distinguished. (7) Where in a chattel mortgage there are some items that can be identified and others that cannot, such mortgage is void in toto only if the items that can be distinguished are few and insignificant, but where such items are neither few nor insignificant the mortgage is quoad such items valid.

Adams v. Hutchings (No. 2), 3 Terr. L. R. 206.

—Sale of growing crop—Subsequent mortgage of crop to third party.] — Plaintiffs agreed to purchase certain lands from one K., who held under contract with C., the first mentioned contract containing a clause that the crop then growing and unharvested on the land should be the property of the purchasers. Subsequently plaintiffs acquired the interest of C. in the land. K. remained in possession, cut and harvested the crop and mortgaged it to defendants, who sold it and applied the proceeds in payment of K.'s indebtedness to them. In an action for conversion K. swore that he did not understand that he was selling the crop to plaintiff, but the whole arrangement was one by which the plaintiffs would get paid before his other creditors:—Held, that the sale of the crop was void as against the defendants under the provisions of s. 9 of the Bills of Sale Ordinance, c. 43, C.O. 1898, not being followed by an actual and continued change of possession.

Mihm v. Balcolvski, 1 Sask. R. 415.

—Chattel mortgage — Validity — Consideration.]—Where a chattel mortgage was in fact given to secure a past indebtedness, but on its face purported to be given in consideration of money "in hand well and truly paid" by the mortgagee to the mortgagor:—Held, that the consideration was duly expressed within the meaning of s. 7, of Ordinance Number 18, of 1889. A small inaccuracy in the statement of the consideration is not sufficient to avoid a chattel mortgage.

Walley v. Harris, 3 Terr. L.R. 161.

—Bill of sale—Copy certified by registrar of deeds in foreign country—Secondary evidence of contents of original—Evidence of sale in foreign country — Application of foreign law.]—

Hennefest v. Malchose, 3 W.L.R. 171 (Terr.).

—Actual and continued change of possession—Rights of execution creditors—Consideration—Past indebtedness—False statement in bill.]—

Mueller v. Cameron, 2 W.L.R. 524 (Terr.).

—Invalidity—Mala fides.]—

Bloomstein v. McArthur Co., 8 W.L.R. 753 (Man.).

—Sale under chattel mortgage—Injunction against by second mortgagee — Payment—Appropriation of payments.]—

McDonald v. Scearce, 5 W.L.R. 324 (Y. T.).

—Seizure by mortgagee—Sale of goods—Bona fides — Right of vendee as against execution creditor or mortgagor — Actual and continued change of possession.]—
Munroe v. Ferguson, 6 W.L.R. 755 (Man.).

—Chattel mortgage — Description — Evidence.]—
Fuller v. Hunker Mercantile Co., 7 W. L. R. 80 (Y.T.).

—Insufficient description of goods — Invalidity — Actual and continued charge of possession.]—
Svaigher v. Rotarn, 3 W.L.R. 486 (Terr.).

—Part crop as rent—Assignment of landlord's interest.]—See LANDLORD AND TENANT.

BLANKS.

Printed form—Clause with blanks not filled up.]—One of the clauses of an agreement contained a number of blanks which by inadvertence were not filled up at the time the agreement was executed:—Held, that the Court could not give effect to the clause in question but must deal with the agreement as if the clause were not there at all.
Miller v. Blair, 37 N.S.R. 293.

BOARD OF HEALTH.

See PUBLIC HEALTH.

BONDS.

—Coupons—Action on, without production of the bonds.]—An action may be brought on interest coupons, without production of the bonds from which they have been detached. (C.R.).
Connolly v. Montreal Park and Island Railway Co., 20 Que. S.C. 1.

And see PRINCIPAL AND SURETY.

—Foreigners imperfectly acquainted with English—Execution of bond.]—
Colwell v. Neufeld, 11 W.L.R. 583 (Man.).

—Judgment for penalty — Liquidated damages.]—In an action on a bond conditioned for maintenance, where the breach assigned is refusal to maintain, the plaintiff may recover the whole penalty as damages. In assessing the damages the jury are not limited to those suffered up to the time of the issue of the writ; but they may take into consideration the damages up to the time of the trial, and that there has been a complete breach of the condition. Judgment may be entered for the penalty upon which subsequent breaches may be assigned under 8 and 9 Wm. III. c. 11, but damages can only be assessed on the breaches assigned up to the commencement of the action.
Barthelotte v. Melanson, 35 N.B.R. 652.

—Of company.]—See COMPANY.

BOOK DEBTS.

See CHOSE IN ACTION; ATTACHMENT; EXECUTION.

BOUNDARIES.

Dominion Lands Act—Error in original survey—Boundary between quarter-sections.]—Plaintiff was the owner of the southwest quarter of a section of land, while defendant was the owner of the northwest quarter of the same section. In making the original survey the surveyor had placed the corner mounds of the section as required by the law then in force, but by mistake the distance between these two points was only seventy-two chains instead of eighty-one as required by law. The central mound between the northwest and southwest corner had either not been placed or if placed had been obliterated. A dispute arose as to the location of the line between the two quarter-sections, and an action was brought to determine the true line:—Held, that the line should be ascertained by taking a point equidistant between opposite northwest and southwest corners of the section and connecting that point with the ascertained mound on the east side. (2) That the provisions of s. 106 of the Dominion Lands Act of 1879 requiring that the boundary be ascertained by drawing a line from the point ascertained to be equidistant at right angles to the line in which such point is situated to the opposite boundary was intended to apply in ordinary cases, but in exceptional cases like the present, where the effect would be to create an unequal division of the land, the practice authorized by s. 105 and followed herein should be adopted.
Rohrke v. Marshall, 3 Sask. R. 82, and 13 W.L.R. 198.

—Party wall—Contract—Windows.]—Parties to the action agreed that a certain wall should be a party wall. Either party was to have right to build upon this wall after it was completed, but it was to retain its character of a party wall. Boyd, C., granted an injunction restraining defendant from placing windows in the wall, holding that that was a derogation from the method of its construction according to the meaning of the contract.
Brennan v. Ross, 1 O.W.N. 1014, 16 O.W. R. 583.

Party wall—Addition to wall—Openings.] —In an action to compel the defendants to remove a wall:—Held, that if the wall, which had been added to or built upon the original party wall, could be called an external wall, there was the right to put windows in it; if the extension or addition had the character of a party wall and was to be so designated, the windows were a derogation from that method of construction. By the contract between the parties, the original wall might be afterwards built upon and added to by a further party wall, which might be used by the party who did not build it as a party wall. But, whether he elected to use it or not, the addition to the party wall was, in the contemplation of the parties, to retain its character as a party wall; and to attach any other character to it by constructing it with openings or windows was in violation of the contract. Sproule v. Stratford, 1 Ont. 335, followed.

Brennan v. Ross, 1 O.W.N. 1014.

—Deer—Possession—Fences.]—
Laffin v. Elsworth, 7 E.L.R. 89 (N.S.).

—Line fence—Occupation not in accord with paper title.]—
Martin v. Martin, 2 E.L.R. 70 (N.B.).

—Conventional boundary—No fences.]—
Carrigan v. Lawrie, 7 E.L.R. 108 (N.S.).

—Trespass — Ambiguous descriptions — Natural boundaries — Conventional line — Admissions.]—
Dimock v. Stonehouse, 2 E.L.R. 406 (N. S.).

—Removal of line fence—Connecting fences to protect land from cattle.]—The proper place for the erection of a boundary fence is on the true line, and where it is so erected it becomes the property of the adjacent land-owners as tenants in common. But, in this case, the original line fence, being wholly on the plaintiff's land, was the property of the plaintiff, the fence being regarded as part of the freehold, and the ownership of the freehold, determining the ownership of the fence. The fence being on the plaintiff's land, the defendant took down the main portion of it, and out of the material built a new line fence on his (the defendant's) land. The defendant also removed a portion of the southerly boundary fence on the plaintiff's land abutting on the highway, which had been originally built by the defendant wholly on the land now owned by the plaintiff, and incorporated the material therefrom in the new line fence. Shortly afterwards the plaintiff built small pieces of fence at the northerly and south extremities of his farm to connect with the new line fence. These the defendant pulled down, and cattle got upon the plaintiff's land and destroyed his crops: —Held, that, in the circumstances, the plaintiff was justified in building the small portions of fencing to connect with the new line fence. It would be unreasonable to expect the plaintiff to reconstruct a new line fence throughout on the true boundary line, because the defendant wrongfully carried his new line fence beyond the true boundary line; and the defendant was liable for the consequences of his acts in pulling down the connecting fences. Damages assessed at $100.

Botta v. Pene, 15 W.L.R. 508 (B.C.).

—Boundaries — Encroachment — Passageway — Gates — Nuisance — Obstruction of light—Removal of wall.]—
Phoenix v. Quagliotti, 11 W.L.R. 659 (B. C.).

—Boundaries—Surveys—Fences.]—
Nikoden v. Saliegycki, 11 W.L.R. 148 (Man.).

—Encroachment on highway—Rebuilding—Party wall.]—In 1872 C. was the lessee of a parcel of land in a town, at the corner of P. and S. streets, for the unexpired portion of a term of 50 years from the 20th July, 1843. By a sublease, C., through whom the plaintiffs claimed, leased the southerly 32 feet of this lot to M., through whom the defendant claimed—M., by the instrument, agreeing to construct, upon the land leased to him, a wall extending from P. street easterly upon the north limit of the demised land, which C. was to be at liberty to use as a partition wall for any building he might erect upon the land retained by him, and, for that purpose, to insert beams, joists, etc., in the wall, spoken of as "the northern wall of M.'s building." Both buildings were erected as contemplated, the whole of the wall referred to standing on M.'s land. After the erection of the buildings, a survey was made of the town, and it was found that the buildings on P. street, including the two mentioned, encroached 20 inches upon the highway. By 47 Vict. c. 50 (O.), the survey was confirmed, subject to the provision that, where any building had been erected encroaching upon the highway as shewn upon the plan, it should not be incumbent upon the owner or occupant to remove it off the street until the rebuilding of such building or the repair to the extent of fifty per cent. of the then cash value thereof; and the future occupation of the street was not to be deemed to create or confer any estate therein. In April, 1910, the defendant's building was destroyed by fire, but the partition wall remained intact:—Held, that the effect of the provisions of the sublease was to confer on C. the same right to use the wall as if it were a party wall, and, when it was so used by building into it the beams and joists of C.'s building, it became an integral and necessary part of that building; the right to use the wall as a partition wall,

and to fit beams, etc., into it, was more than an easement—it was an interest in the land itself; the plaintiffs were not rebuilding, nor was their building being repaired, and the license conferred by the statute was, therefore, still subsisting, and it was not open to the defendant to pull down the part of the wall encroaching upon the street.

Sterling Bank v. Ross, 22 O.L.R. 231.

—Survey—Excess—Buildings and fences—Encroachment.]—The plaintiff and defendant owned adjoining lands in block 21 in a city, and the plaintiff alleged that the defendants so constructed a certain building on his own land that the eaves and eavestroughs projected over the plaintiff's land, and so constructed a fence that it encroached upon the plaintiff's land beyond the dividing line. The issue was as to the proper location of the dividing line between the southerly 10 feet of lot 15, owned by the plaintiff, and the northerly 15 feet of the same lot, owned by the defendant. The plaintiff based his claim on an excess in length of 3.3 feet shewn on the plan of a survey of the block made in 1894. He contended that this excess should be distributed over the whole length of the block; and that, by doing this along the northern boundary of the block, one inch would be added to the width of each 25-foot lot, with the result that the line in dispute, instead of being just 360 feet from the southern boundary of the block, on the basis of allowing 25 feet for each lot, would be moved 1.4 feet to the north:—Held, that the main scheme, based on the predetermined and fixed dimensions, was the staking out of the bulk of the block in 25-foot lots; and the rest of the block was treated as a remnant of yet undefined quantity, to be dealt with as further consideration would suggest; and the discrepancy should be thrown on the north end of the block, which would not affect lots 1 to 28. Held, also, that the plaintiff would not, in any event, be entitled to damages, an injunction, or a mandamus, but only to compensation for the land encroached upon.

Thordarson v. Akin, 15 W.L.R. 115.

—Sale of immovable—Guarantee against eviction—Action in warranty.]—The purchaser of an immovable against whom the adjourning owner has set up, by an action en bornage, a claim for a dividing line based on an acquired prescription and involving a partial eviction, has a remedy against his vendor by a formal action in warranty. The action in warranty in such a case is none the less connected with the principal action from the fact that it contains subsidiary conclusions for a money condemnation in case of eviction. The sale of an immovable by metes and bounds is that of a certain and fixed entity and regard should be had to the precise limits marked in the title rather than to the area which is merely subordinate. When, in the description of an immovable sold, it is said to front on a cadastral lot, the latter should be understood as found on the plan and cadastral register, and not with additions that a prescription acquired may have given to its owner. By application of the rule that the debtor is liable for non-performance of his obligation, for damages only which are the direct and immediate consequences thereof, the vendor of a vacant lot must indemnify the purchaser, evicted from part of it, only for the value of such part and for the shrinkage in value of the land delivered resulting from its diminution in area. He is not liable for depreciation in value of buildings erected by the purchaser after the sale resulting from the latter's eviction.

Fallée v. Gagnon, Q.R. 19 K. B. 165.

—Adjoining lands—Building operations.]—An interlocutory injunction will not be granted to prevent a party from building on his own land and placing half of his wall on his neighbour's land on the ground that the same is an encroachment, especially if there has never been a legal bornage between the two properties.

Racicot v. Maher, 11 Que. P.R. 208.

—Monuments — Conventional line — Mistake.]—In an action for trespass where title to land was in question and both parties claimed under the same title, and defendant's deed was long prior in point of time to plaintiff's, the title to the land in question depended upon the reading of the description in defendant's deed, the material portion of which was as follows:—"Thence running in an eastwardly direction along the said highway until it comes to a crossway," (a kind of wooden culvert or bridge) "in the public highway, and running in a southerly direction until it comes to the waters of Broad Cove, etc." It was proved that on the highway there were two crossways, and the dispute was to which was meant:—Held, that there was no authority for rejecting the first crossway in favour of the second. Also, that the words, "running in a southerly direction, etc." did not demand a straight course but only a southerly direction. Also, that defendant was not bound by an alleged conventional line agreed to between the parties "if bound to be correct," in the absence of evidence to show that it was found to be correct, and when it appeared that, at the time the agreement was made, there was uncertainty in the minds of the parties as to which crossway was meant. Also, that in interpreting the agreement, both the agreement and the plan referred to in it must be considered. Circumstances which do not contradict the terms of the deed, may be looked at in order to a proper construction of the instru-

ment. Effect must be given to the instrument, where possible, against the grantor.

Reddy v. Strople, 44 N.S.R. 332.

—Boundary line between lots—Agreement—Possession.]—The plaintiff owned, subject to a mortgage, lot 33 in the 3rd concession of the township of Alfred, and the defendant lot 34, immediately to the west thereof. Most of the line between these lots was well ascertained, but there was a dispute concerning about six rods at the south; and this action was brought to determine the boundary at that place:—Held, that, although part of the line between the two lots had been agreed upon or fixed by the Statute of Limitations, that had no effect in or towards establishing a line in continuation thereof. It was contended that the defendant had been for more than ten years in possession of the strip of land claimed by the plaintiff, and so had acquired title by the Statute of Limitations:—Held, upon the evidence, that there was no exclusive possession: the plaintiff was the rightful owner of his own lot and the defendant of his, and each was in constructive possession up to the true line, wherever that might be. Rogers v. Nixon, unreported decision of a Divisional Court, Queen's Bench Division, 21st December, 1889, followed. The defendant also contended that the plaintiff had not such possession as enabled him to sue in trespass:—Held, that, where one has the paper title to a piece of land and comes upon it and occupies in fact part thereof, he is considered in law in possession of the whole, unless another is in actual physical occupation of some part to the exclusion of the true owner; here no other person was in actual possession; and the plaintiff had sufficient possession. Held, also, that the fact that the plaintiff was merely a mortgagor was tendered immaterial by the Ontario Judicature Act, s. 58 (4). McMullen v. Free, unreported decision of a Divisional Court, Chancery Division, 8th January, 1887, followed. It was also contended by the defendant that the plaintiff had not made out the true line. The original survey of the township was made in 1797. In 1880 H. was appointed by the Lieutenant-Governor to make a survey of the east boundary line of North Plantaganet and the west boundary line of Alfred, from the Ottawa river to the front of the 11th concession. H., in making the survey, placed a stone monument at the northwest corner of the 3rd concession of Alfred, at the place at which an old post had previously been, and another stone monument at the southwest corner of the 3rd concession, and the line between these became the true western boundary of the township, and the governing line: R.S.O. 1897, c. 181. ss. 14, 15, 17, 23, 24, 36. The road at the southeast corner was rightly placed so that the monument was in the middle of the road. A survey was made for the plaintiff by W., who found these two posts, but, not having heard of H.'s survey, thought the monument at the north was at the true position for the east side of the road, thirty-three feet east of the west boundary of Alfred. The result was that the line which W. found made an angle with the true line of about 1' 43". Then he took a post on the northeast corner of lot 34, admitted to be at the place of the original post, and ran from this a line parallel to the line he had determined from H.'s monuments, thus running the line thirty-three feet east of the true line at the south end of the lot, and taking off certain of the plaintiff's land and putting it on the defendant's lot, of which the plaintiff did not and the defendant could not complain:—Held, that the boundary was determined by the line run by W. A Court is not concerned with the question whether the surveyor took the prescribed means for determining his data—he should follow the directions of the statute; the Court is concerned with the facts, and not with the manner of determining the facts. The monuments planted by H. were found by W.; and it was a matter of indifference what method he adopted to satisfy himself that they were real monuments. Held, also, that there is no necessity for finding the true astronomical bearing of the governing line, so long as the line to be run is on the same astronomical course. Held, also, that the plaintiff was entitled to the costs of the action, although the damages assessed against the defendant did not exceed the amount paid into Court by him, the defendant not having admitted the plaintiff's title, which was the main matter in dispute, and there being nothing in the conduct of the plaintiff which should deprive him of costs.

Charbonneau v. McCusker, 22 O.L.R. 46.

Description where no boundary marks.]—Where land claimed by a petitory suit was situated in a locality of which there was no cadastral plan, and no fences or other boundaries, the judgment was held to be executable and the land to be sufficiently described as the lot of land situate at Fox Bay, Anticosti, on which the defendant had built a dwelling house and which the defendant occupied.

Menier v. Whiting, 18 Que. S.C. 113.

—Line fences—Agreement to keep in repair—Trespass—By-law.] — The plaintiff and defendant, adjoining land owners, made an arbitrary division of the line fence between their lots, which was less than five feet in height, which they were to build and keep in repair. By reason of the defendant allowing his portion to get into disrepair, his cattle and sheep got on to the plaintiff's land and damaged it. The defendant also allowed his cattle to escape and run at large on the highway, from whence, by breaking down the plaintiff's fences, they got on to the plaintiff's

land, and further damaged it. A township by-law provided that no fence should be less than five feet high, etc., and prohibited the running at large of all breachy cattle, i.e., cattle known to throw down or leap over any fence four feet high, and provided for impounding them, etc.:—Held, that the defendant was liable for the damages sustained by the plaintiff; and that such liability was not displaced by the by-law.

Barber v. Cleave, 2 O.L.R. 213.

—Obligation to fence—Trespass by cattle.] —See FENCES.

Garrioch v. McKay, 13 Man. R. 404.

—Trespass—Line fence—Burden of proof.] —Plaintiff and defendant were owners of adjoining lots of land, the title to which was derived from the same original grantor. Plaintiff's lot was described as being bounded on the north by the south line of defendant's lot. In an action claiming damages for trespass plaintiff complained that defendant, in erecting a new fence had placed it on a line different from the line of the fence which existed previously, and which was admitted to have been on the true line between the two lots. The question whether defendant had, as a matter of fact, departed from the old line or not, having been left undetermined:—Held, that there must be a new trial. Per Weatherbe, J., dissenting:—Held, that the burden was upon plaintiff to prove the south line of defendant's lot, and that as she had failed to do so she could not recover.

Dixon v. Dauphinee, 34 N.S.R. 239.

—Party wall—Raising—Notice to adjoining owner—Damages.]—A person desiring to raise a party wall should first give notice to the adjacent owner to enable him to prepare for it, in order to avoid all liability except such as should arise from his negligence or want of care. If the damages caused to the co-proprietor of the party wall are the result, not of the raising of the wall, but of the demolition of the house adjoining it, the one who did the work of raising it is not responsible therefor. In other words, the co-proprietor of the party wall has no recourse against him who raised it unless the damage which he suffers is caused by defects in the construction of the latter's own building.

Demers v. Lemieux, 21 Que. S.C. 26 (Sup. Ct.).

—Action for removal of ore—Boundary line in lease controlled by fixed monument —Plan—Copy put in by one party without restriction, may be used by other to prove measurements — Falsa demonstratio.]—In an action brought by plaintiff to recover damages for the mining and removal of iron ore, claimed by plaintiff, under a lease from the Crown, judgment was given in favour of the defendant company, on the ground that, in order to recover, it was necessary for plaintiff to establish the south line of land originally granted to G. The starting point in plaintiff's lease was a marked stone, located a given distance from a marked maple tree, on the south line of lands originally granted, etc. There being evidence to show the actual starting point of plaintiff's lease:—Held, following Fielding v. Mott, 6 R. & G., 339, and 14 S.C.R. 254, that the trial Judge erred in holding that plaintiff could not recover unless he established the south line of the land granted to G., as such line, if shown to be in a different place from the marked tree, would be rejected as falsa demonstratio. Held, that a copy of a plan from the Crown Lands office, as to which one of plaintiff's witnesses was cross-examined, and which was put in by defendant's counsel, without restriction, as part of his general evidence, was in for all purposes to which plaintiff might apply it, and was properly used for the purpose of proving measurements made on the ground.

Bartlett v. Nova Scotia Steel Co., 35 N.S.R. 376.

—Line fence—Mitoyennete.] — If a line fence (cloture deligne) can be mitoyenne, that is, made and maintained by adjoining owners at their common cost, it is usually divided equally among the owners, each being the sole proprietor and responsible for his share. In such case one owner may maintain a petitory action against a neighbour who has taken possession of his share.

Proulx v. Renaud, Q.R. 23 S.C. 511 (Sup. Ct.).

—Action en bornage—Examination of witnesses.]—In a cause en bornage the defendant who has not filed his pleas has the right to examine witnesses.

The Johnsons Co. v. Wilson, Q.R. 24 S.C. 131 (Sup. Ct.).

—Common wall—Footing courses—Rights of neighbour—Art. 520 C.C.]—(1) The proprietor who first builds a house wall, intended to become common, has a right to establish the base of the wall on the first soil sufficiently solid to support the wall which he intends to construct, and is not obliged to go deeper, although his neighbour may require a greater depth, and may offer to bear the cost of the increased excavation and masonry. If the neighbour desires to have a heavier building, necessitating a deeper foundation, he must make the understructure at his own expense. (2) The proprietor first building

a wall destined to become common, has a right to extend the footing courses more than nine inches on his neighbour's land, where such extension is necessary to secure the solidity of his wall. (3) Article 520 C. C. has no application to house walls, but refers to fence walls only; house walls being governed, not by positive law, but entirely by custom, which varies according to local conditions and usages, which, in the city of Montreal, require a footing course wider than the body of the wall, where the same is necessary for the solidity of the wall.

Roy v. Strubbe, 24 Que. S.C. 520, (Archibald, J.).

—Surveyor's field notes — Existence of posts and blazings—Possession by contiguous owner.]—Oral evidence of the setting of a boundary (bornage) by a surveyor with the production of his field notes, of the existence of posts at either end thereof and of blazings along the line from one to the other and of eighteen years' legal possession by one of the contiguous owners in conformity therewith, is admissible and sufficient to establish a settlement of boundaries (bornage), in the absence of an official statement or authentic procès-verbal thereof. (2) The costs of suit in an action of boundary are subject to the rule which applies to litigation in other matters and should be awarded to the party whose pretensions, as set forth in the pleadings, are upheld by the judgment.

Laurentides Mica Co. v. Fortin, 15 Que. K.B. 432.

—Interference with possession—Revendication—Warranty.]—The action en bornage by which the plaintiff complains of an encroachment and asks to be declared owner of the part of an immovable his enjoyment of which is interfered with, takes the character of a revendication and from that time the remedies en garantie which the defendant could have are open to him.

Town of Chicoutimi v. Lavoie, Q.R. 30 S.C. 148.

—Erroneous description.] — Drulard v. Welsh, 11 O.L.R. 647, reversed and action dismissed by Court of Appeal on ground that plaintiff had failed to prove either a paper title or title by possession.

Drulard v. Welsh, 14 O.L.R. 54 (C.A.).

—Recovery of double cost of erecting fence.]—Plaintiff sued under the provisions of R.S. 1900, c. 93, s. 6, sub-s. 3, to recover double the expense of making a boundary or division fence between the properties of defendant and an adjoining owner. The only defence offered was that the fence constructed was not of the height of four and one-half feet as required by the Statutes, 3. The trial Judge having found that the fence was built to the proper height as required by the statute:—Held, that his judgment on this point should not be disturbed.

Cross v. Legag, 41 N.S.R. 419.

— Exhibits—Motion for production of — Specification of documents.]—In an action en bornage, a motion by plaintiff that the defendant be ordered to produce and give communication of all documents and titles, which he has in his control and which relates to the contestation, is too vague and indefinite, because it does not call for any particular document.

Bruneau v. Talbot, 9 Que. P.R. 424.

—Adjoining farms—Division fence—Injury to cattle.]—The owner who neglects to maintain his portion of the fence between adjoining farms is liable for loss of his neighbour's cattle, which, passing through a gap in the fence get on a railway track and are killed by a train.

Paradis v. Parks, Q.R. 32, S.C. 263 (Ct. Rev.).

—Encroachment — Building — Knowledge and acquiescence of owner.] — A slight encroachment on neighbouring land by a party who builds a house, made in good faith and with the knowledge of the owner of such land, and without objection on his part, will not give the latter the right to revendicate the strip taken, nor to sue for the demolition of the building. His recourse, in such a case, is for an indemnity of which the measure is the value of the land taken.

Lidstone v. Simpson, 16 Que. K.B. 557.

—Trespass—Title by possession — Evidence.]—P. petitioned the Crown for a grant of land in the parish of Saint Martins, in the county of Saint John, and on the 24th of July, 1834, the Crown gave him a ticket of possession of a tract called lot B of 200 acres, more or less, describing the tract as bounded on the north by the grant to Isaac and David Springstead, on the east by lot C, on the south by vacant land, and on the west by lot A. P. went into possession under the ticket of lot B. In 1837 the Crown granted to B. lot A, describing it by metes and bounds, and stating that it contained 300 acres, more or less. In 1838 (the Crown having ascertained that there were not 200 acres between lots A and C) issued a grant of lot B to P., describing it by metes and bounds, and stating that it contained 134 acres, more or less. The plaintiff acquired the title to lot B by mesne conveyance from P., referring to the grant and describing the lot by metes and bounds as therein described. In an action of trespass by the plaintiff against the defendant, the successor in title of lot A, where the

question in dispute was the location of the eastern boundary of lot A, and the western boundary of lot B:—Held, that as the title of the plaintiff was by conveyances describing the lot by metes and bounds as given in the grant, the possession of her predecessors in title under the ticket of possession, or otherwise outside of the bounds of the grant would not enure to her benefit, and the ticket of possession was improperly received as evidence of either title or possession.

Ingram v. Brown, 38 N.B.R. 256.

—Action en bornage — Surveyors.] — Laurentide Mica Co. v. Fortin, 15 Que. K.B. 432, affirmed; 39 Can. S.C.R. 680.

—Action for trespass—Alleged agreement.] —In an action for trespass, if defendant alleges an agreement between the parties, he must set forth that said alleged reference to a land surveyor was to be in any manner a method of settlement of the trespass complained of, or of the action as to costs.

Desève v. Roy, 9 Que. P.R. 238.

—Bornage—Cadastral plan—Designaton of contents and extent—Fixing boundary line—Title and possession.]—The plaintiff in an action en bornage in which the boundaries of the immovables are described according to the numbers they bore on the cadastral plan for registry of real rights is not to be considered as recognizing the correctness of said plan and the contents of the immovables stated therein. The rights of the parties as to the extent of their respective lands and the establishment of the line separating them results from their respective titles and possession. The adjucation as to costs caused by the correction of a clerical error by amendment is in the discretion of the Court of first instance and except where the power is abused will not be reviewed by the Court of Appeal.

Forcier v. Bélanger, Q.R. 16 K.B. 289.

—Deed—Erroneous description — Latent ambiguity.]—In a deed from T. H. to S. the lands were described as beginning at a stake standing on the west side of the highway road, being 6.86 chains at right angles from T. H.'s south line, thence north 84° 45′ west, 25 chains to a cedar post standing on Lenihan's east line, thence north 5° 45′ east, along said line 6.86 chains to T. H.'s south line, thence south 84° 45′ east, along said line to the west side of said highway road, thence southerly along west side of said road to the place of beginning, containing 20 acres, more or less. The description as it stood could not be applied to the land, and evidence was admitted as to the location of the stake and post of a former survey:—Held, on the evidence that the words T. H.'s "south line" in the description, intended to describe the northern boundary of the lot, were an error and the lot bounded on the north by T. H.'s north line would pass under the deed.

Chute v. Adney (No. 2), 39 N.B.R. 93.

—Construction of house—Encroachment—Prescription.]—The right of every owner of land to compel his adjoining owner to submit to a bornage does not the less exist when the latter has built a house the wall of which forms a fixed and certain limit within the line of division between the lands. The fact that the wall was built without the other owner's consent suffices to preserve to the latter his right of action en bornage which otherwise would not be the case. The boundary in such case should be placed on plaintiff's land at the distance from the wall required by law, the right of bornage not going beyond the limits of his own land and the other owner being mis en cause only to make the proceedings litigious. In an action en bornage in which the plaintiff claims that a building upon the adjoining land encroaches upon his own the defendant can successfully set up against the conclusions drawn from such claim an acquired prescription by ten years' possession based upon a deed conveying the property.

Brown v. McIntosh, Q.R. S.C. 464.

—Encroachment—Proof of location—Authority of surveyor to determine.]—The posts planted at the time of the survey of a city lot having been destroyed by a general fire which swept over the block of land in which the lot was included:—Held, on appeal, that a surveyor could not determine the location of the lot by apportioning the apparent shortage among all the lots in the block.

Barry v. Desrosiers, 14 B.C.R. 126.

—Action by contiguous owner to annul deed fixing boundaries—Reservation of right to recover.]—An action by the owner of an immovable against the owner of a contiguous immovable to have a deed in which the division line had been agreed upon by their predecessors in title, declared null and void, "under reserve of the plaintiff's right to afterwards proceed en bornage, or otherwise, to recover the part of his property possessed by the defendant under the authority of the deed," is a trouble de droit which gives the defendant the right to sue his seller in warranty against eviction.

Harbour Commissioners of Montreal v. Nova Scotia Steel & Coal Co., 34 Que. S.C. 446.

BREACH OF PROMISE.

See MARRIAGE.

BREAD LAWS.

"Small bread"—Several loaves baked together.]—When "small bread" loaves have been baked together in large pans, the Bread Sales Act, 10 Edw. VII., c. 95, s. 3 (Ont.) does not require that the "small bread" should be separated in loaves before they are offered for sale.

Rex v. Nasmith Baking Co., 17 O.W.R. 116, 2 O.W.N. 116.

BRIBERY.

Corrupting witnesses.] — The prisoner was charged on two counts, with (1) having attempted to dissuade a witness, B., by a bribe, from giving evidence before a Court of Revision held in connection with a contested provincial election; (2) with having attempted to obstruct the course of justice by giving to one B., $10 to induce him to abstain from attending such Court of Revision. B. was the person whose vote had been objected to and appealed against: —Held, that it being charged that B. was dissuaded as a witness, not as a party, the first charge fell properly within clause (a) of s. 154 of the Criminal Code, 1892; but that the second charge was defective, at all events in omitting to state that B.'s absence from the Court of Revision would lead to a defeat of justice.

Rex v. Lake, 11 Can. Cr. Cas. 37, 6 Terr. L.R. 345.

BRIDGES.

Toll-bridge—Franchise—Exclusive limits—Measurement of distance—Encroachment.]—The Act, 58 Geo. III. c. 20 (L.C.) authorized the erection of a toll-bridge across the River Eachemin, in the parish of Ste. Claire, "opposite the road leading to Ste. Thérèse, or as near thereto as may be, in the county of Dorchester," and by section 6, it was provided that no other bridge should be erected or any ferry used "for hire across the said River Etchemin, within half a league above the said bridge and below the said bridge":—Held, (Nesbitt and Idington, JJ. dissenting), that the statute should be construed as intending that the privileged limit defined should be measured up-stream and down-stream from the site of the bridge as constructed.

Rouleau v. Pouliot, 36 Can. S.C.R. 224.

—On Highways.]—See HIGHWAY.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW.

BROKER.

Purchase of shares for customer on margin—Hypothecation.]—The plaintiff sued for the conversion of and other wrongful dealings with shares of stock purchased for her by the defendants as her brokers, "on margin," the complaint being that the defendants had pledged the shares bought for the plaintiff for a larger amount than that owing by the plaintiff:—Held, on the facts, that there was no breach by the defendants of their contract with the plaintiff, which was largely a tacit one, both parties understanding the terms on which they were dealing. (2) That the terms of the bought notes afforded at the least some evidence of what the real tacit contract was; and they very plainly set forth a term as to raising money upon the bought shares, in any way most convenient to the defendants. (3) That, assuming that the defendants were guilty of converting the plaintiff's shares, she could recover; for, at the appointed time and in the agreed manner, her shares were duly transferred to her, accepted, and resold and retransferred to her; and the "conversions" brought no profit to the defendants nor loss to the plaintiff. Conmee v. Securities Holding Co. (1907), 38 S.C.R. 601, distinguished. Order of a Divisional Court, 19 O.L.R. 545, affirmed.

Clark v. Baillie, 20 O.L.R. 611 (C.A.).

—Cancellation by vendor—Effect of on agent's right to commission.]—Defendant listed certain land with plaintiff for sale on certain terms, and a commission of $200 was agreed upon. Plaintiff sold the land to a purchaser who could not pay the agreed amount as deposit, but the defendant accepted the purchaser and signed an agreement to sell. At this time it was arranged that the payment of the plaintiff's commission should be postponed until the purchasers could get a loan to pay for the property or sell it. Subsequently no payment being made under the contract other than the deposit of $50, the vendor cancelled the contract:—Held, that, the plaintiff, having secured a purchaser who was willing to purchase for the price agreed and who was accepted by the defendant, was, in the absence of any agreement to the contrary, entitled to his commission. (2) That, even if the time of payment of the commission had been postponed, yet, as the defendant had by this action in cancelling the contract made it impossible for the purchaser to complete his contract, so that the plaintiff would be entitled to receive his commission, the plaintiff was entitled to recover notwithstanding the arrangement for postponement.

McCallum v. Russell, 2 Sask. R. 442.

—Commission on purchase of real estate.]—(1) A plaintiff who sues as a real estate agent and claims $325 as a commission of 2½ per cent. agreed upon for procuring the purchase of real estate for the price of $13,000, may prove the agreement by testimony. (2) He may also urge his claim as one "de in rem verso" (Article 1046 C.C.). and prove in like manner his services, their value and a customary commission of 2½ per cent. on such transactions.

Zaid v. Delicato, 37 Que. S.C. 159.

—Commission—Failure of agent to complete sale.]—Where the agent entrusted with the sale of a mining property, upon certain terms involving the payment of a considerable portion of the purchase money in cash, for which he was to receive a commission of ten per cent., failed to carry out the object aimed at and his principals were subsequently approached by the parties with whom their agent had been negotiating and were induced to agree to a sale of the property for a different consideration from that originally contemplated, consisting wholly of bonds and preferred and common stock in the company by which the property was acquired, the latter proposition being one that was open to the vendors before the matter was placed in the hands of the agent:—Held, that the transaction was not to be regarded as substantially the same disposition of the property that the agent was employed to effect and that the principle of law in regard to the payment of commissions when a sale is made of the same property to the same parties by the principals direct, did not apply.

Burchell v. Gowrie and Blockhouse Collieries, 43 N.S.R. 485.

[Same case on appeal [1910] A.C. 614, see column 526 infra.]

—Joint liability of principal and agent—Performance by agent.]—When, by the custom of trade, in a sale made through an agent, the latter is held jointly liable with his principal, for its performance, an action will lie in his favour to recover from his principal whatever he may have expended for that purpose. Hence, a broker, in Montreal, has an action to recover from a customer, together with his commission and charges, an amount expended to fill an order for the sale of stock, in consequence of repudiation by the customer and of his joint liability, as a broker, to the purchaser, by the custom of trade governing stock exchange operations in Montreal. Parol testimony is admissible to prove such custom of trade, as well as the price for which the broker was authorized to sell the stock.

Pitbaldo v. Rosenthal, 37 Que. S.C. 443.

—Commission—Introduction of terms not authorized by vendor.]—To entitle himself to a commission for finding a purchaser of land for his principal, the agent must show that the purchaser found was not only in a situation and ready and able to carry out the purchase, but was also willing to carry it out on the terms authorized by the principal, so that, if the purchaser stipulates for an additional term giving him the privilege of paying off, at any time, the part of the purchase money to be secured by mortgage and the vendor has not authorized, or does not agree to, such additional term, the agent is not entitled to any commission.

Egan v. Simon, 19 Man. R. 131.

—Commission—Different claimants to same amount.]—Relief by way of interpleader may be granted, under Rule 899 of the King's Bench Act, to a vendor of land as between two agents each claiming the same amount as commission on the sale of land, the vendor admitting that the amount is due to one or other of the agents.

Webb v. Rodney, 19 Man. R. 120.

—Commission on sale of land—Necessity to get purchaser bound in writing.]—When the agent has found a purchaser ready, willing and able to carry out the purchase for the price and on the terms stipulated for by his principal, he will be entitled to his commission, although he has not secured a deposit or got the purchaser bound by any writing, in a case where the principal, after being informed of the willingness of the purchaser to buy, simply ignored the agent and dealt directly with the purchaser by selling the land to him at the stipulated price less the commission.

Ross v. Matheson, 19 Man. R. 350, 13 W.L.R. 490.

—Introduction of purchaser—Options—Severance of land—Renewed negotiations.]—T., in 1904, having listed his property with plaintiff at the selling price of $30,000, the latter introduced P., who obtained from T. a three months' option, upon which $100 was paid. This was renewed for $50, and the second option was also allowed to lapse. A small portion of the property was sold to one L. after the expiration of the second option, on which plaintiff received a commission. In 1906, negotiations were revived between T. and P. which resulted in a sale to P. of the property for $26,000, but plaintiff was unaware of either the negotiations or sale at the time. Plaintiff, on learning of the sale, claimed a commission:—Held, on appeal, that he was entitled to recover.

Lee v. O'Brien, 15 B.C.R. 326.

—Cheque given to agent as deposit on scrip to be purchased—Purchase by agent—Cheque handed to vendor.]—The plaintiff alleged that he gave a cheque for $200 to the defendant company to pay as a deposit on a purchase by the company of land warrants for him, and that before the purchase he revoked the authority. The defendant company proved that they entered into a contract in writing to so purchase, and, on receipt of the plaintiff's cheque, handed

over to him the contract; and, further, that they did not get the money on the cheque, but handed it over to the person from whom they had purchased, and that person received the money thereon. No negligence was charged or proved against the defendant company:—Held, that the plaintiff could not succeed in the action as framed, and it should be dismissed, without prejudice to an action against the company framed as by purchaser against vendor.

Dart v. Coward Investment Co., 14 W.L.R. 52 (Man.).

—Sale of land—Agreement to pay commission only in event of purchase money being paid.]—The defendants sold land to B. through the instrumentality of the plaintiffs acting as agents for the defendants. The defendants agreed to pay the plaintiffs $2,400 as commission, by instalments, the dates for payment of the instalments being contemporaneous with the dates agreed upon by the defendants and B. for the payment of the instalments of the purchase-money by the latter. The agreement between the plaintiffs and defendants contained a proviso that the amount payable thereunder should be payable only in case the defendants should receive the amounts due under the agreement with B. B. made only one payment under his contract, and the plaintiffs received their proportion of that. B. failed to make the other payments, and the contract between B. and the defendants was cancelled by consent, B. returning his copy to the defendants, who retained the amount paid to them:—Held, that the plaintiffs were not entitled to recover the balance of their commission, although B. subsequently repurchased the land from the defendants, there being nothing in the evidence to lead to the suspicion that the cancellation of the first agreement and the making of the second was for the purpose of evading payment of the plaintiffs' claim. Glendinning v. Cavanagh, 40 S.C.R. 414, distinguished.

Hammer v. Bullock, 14 W.L.R. 652.

—Commission—Purchaser found by agent.]—An owner who had listed his property with an agent for sale on certain terms, subsequently and without notice to the agent, gave an option for sale to a third party. The latter, when the time for taking up his option arrived, had the property conveyed to a party originally found by the agent, and with whom the agent was negotiating for a sale. The purchase price was the same in both cases:—Held, on appeal, that the circumstances connected with the granting of the option precluded any idea of a mere agency on the part of the option holder, and his position as purchaser was not affected by the fact of his selling to the purchaser with whom the agent was negotiating.

White v. Maynard, 15 B.C.R. 340.

—Commission on sale of land—Purchaser found by agent—Sale by principal.]—On the 8th January the defendants "listed" land for sale with the plaintiff, a land agent, at $6,000, but four days later told the plaintiff that, as property had gone up, they should want $6,000 net. On that day the plaintiff had brought the property to the notice of C., but C. had not seen it, and had not decided to purchase. The plaintiff then changed his advertisement of the sale of the property so as to make the price read $6,500, instead of $6,000, and tried to get C. to pay $6,300, but he refused, and eventually bought for $6,000 direct from the defendants:—Held, that the defendants had properly revoked the plaintiff's authority to sell at $6,000; and the plaintiff was not entitled to commission on the sale.

Holmes v. Lee Ho, 15 W.L.R. 226 (B.C.).

—Agent's commission for procuring purchaser—Terms of purchase.]—In an action by land agents to recover a commission as remuneration for their services in procuring a purchaser for land placed by the defendant in their hands for sale:—Held, upon the evidence, that the plaintiffs had not procured a purchaser upon the defendant's terms, which included the giving of security by the purchaser if only $1,000 was paid in cash.

Millar v. Napper, 14 W.L.R. 335 (Sask.).

—Contract made in name of principal—Repudiation by principal.]—The defendant, as agent of persons in Manitoba, was authorized by them to sell a block of land in Saskatchewan for $37,000 cash. He made an agreement with the plaintiff, which was reduced to writing and signed by him as agent on behalf of the owners, to sell the lands to the plaintiff for $37,000, of which $1,000 was to be cash, and the balance was to be paid in a foreign country upon the delivery to a bank there of transfers and duplicate of certificates of title. The cash payment was made to the defendant. The owners, on being advised of the terms of sale, refused to ratify the contract, taking the position that the defendant had no authority to enter into such a contract. The plaintiff insisted upon the performance of the contract in its entirety or not at all, and the sale fell through. The plaintiff then brought this action for money had and received:—Held, treating the action as one for recovery of the money because of misrepresentation on the part of the defendant as to his authority to enter into the contract, or for damages for breach of the contract of warranty implied from the act of the agent in entering into such a contract, that the defendant had in fact exceeded his authority, and that, by entering into and signing the agreement of sale, he had represented to the plaintiff that he had the authority of his principals to the extent represented by the agreement, and

the plaintiff was entitled to recover from him $1,000.

McManus v. Porter, 15 W.L.R. 269 (Sask.).

—Agent's commission—Sale of land—Purchaser found by agent—Sale by principal.]—The defendants "listed" a lot with the plaintiff, a land agent, for sale at $15,000. R. saw the plaintiff's "for sale" notice on the lot, and spoke to the plaintiff about it; R. said the price was too high. The plaintiff, after seeing the defendants, who said they would cut the price down a little, offered R. the property for $14,500, and R. said he would think about it. D., also a land agent, and known as such to one of the defendants, approached that defendant, and asked him his price for the property, and was told $15,000. D. paid the defendants $50, and the defendants, by a writing gave D. the right, for a defined period, to purchase the property at $15,000. D. then, without taking a conveyance from the defendants, sold to R. at $14,750, of which he paid the defendants $14,250 and kept $500 for himself. D. said that the defendants, after the writing was signed, promised him a rebate of 5 per cent.:—Held, on the evidence, reversing the judgment of Lampman, Co. C.J., the trial Judge, that the bargain between O. and the defendants was made in good faith, and not with collusive intent to defeat the plaintiff of his commission. D., without knowledge of what the plaintiff had done in bringing the property to the attention of R., got his option to purchase, and paid $50 for it; he came in contact with R. not by reason of anything that the plaintiff had done; and the defendants were not aware until after the whole transaction was closed that R. was the purchaser. D. was not an agent, but a purchaser; the defendants understood that D. was purchasing for himself; and the reduction in price was not by way of commission. And, on these facts, the plaintiff was not entitled to a commission on the sale.

White v. Maynard, 15 W.L.R. 388 (B.C.).

—Claim for work done before revocation—Commission on sale of land—Quantum meruit.]—An agent who has been given the exclusive sale of real estate for a limited period on terms of being paid a commission in case of sale is entitled to substantial damages upon a revocation of his authority, if he has, within the time limited, found a purchaser for the property as the result of special efforts and the expenditure of money in advertising and otherwise which the principal knew or had reason to believe the agent would make and incur to find a purchaser. Although the principal may have power to revoke the authority given to the agent, he has not always the right to do so without liability for damages.

Aldous v. Swanson, 20 Man. R. 101.

—Commission on sale of land—Absence of evidence to show employment.]—The plaintiff, a land agent, was held, not entitled to a commission upon a sale of land made by the defendants to a purchaser, although the land was brought to the notice of the purchaser by the plaintiff, and although the plaintiff had obtained from a clerk of the defendants a list of properties for sale, which included the one so sold, and had been told by the clerk that he would be entitled to the regular commission if he brought about a sale of any of them, the clerk having no authority, the plaintiff having had no communication with any officer of the defendants, no contract of agency, and no ratification or recognition of his voluntary agency.

Haffner v. Northern Trusts Co., 14 W.L.R. 403 (Man.).

—Promise to pay share of commission—Sale of land to syndicate—Agent member of syndicate.]—In an action by a land agent against another land agent for a share of a commission earned by the defendant upon the sale of land to a syndicate of purchasers, of whom the plaintiff was one:—Held, that the defendant's promise to pay the plaintiff a share of the commission was well proved, on the evidence adduced at the trial, and the plaintiff was entitled to recover notwithstanding his interest in the purchase, and notwithstanding that in his pleading he alleged that one C., who was merely a trustee for the syndicate, was the purchaser, it being immaterial who the purchaser was.

Frank v. Goodman, 14 W.L.R. 406 (Man.).

—Commission on sale of land—Secret agreement to divide commission with agent of vendor.]—(1) An agreement between the agent of the vendor company and the manager of the company for an equal division of the commission to be received by the agent on a sale of the company's real property, though kept from the knowledge of the company, is no bar to the right of such agent to recover the commission in case a sale is effected, as it places neither the agent nor the manager in a situation where their interests would be in conflict with their duty to their employers in getting the best possible price for the property. Rowland v. Chapman (1901), 1 Times L.R. 669, and Scott v. Lloyd (1894), 35 Pac. Rep. 733, followed. (2) Unless, however, the company knew of and acquiesced in such an agreement, they could recover the half commission from their manager if he received it, and therefore the agent could have judgment for only half the commission.

Miner v. Moyie, 19 Man. R. 707.

—"Selling fee" on sale of shares—Commission on par value.]—A broker who agrees to sell for a customer shares paid for in part and subject to further calls, and to pay him

the proceeds of the sale, "less five per cent. selling fee," and who sells the shares for a sum equal to the amount paid on them, has a right to charge his "selling fee" on the par value of the shares, particularly when the company that issued them paid that commission to the agents who procured the original subscription to them. Evidence is admissible to establish the last mentioned fact, as a means of ascertaining the true meaning of the agreement as to the "selling fee."

Haycock v. Findlay, 38 Que. S.C. 265.

—Commission on sale of land—Agent introducing prospective purchaser—Failure to complete sale—Sale on different terms.]—The agent was a solicitor who transacted the business of the principal. When the principal was leaving on a long journey, he spoke to the agent with reference to the sale of certain lands, and asked the agent to communicate any offers he might receive. The agent subsequently learned of a likely purchaser, and asked for the principal's price. This was received, but the terms proved unsatisfactory, and the sale was not made. This prospective purchaser mentioned the property to two other parties, who were to purchase with him, and these parties, on the principal's return, waited on him and completed a purchase of the property in question on different terms. The principal was not aware that these parties were in any way connected with the original negotiations or of the agent's relation to the sale. The agent, on learning of the sale, claimed commission:—Held, that the agent, not having secured a purchaser upon the original terms, could not recover upon the contract of agency. (2) An allowance by way of quantum meruit is based upon the acceptance by the principal of the agent's efforts, and an implied agreement to compensate him in respect thereof, which implies knowledge on the part of the principal of the agent's previous connection with the transaction, and, therefore, where the principal had no knowledge of or reason to suspect the agent's previous connection with the transaction, no allowance could be made.

Vachon v. Straton, 3 Sask. R. 286.

—Sale by principal to purchaser on different terms—Agent's right to commission.]—Defendants listed land with plaintiffs, real estate agents, for sale on specified terms, and within a limited time. At the time of such listing the defendants mentioned the name of a possible buyer. Plaintiffs saw this party, but were unable to make a sale within the time limited. Subsequently this party purchased from the defendants without plaintiffs' intervention, but on more favourable terms and for a less price than mentioned in the memorandum given the plaintiffs. At the time of the original listing the price was increased to cover the plaintiffs' commission, and defendants refused to allow the commission asked unless an increased price were obtained. The plaintiffs sued for the agreed commission or alternatively on a "quantum meruit":—Held, that (following Yates v. Reser (1909), 41 S.C.R. 577) as the plaintiffs did not procure a purchaser ready and willing to purchase on the terms stated, they could not recover. (2) That (distinguishing Boyle v. Grassick (1905), 2 W.L.R. 284) the plaintiffs were not entitled to recover on a quantum meruit, because the party who ultimately purchased was not found by the agents, but was mentioned to the agent by the principal.

Blackstock v. Bell, 3 Sask. R. 181.

—Commission on sale of mining property—Sale completed on terms disapproved by agent—Agent the efficient cause of the sale.]—In an action by the appellant to recover an agreed commission on the proceeds of the sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected:—Held, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept.

Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, on appeal from Nova Scotia.

—Moneys intrusted to agent for purchase of shares—Appropriation of shares of agent to principal.]—An agent, stock broker or other agent, employed to buy stock for another, cannot be allowed to transfer so much stock of his own as a fulfilment of his mandate. An agent may, indeed, sell to his principal property of his own, if it be proved that no advantage was taken by the agent of his position, and that the transaction was entered into in perfectly good faith and after full disclosure; but the onus of proving this lies upon the agent. The defendant, having instructions from the plaintiff to buy for her 500 shares of the capital stock of a company, and having received $500 for her for that purpose, did not buy for her 500 shares at all, but bought for himself 2,000 shares of pooled stock, out of which he intended to give her 500 shares (as being bought from himself) when the stock should be issued. The defendant did not give evidence to show good faith and full disclosure:—Held, that he was liable for the return of the $500 and interest. The original plaintiff died after having been examined for discovery in the action, and the action was continued by her executor by virtue of an order obtained for that purpose:—Held, that the depositions of the original plaintiff upon her examination could not be read as evidence to prove the plaintiff's case: for (1) the evidence could not be used at any stage of the action against the defendant upon any proceeding

in the lifetime of the witness; (2) an examination for discovery is not an affidavit, so that Con. Rule 483 can apply; and (3) the Rules provide for the use in evidence of the examination for discovery of the opposite party, and expressio unius est exclusio alterius. The application for leave to read the depositions should have been made before the trial, and was treated as if so made, though in fact made at the trial.

Johnson v. Birkett, 21 O.L.R. 319.

Introduction of purchaser—Subsequent sale through other agent—Commission.]—Where a broker, on the instruction of the vendor, introduces a purchaser, he is entitled to his commission even though the sale be effected wholly through another agent.

Osler v. Moore, 8 B.C.R. 115, (Drake, J.).

—Stock exchange—Payment of differences—Illegality—Criminal Code, s. 201.]—Defendant instructed the plaintiffs to sell shares in the C. T. Co. for him, who asked for cover and defendant paid $600; no time was fixed for delivery; plaintiffs asked defendant for more as shares were rising, and finally called for $2,400, which defendant refused to pay. Plaintiffs then, as they alleged, purchased the shares to satisfy their own liability and sued for amount paid:—Held, by Drake, J., dismissing the action, that as no stock was ever delivered or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transaction was illegal.

B. C. Stock Exchange, Limited, v. Irving, 8 B. C. R. 186. (Drake, J.).

—Secret commission—Rescission of contract.]—See SALE OF LAND.

Murray v. Smith, 14 Man. R. 125.

—Real estate agent—Proof of mandate—Commission.] — In order to vest a real estate agent with the exclusive right of sale of an immovable, and entitle him to a commission, there must be a contract in writing, or, at least, an equivalent admission on the part of the owner, of the existence of a contract. The mere statement of a price which the owner is willing to take, and of a commission which he is willing to pay, does not constitute such a contract.

Mainwaring v. Crane, 22 Que. S.C. 67. (Davidson, J.).

—Secret commission.]—See PRINCIPAL AND AGENT.

Davidson v. M. & N. W. Land Corporation, 14 Man. R. 232.

—Stock operations — Gaming.]—See GAMING.

—Stock broker—Dealings on margin—Obligation of broker to sell.]—There is no obligation on a broker, in the absence of the customer's order, to sell shares during a falling market, after he has demanded further margins and received no reply from his customer; and therefore if he does not sell the stock under such circumstances, he is not liable for any loss that may arise to the customer.

Kerr v. Murton, 7 O.L.R. 751 (Teetzel, J.).

—Broker—Mandate—Speculation on stock exchange—Delivery of goods—Article 1927 C.C.]—Held, reversing the judgment of the Superior Court, Lemieux, J., 23 Que. S.C., p. 190:—1. Where a broker enters into a transaction on the stock exchange for the purchase or sale of goods in behalf of a customer, and the transaction takes place in the ordinary course of business, the broker's sole interest being his commission, he is entitled to recover from the customer the amount of the loss resulting from the operation. 2. The broker's claim is not restricted to the amount of the margin in his hands, but, in the absence of any contract to the contrary, includes the entire loss. 3. A contract does not fall under the head of gaming contracts merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value, and with the intention of realizing a profit by its resale. 4. Where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery of the goods to the broker by transfer of warehouse receipts is delivery to the principal, just as much as if it had been made directly to himself.

Morris v. Brault, 24 Que. S.C. 167 (C. R.).

—Stock transactions—Bourse—Buying on margin.]—Operations on the Bourse consisting of the purchase of stocks on margin are permitted by law and cannot be compared to gambling and the like. Brokers are not bound to notify their clients of their intention to sell the latter's stock when margins to cover unexpected fluctuations on the market have not been furnished. A demand for margins by telegraph only creates, so far as the brokers are concerned, an obligation not to sell the stock of a client so long as the latter has agreed to furnish the margin demanded and has notified the broker of such consent.

Belleau v. Lagneux, Q.R. 25 S.C. 91 (Sup. Ct.). Appeal pending in K.B.

—Real estate agent—Commission on sale of land.]—Plaintiffs, whom defendant knew to be real estate agents, called on defendant and ascertained from him that his house was for sale at $14,000, nothing being said about a commission. Shortly

afterwards plaintiffs introduced a purchaser for the property, who, after inspection, authorized plaintiffs to offer $12,500. On this offer being communicated to defendant, he told the plaintiffs that he would not accept any less than $14,000, and that he wanted that net, which plaintiffs understood meant clear of commission. Plaintiffs tried to induce the purchaser to buy on these terms, but he afterwards dealt with the defendant directly and bought the property for $14,000:—Held (Perdue, J., dissenting), that plaintiffs were entitled on a quantum meruit to recover the full amount of the usual commission on the $14,000.

Aikens v. Allan, 14 Man. R. 549.

—Real estate agent—Commission on sale of land—Duty of agent to secure contract binding on purchaser.]—After the plaintiff had procured a purchaser ready and willing to carry out the purchase of the property in queston on terms satisfactory to the defendant, the proposed purchaser discovered that the north wall of the building on the property was out of plumb, and slightly overhung the adjoining lot, and called on the defendant to make good the title to the building which formed part of the property bought. Being unable or unwilling to make good the defect in the title or to make satisfactory terms with the owner of the adjoining lot, defendant proposed to the purchaser that the agreement of sale should be cancelled, and it was cancelled accordingly:—Held, following McKenzie v. Champion (1887), 4. M.R. 158; Wolf v. Tait (1887), 4 M.R. 59, that plaintiffs had earned and were entitled to be paid a compensation for their services in finding a purchaser, not necessarily the amount agreed on as commission, but a compensation as on a quantum meruit or by way of damages, and that under the circumstances it was competent for the trial Judge to award compensation equivalent to the amount of the commission agreed on had the sale gone through. Held, also, following McKenzie v. Champion, that plaintiffs were entitled to be paid notwithstanding the fact that they had not procured the purchaser to execute a binding agreement of purchase.

Brydges v. Clement, 14 Man. R. 588.

—Commission on sale of land — Appeal against findings of fact—Evidence.]—The defendant had a property for sale which he had placed in the hands of several estate agents. The plaintiff, who was not known to defendant to be a real estate agent, and who had no office as such, went to defendant, ascertained that the property was for sale, and asked the terms, which the defendant gave him. Plaintiff tried to find a purchaser; and, at a subsequent interview, he told defendant that he had found one. In answer to defendant, plaintiff gave the name of the purchaser. Defendant stated the terms as before, but said he would require a larger cash payment than plaintiff had previously understood would be accepted. Plaintiff then said that the purchaser would take the property on these terms, and brought the purchaser to the defendant. The purchaser then proposed that, instead of $10,000 cash, he should pay $5,000 cash and $5,000 in six months—The other payments to be as agreed on—to which the defendant acceded and the sale was carried out. There was some conflict of testimony as to whether defendant understood that plaintiff was working for a commission on the sale, but the trial Judge, in dismissing the action, said that he did so with hesitation, and that all the witnesses had impressed him with the honesty of their belief in their statements:—Held, that the Court on appeal was in as good a position to judge of the evidence and its effect as the trial Judge, and that the plaintiff was entitled to the usual commission on the sale. Wolf v. Tait (1887), 4 M. R. 59, followed. Where there are two persons of equal credibility and one states positively that a particular conversation took place, whilst the other positively denies it, the proper conclusion is to find that the words were spoken, and that the person who denies it has forgotten the circumstances. Lane v. Jackson (1855), 20 Beav. 535; King v. Stewart (1902), 32 S.C.R. 483.

Wilkes v. Maxwell, 14 Man. R. 599.

—Real estate agent—Special agreement as to remuneration.]—Defendant commissioned plaintiff to sell his house and lot and agreed to pay five per cent. commission; plaintiff offered it to R., the tenant who paid the rent to plaintiff as agent for defendant, who did not want to buy at the time; defendant became dissatisfied at plaintiff's not being able to sell and told him he was going to put the property in other agents' hands for sale, but not withdrawing it from plaintiff's, and that his price was $3,000 net, and whoever sold it was to look for remuneration to what he could get a purchaser to pay above that sum; another agent sold to R. for $3,150, defendant realizing $3,000:—Held, affirming Harrison, C.O.J., that plaintiff was not entitled to commission in respect of the sale.

Johnson v. Appleton, 11 B.C.R. 128.

—Commercial usage—Mandate — Sale on commission.]—The allegation of a custom or commercial usage will not be struck out of an inscription en droit especially where it is claimed that the same had always been recognized by the parties in their business dealings and especially in the transaction on which the action was

founded. The mandate of a broker or agent employed to sell immovables on commission is a civil contract which cannot be proved by oral testimony; and in an action by the agent for payment of his commission he will not be allowed to give evidence in his own favour except for a commencement of proof in writing.

Laflamme v. Dandurand, Q.R. 26 S.C. 499 (Sup. Ct.), affirmed on review, 20th February, 1905.

—Real estate agent—Commission for procuring purchaser—Commercial corporation —Powers of general manager.]—A land broker volunteered to make a sale of real estate owned by a trading corporation and obtained, from the general manager, a statement of the price, and other particulars with that object in view. He brought a person to the manager who was able and willing to purchase at the price mentioned and who, after some discussion, made a deposit on account of the price and proposed a slight variation as to the terms. They failed to close and the manager sold to another person on the following day. The broker claimed his commission as agent for the sale of the property, having found a qualified purchaser at the price quoted:—Held, affirming the judgment appealed from (14 Man. Rep. 650) Taschereau, C.J., and Girouard, J., dubitante, that the broker could not recover a commission as he had failed to secure a purchaser on the terms specified. Under the circumstances, as the owner did not accept the purchaser produced and close the deal with him, there could be no inference of the request necessary in law as the basis of an obligation to pay the plaintiff a commission. Per Taschereau, C.J., and Girouard, J.:—That the general manager of a commercial corporation could not make a binding agreement for the sale of its real estate without special authorization for that purpose.

Calloway v. Stobart, 35 Can. S.C.R. 301.

—Purchase of shares on margin—Sale by broker without notice—Acquiescence.] —Defendant instructed plaintiff's manager at Winnipeg to purchase for him, on a margin of 3 per cent., 100 shares of Erie Railway stock. Plaintiffs, through their agents, bought the shares on the New York Stock Exchange, and the agents thereafter held them subject to the control and order of the plaintiffs. Defendant was informed within an hour of the purchase and the price paid. The next day he received the usual advice note of the transaction in which it was stated that on all marginal business the plaintiffs reserved the right to close transactions when margins are running out without further notice. Two weeks afterwards the price of the shares began to fall, and the margin became so small that the manager telegraphed defendant at Gladstone to send $500 additional margin; and later on the same day the margin being entirely lost, he telegraphed defendant to put up $1,000 further margin. Defendant replied to these telegrams: "Will attend message; down to-morrow." The manager gave no express notice that he would sell the shares unless the margins demanded were put up, but waited until delivery of the mail from Gladstone the next morning. Then, not having heard from defendant, he telegraphed to have the shares sold, which was done at a loss of $1,150:—Held, 1. There was an actual purchase of the shares for the defendant, and it was not necessary that the shares should have been actually transferred on the books of the railway company, either to the defendant or to the plaintiffs. 2. There was an actual sale of the shares regularly made on defendant's account, according to the usages of the stock-broking business. 3. The plaintiffs were entitled under the terms of the notice sent to defendant, to sell the shares without notice to him when the margin was exhausted, as the defendant, not having objected to these terms, must be taken, after a reasonable time, to have assented to them.

Van Duzen-Harrington Co. v. Morton, 15 Man. R. 222 (Dubue, C.J.).

—Authority of agent to sell land—Implied powers of real estate agent.]—(1) Although an agent for the sale of land, having only a verbal authority from the owner, may sign for him a contract of sale of the land which will be binding under the Statute of Frauds, yet, if disputed, the evidence of the agent should not be accepted as sufficient proof of such authority without corroboration, unless it is of the clearest and most convincing kind and such as bears overwhelming conviction on its face. (2) The authority ordinarily conferred upon a broker employed in the sale of land is limited to the duty of finding a purchaser ready and willing to buy the property at the named price and on suecified terms, and to introduce him to his principal; and, without a clear and express provision, such authority does not warrant the agent in signing a contract of sale so as to bind the principal. Hamer v. Sharpe (1874) L.R. 19 Eq. 108; Prior v. Moore (1887) 3 T.L.R. 624, and Chadburn v. Moore (1892) 61 L.J. c. 674, followed. (3) Where the owner has authorized his agent to sell on terms requiring payment of $1,000 cash this will not authorize him to sign an agreement of sale by which the purchaser is to pay the money "on acceptance of title." (4) Although accepting the findings of the trial Judge as to the credibility of the witnesses, the Court in appeal may re-

view the evidence and reverse the decision arrived at as to the legal conclusions to be drawn from the admitted facts. Rosenbaum v. Belson [1900] 2 c. 267, commented on and distinguished.

Gilmour v. Simon, 15 Man. R. 205, (Dubuc, C.J., and Richards, J.).

Affirmed, 37 Can. S.C.R. 422.

—Real estate—Commission on sale of land—Property in hands of two agents—Liability of agent on contract made on behalf of principal.]—Defendant, living in New York, placed a farm in the hands of plaintiff and S., two different real estate agents in Winnipeg, for sale. Plaintiff found a purchaser at $12 per acre in cash, and informed defendant by letter. Defendant replied accepting the offer, but asking plaintiff to call on S., and arrange regarding commission so as to avoid having to pay more than one commission. Plaintiff did not communicate with S., but introduced his purchaser to defendant's solicitor in Winnipeg. This purchaser paid the solicitor $500 on account, and was ready and willing to pay the balance on receipt of a transfer. Meantime S. also made a sale of the farm at the same price. This latter sale was carried through by defendant who paid S. the usual commission:—Held, that the plaintiff was also entitled to his commission, as he had done all that was necessary to earn it. The title to the property was in defendant's father and plaintiff knew that; but defendant held a power of attorney to sell and convey it, and the Court held that the defendant's statements to the plaintiff, both verbally and in letters, and his conduct throughout, justified the plaintiff in looking to defendant alone for his commission:—Held, following Story on Agency, pp. 306, 309, and Jones v. Littledale (1837) 6 A. and E., 490, that the defendant was personally liable for the commission.

Bell v. Rokeby, 15 Man. R. 327 (Dubuc, C.J., and Perdue, J.).

—Real estate agent—Authority.] — The term "sell" is the term that would be ordinarily used when a person lists property with a broker to find a purchaser, and unless there is something to indicate that there was an intention to give authority to sell, it would be inferred that the intention merely was to authorize the broker to find a purchaser.

Boyle v. Grassick, 2 W.L.R. 284, reversing 2 W.L.R. 99.

—Sale of land—Authority to make contract — Specific performance.]—The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for $4,270 (the price being calculated at the rate of $40 per acre on its supposed area), an instalment of $1,000 to be paid in cash, and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at $40 per acre, $50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments and with the privilege of "paying off the mortgage at any time." This contract was in the form of a receipt for the deposit and signed by the broker as agent for the defendant:—Held, affirming the judgment appealed from (15 Man. Rep. 205), that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal. Held, further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant.

Gilmour v. Simon, 37 Can. S.C.R. 422.

—Contract — Consideration — Revocation of agency to sell land.]—The plaintiffs, being entitled to a commission for finding a purchaser for the defendant's farm placed in their hands for sale, consented to forego the commission on the defendant giving them the special sole right to sell the land for a fixed higher price within a time named:—Held, that defendant could not revoke the agency thus conferred, and was liable in damages for having, before the expiration of the time limited, notified the plaintiffs that he would not sell. A special agreement of agency founded on a distinct and valuable consideration cannot be revoked at the will of the principal.

Richardson v. McClary, 16 Man. R. 74 (Dubuc, C.J., and Mathers, J.).

—Mandate—Obligation of mandatary to account—Condition precedent to suit for salary.]—Where a person agrees, in consideration of a fixed monthly salary, to obtain custom and business in Montreal for a firm of brokers in New York, and, for that purpose, is constituted and holds himself out to the public as their representative, the contract between them is one of mandate rather than of lease and hire of work, and the obligation arises from it for the mandatary to account to his principal, as provided in Art. 1713 C.C. This obligation is a condition precedent to the exercise by the mandatary of the right to bring suit for wages or salary.

Violett v. Sexton, 14 Que. K.B. 360.

—Estate agent—Failure to account—Interest.]—An agent refusing to give an account and pay over balance is chargeable with interest. Costs disallowed to an estate agent of preparing a receipt contain-

ing a schedule of leases and securities delivered up to the principal. Costs of suit against an agent for an account ordered to be paid by him where he had disregarded requests for an account, and had filed an improper account in the suit.

Simonds v. Coster, 3 N.B. Eq. 329.

—Agent to sell mine—Agreement for commission — Termination of agreement.] — Plaintiff obtained from defendants an option on a mining property, to expire May 31st, 1902, under an agreement by which he undertook to find a purchaser for the property for the sum of $27,000 for a commission of $5,000, but with a provision that in case it might be found necessary to make a reduction in the price of the property, the commission payable to plaintiff should be 20% on the purchase price. Some time before the expiration of this option, on the 12 March, 1902, plaintiff wrote defendants informing them that he had failed to bring about a sale of the property, but that he had induced a person whose name was mentioned, to join with him in purchasing it, and making a cash offer of $15,000 for the property as it stood, payable in 30 days, and saying, among other things: "This is only a game of chance as far as I am concerned, for I am now a buyer instead of a seller . . . . this is a cash offer . . . . and it is all I can afford or will offer, whether accepted or rejected." The offer was not carried into effect, and defendants having subsequently made an arrangement to sell the property to other parties, plaintiff claimed commission: — Held, that the relationship established between plaintiff and defendants under the first arrangement, which was practically that of principal and agent, was terminated when plaintiff made his offer of the 12th March, and that plaintiff, having then elected to associate himself with the parties who were proposing to purchase the property, was estopped from claiming remuneration from defendants in connection with the sale made subsequently. Also, that the relationship between plaintiff and defendants having been severed on the 12th March, the burden was on plaintiff to show, by express evidence, that it was subsequently revived.

Fleming v. Withrow, 38 N.S.R. 492.

—Contract — Action — Lex loci.] — An agreement whereby a party undertakes to purchase fruit, at a distant point, during the season about to open, upon a rate of commission on the price, to be fixed later on, is a contract of a personal nature, in respect of which action may be brought before the Court of the place where the contract was made, as provided in the fifth clause of Art. 94 of the Code of Civil Procedure.

Archambault v. Laroche, Q.R. 14 K.B. 380.

—Carrying stock on margin—Advances by broker—Sale of shares—Measure of damages.]—On an appeal from a Divisional Court reported 9 O.L.R. 631:—Held, on the evidence, that the plaintiffs, having admittedly paid money for the defendant at his request, they had the usual right of action at law on the common counts for money paid. That the defendant not having sought to redeem his shares nor made any tender of the amount due by him, he could say the plaintiffs would not have restored his shares, which could have been bought in the market for a lower price than they were sold for and credited to him. And, that, even if the plaintiffs were wrongdoers or had committed a breach of their contract, he was not entitled under the circumstances of this case to damages greater in amount than the price for which the shares had been sold and credited to him. Judgment of a Divisional Court affirmed.

A. E. Ames & Co. v. Sutherland, 11 O.L. R. 417 (C.A.).

Affirmed 37 Can. S.C.R. 694.

—Agreement between broker and customer for purchase of stock—Rules of Stock Exchange—Evidence of special agreement.]—A party who orders a purchase of stock through a broker under the rules of the Stock Exchange, implicitly consents to its resale without notice in case of his failure to maintain the margin agreed upon. Any agreement at variance with the rule must be expressly proved and will not be inferred from conduct in previous transactions.

Lagueux v. Belleau, 14 Que. K.B. 219.

—Contract for sale of land—Authority of agent—Statute of Frauds—Memorandum in writing—Absence of vendor's name.]—In an action to enforce specific performance of an alleged contract for the sale of land the only written memorandum of the contract was a receipt for $100 "in part payment of lot 16," etc., describing it, mentioning also the balance of the price and the purchaser's name, but not disclosing the name of the vendor, and signed "P. W. Black, agent":—Held, that this was not sufficient to satisfy the Statute of Frauds, parol evidence to supply the name of the vendor not being admissible. Semble, also, on the evidence, that the agent had no authority to bind the vendor by executing a contract, and that, on account of the inadequacy of the price, the Court would be slow to enforce specific performance.

Bradley v. Ellott, 11 O.L.R. 398.

—Stock broker — Margin transactions — Theft by agent.]—See THEFT.

R. v. Bastien, 15 Que. K.B. 16.

—Condition requiring production of purchaser willing to sign a written agreement to buy land—Commission on sale.] — The defendant agreed for a good consideration that, if the plaintiff would, within a time fixed, produce to him a bona fide purchaser willing to enter into an agreement to purchase certain lands at named prices and ready and willing to pay one-quarter of the purchase money in cash and who had signed an offer in writing therefor, then he, the defendant, would pay to the plaintiff twenty-five per cent. commission on such purchase price, in case the defendant refused to make the sale. On the 13th of March and within the limited time an agent of the plaintiff received from A. M. Lewis an offer in writing to purchase the lands in question on the terms and at the prices mentioned in the defendant's agreement, coupled, however, with the statement that, if not accepted before ten o'clock a.m. on the 16th of March, the offer would be withdrawn. The agent at once wrote to the plaintiff informing him of the offer and its condition, and urging haste in communicating it to the defendant, but without disclosing the name of the purchaser. The plaintiff, who lived in Winnipeg, received the letter on the morning of the 14th, and made every effort by telegram and letter to induce the defendant, who lived in Gretna, to accept the offer, informing him fully of the terms of the offer and its condition, but not giving the name of the purchaser, which the plaintiff did not then know himself. Defendant wrote by first mail to his solicitor in Winnipeg instructing him to see plaintiff and make inquiries, and communicate the result by telephone in the evening of the 15th. The solicitor met the plaintiff in the afternoon of the 15th and ascertained all particulars including the name of the purchaser, and spoke to the defendant over the long distance telephone between six and seven o'clock in the evening, when he received instrustions to accept the offer; but through some mischance the plaintiff was not informed of this in time to allow him to notify Mr. Lewis of the acceptance before ten o'clock on the 16th and the offer was withdrawn at that hour. Plaintiff sued for the twenty-five per cent. commission, contending that he had produced a purchaser in accordance with the agreement, and that, under the circumstances, it should be held that defendant had refused to make the sale:—Held, that plaintiff could not recover. Per Howell, C.J.:—The plaintiff did not produce a bona fide purchaser willing to enter into such an agreement as was referred to. An offer, which had to be accepted in less than two days after defendant received it, was not an offer contemplated by the agreement. Per Phippen, J.A.:—The plaintiff had to produce a purchaser, and neither his telegram nor his letter did this. The earliest production was when the name was mentioned to defendant's solicitor, and the solicitor was entitled to a reasonable time to communicate the name to his client.

Rogers v. Braun, 16 Man. R. 580.

—Conditional deposit—Performance of condition.]—A broker who accepts money on deposit from a number of customers undertaking to reimburse them if a certain event happened and afterwards made returns to some of them thereby acknowledges that the conditon has been fulfilled and is bound to carry out his engagement to all, even to those who, objecting to the amount, refused a first offer made to them.

Pitl v. Hamel, Q.R. 15 K.B. 373.

—Stock—Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.]—C. instructed A. & Co, brokers, to purchase for him on margin 300 shares of a certain stock, paying them $3,000, leaving a balance of $6,225 according to the market price at the time. A. & Co. instructed brokers in Philadelphia to purchase for them 600 shares of the stock, paying $9,000, nearly half the price, and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as security for indebtedness and later drew on A. & Co. for the balance due thereon, attaching the script to the draft which was returned unpaid and 475 of the 600 shares were then sold and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares with interest and commission:—Held, reversing the judgment of the Court of Appeal (12 Ont. L.R. 435, affirming 10 Ont. L.R. 159), Fitzpatrick, C.J., dissenting, that the brokers had no right to hypothecate the shares with others for a greater sum than was due from C. unless they had an agreement with the pledgee whereby they could be released on payment of said sum; that there never was a time when they could appropriate 300 of the shares pledged for delivery to C. on paying what the latter owed; and, that, therefore, they were not entitled to recover. The bought note of the transaction contained this memo: "When carrying stock for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us." Held, per Davies and Idington, JJ.:—That this did not justify the brokers in pledging the shares for a sum greater than that due from the customer. Per Duff, J.:—That the

shares were purchased before this note was delivered, and it could not alter the character of the authority conferred on the brokers; and that no custom was proved which would modify the common law right and duties of the brokers and their customer in the transaction.

Conmee v. Securities Holding Company, 38 Can. S.C.R. 601.

—**Sale of land—Agent's commission.**]— The defendant employed the plaintiffs, real estate agents, to sell certain property at a certain price, agreeing to pay a commission. They procured a purchaser able and willing to pay the price, and submitted a written offer. On receipt of the offer, defendant, making no objection to it, said he wanted to look into the matter, and used the offer as a lever to close a pending offer of his own to another party at the same price, in order to save the commission:—Held, that plaintiffs had done all they were called upon to do when they obtained a purchaser ready and willing to purchase, and that they were entitled to their commission. Sibbald v. Bethlehem Iron Co. (1881), 83 N.Y. 378, at p. 383, specially referred to.

Marriott v. Brennan, 14 O.L.R. 508 (Riddell, J.).

—**Real estate agent—Commission—Engagement to procure purchaser at a given figure—Sale subsequently at a lower figure to the same person.**]—H. being pressed by his mortgagees, applied to B. to procure a loan of $58,000. Negotiations to that end by B., and also further effort to procure a sale of certain of the property for $56,000, failed. Subsequently the person with whom B. was negotiating was introduced by his (the prospective purchaser's) banker to the agent of the mortgagees, and a sale was brought about for $50,000, H. paying the agent a commission. In an action by B. against H. for a commission for having first introduced the purchaser:—Held, on appeal that B. was engaged to find a purchaser at a certain figure, and having failed to do so, he was not entitled to a commission on a sale, although made to the person originally introduced by him. Per Hunter, C.J.:—When, prima facie, the agreement is to pay a commission on a named figure it is for the agent to show in the clearest way that the intention of the parties was to pay a commission on any figure at which the sale goes through.

Bridgman v. Hepburn, 13 B.C.R. 389, affirmed, 42 Can. S.C.R. 228.

—**Terms of agent's employment—Purchaser found by principal.**]—The defendant (appellant) employed the plaintiff (respondent) to find a purchaser for certain lands at a certain price clear of all commission. The land was subsequently sold to a purchaser found by the principal, but at a price less than that at which it was listed. The agent performed some services in connection with the sale, but was unable to sell at the price authorized:—Held, that as the agent was not instrumental in bringing the vendor and purchaser together and as his employment was of a special character, namely, to sell the land at a specified price which he was unable to do, he was not entitled to a commission or to recover for his services upon a quantum meruit.

Munro v. Beischel, 1 Sask. R. 238.

—**Breach of duty by agent—Interest in purchase of principal's lands intrusted to agent for sale—Non-disclosure—Resale at profit.**]—The defendant B., an estate agent, was authorized by the plaintiff to sell for him 225 acres of land for the best price obtainable, but not for less than $30 an acre, B. to receive a commission. On the 3rd March, 1906, or later, B. sold or pretended to sell the land for the plaintiff to the defendant C. at $35 per acre, B. and the defendant M. having between them a half interest with C. in the purchase. The purchase was completed and the land transferred to C., and on the 8th August, 1906, the defendant D. became the purchaser from C. at $125 per acre. The facts were not disclosed to the plaintiff, and he did not know until after the sale to D. that B. and M. had an interest with C.:—Held, that B. and C. were in fact partners in an arrangement for the purchase and disposition of the land, and that C. was liable, equally with B., to account to the plaintiff for the profits; but that M. was led by B. to believe that C. was the purchaser from the plaintiff, and that B. was buying from C., and not that B. and C. were buying from the plaintiff; and nothing was brought home to M. which should make him liable to the plaintiff. Per Newlands, J., dissenting as to C., that, as the contract could not be set aside because of the sale to D., who was a bona fide purchaser for value without notice, the only remedy of the plaintiff against C. and M. was in damages for any loss sustained by the plaintiff; and there was no fraud on the part of the defendants C. and M. nor any damage sustained by the plaintiff on account of the sale to them. Judgment of Johnstone, J., 3 Sask. R. 51, 13 W.L.R. 248, varied.

Pommerenke v. Bate, 15 W.L.R. 542 (Sask.).

— **Agent's commission on sale of land — Quantum — Evidence — Corroboration.**]—

Gwartney v. Oleson, 2 W.L.R. 80 (N. W. T.).

—**Agent's commission on sale of land — Amount.**]—

Land v. Gesche, 2 W.L.R. 456 (N. W. Terr.).

—Delivery of scrip — Breach — Return of deposit—Authority of agent.]—
McDougall v. Bull, 2 W.L.R. 193 (Terr.).

—Agent's commission on sale of land—Purchaser procured by agent—Agreement entered into—Misrepresentations — Promissory note in lieu of cash payment — Mistake in written agreement.]—
McCuish v. Cook, 9 W.L.R. 304 (Man.).

—Introduction of prospective purchaser — Subsequent sale.]—
Hunter v. Bunnell, 3 W.L.R. 229 (Man.).

—Commission on sale of land—Authority of manager of company to employ agents—Agreement as to remuneration—Purchaser found by agents—Sale consummated without intervention of agents.]—
Miner v. Moyie Lumber Co., 10 W. L. R. 242 (Man.).

—Employment of agent—Remuneration.]—
Mensees v. Tait, 4 W.L.R. 322 (N.W.T.).

—Contract for payment of commission — Vendor and purchaser brought together by agent's procurement—Evidence.]—
Elvin v. Clough, 8 W.L.R. 590 (Man.).

—Agent's commission on sale of land—Purchaser procured by agent—Finding that agent not employed by defendants.]—
Couse v. Banfield, 7 W.L.R. 19 (Man.).

— Agent's commission on sales of lands — Pending sales—Termination of agency.]—
Buckworth v. Nelson and Fort Sheppard Ry. Co., 8 W.L.R. 43 (B.C.).

—Agent's commission on sale of land—Contract for payment of commission—Quantum meruit.]—
Bent v. Arrowhead Lumber Co., 8 W. L. R. 594 (Man.).

— Sale of goods—Commission—Right of agent to recover where sale not completed.]—Defendant company entered into an agreement in writing to pay plaintiffs a commission of five per cent. upon all sales effected in the district of H. and vicinity on condition that plaintiffs would give their best services as might be desired from time to time, etc. Plaintiffs assisted defendant to obtain a contract with the city of H. for the purchase of one of their engines, to be constructed according to specifications attached, provided the engine when completed should undergo certain tests to the satisfaction of persons to be appointed by the city for that purpose. The engine, when completed, failed to undergo the stipulated tests and was not accepted:—Held, that plaintiffs, notwithstanding, were entitled to their commission.
Austen Bros. v. Canadian Fire Engine Co., 42 N.S.R. 77.

—Commission on sale of land—Knowledge of vendor that purchaser sent to him by agent.]—The defendant listed his property with the plaintiffs, real estate agents, for sale at a fixed price and on named terms. The plaintiffs mentioned the property to one Forrest who thereafter negotiated with defendant for the purchase of the property and concealed from him the fact that the plaintiffs had sent him. Defendant then without any knowledge of the plaintiffs' intervention sold to Forrest on terms less advantageous to himself than those contemplated in the agreement between the plaintiffs and himself. There was nothing in the circumstances to put defendant upon his inquiry as to whether the plaintiffs had sent Forrest to him:—Held, that the plaintiffs could recover neither a commission on the sale nor anything for their services by way of quantum meruit.
Locators v. Clough, 17 Man. R. 659 [appeal taken to Sup. Court of Canada].

—Negotiations commenced through agent and continued between principals alone.]—When P. employed C. to sell real estate at a stated price for a commission of 5 per cent. and C. having found a purchaser M., the sale was not completed, but further negotiations were carried on betwen P. and M. alone, with C.'s consent, and resulted in a sale for a sum exceeding that originally sought, C. was entitled to recover his commission on the price actually paid. The fact that C. was a practising advocate was no bar to his claim.
Cruickshank v. Prud'Homme, 31 Que. S.C. 313.

—Commission—Sales for less than listed price—Right of agent to remuneration.]—Where a sale is effected to parties introduced by the agent, such agent is entitled to remuneration, notwithstanding that the price realized was less than that at which the property was originally listed.
Milestone Land & Loan Agency v Lucksinger, 1 Sask R. 61.

—Commission—Right of agent to recover.]—An agent employed to sell upon commission is entitled to recover commission upon a sale resulting from negotiations brought about by his efforts.
Schuchard v. Drinkle, 1 Sask. R. 16.

—Commission on sale of land—"Completion of the sale."]—A dispute having arisen as to the plaintiff's right to a commission on the sale of certain property belonging to the defendant, the former claiming $5,000, the latter denying liability for anything, the parties compromised at $2,000 and the defendant gave the plaintiffs a letter which was in part as follows:—"In connection with the sale of (description) from Mrs. Cordingly and

myself to John A. Lock et al., I hereby agree that, on the completion of the said sale, I will pay your firm a commission of $2,000 . . . This amount to be paid on completion of the deal." The purchaser had previously made a deposit of $2,000, but had not signed a formal agreement to purchase. A few days afterwards the formal agreement was executed by all parties and a further payment of $8,000 was made. The purchaser made default in payment of further instalments of the purchase money, and the defendant took back the land, retaining all money paid, and released the purchaser from further liability. The defendant resisted the action for the $2,000 commission on the ground that the sale had not been completed within the meaning of his letter. He had, however, on several occasions after the agreement had been executed asked time for payment of the $2,000:—Held, that, interpreting the letter in the sense in which the parties intended the words to be understood at the time, as gathered from the document itself and the surrounding circumstances and the defendant's promises to pay, what the parties meant by the words "completion of sale" and "completion of the deal" was the execution of a binding agreement of sale, and the plaintiffs were entitled to recover.

Haffner v. Cordingly, 18 Man. R. 1.

—Sale of land—Commission—Assisting to procure purchaser — Quantum meruit.]—Held, that when the principal lists lands with an agent and communicates to such agent the information that a third party has been enquiring with a view to purchasing the land and as a result of such information the agent opens negotiations with such third party but fails to make a sale and the principal thereafter owing to the neglect or inability of the agent to effect a sale opens negotiations directly with the third party, and effects a sale at substantially the price originally listed, the agent cannot be said to have introduced the purchaser or so assisted to effect a sale as to entitle him to recover his commission.

Thompson v. Milling, 1 Sask. R. 150.

— Principal and agent — Secret profit —Trust — Clandestine transactions by broker—Sham purchaser—Commission — Quantum meruit.]—H., a broker, undertook to obtain two lots for F., as an investment of funds supplied by F., for that purpose, at prices quoted and on the understanding that any commission or brokerage chargeable was to be got out of the vendors. H. purchased one of the lots at a price lower than that quoted, receiving, however, the full amount quoted from F., and, by representing a sham purchase of the other lot, got an advance from F. in order to secure it:——Held, affirming the judgment appealed from, that H. was the agent of F. and could not make any secret profits out of the transactions, nor was he entitled to any allowance by way of commission or brokerage in respect of either of the lots so purchased.

Hutchinson v. Fleming, 40 Can. S.C.R. 134.

—Sale of land—Remuneration—Finding a purchaser, able, ready and willing to purchase—Added terms by vendor.]—In an action by an agent to recover the amount of his commission, he must show that he has produced to the principal a purchaser ready, willing and able to enter into a binding agreement to purchase; and the agent is entitled to his commission if, the parties having been shown to be agreed upon the terms, the sale is subsequently prevented by the fault or default of the vendor. Grogan v. Smith (1890), 7 T.L.R. 132, followed.

Bagshawe v. Rowland, 13 B.C.R. 262.

—Commission on sale of land—Exchange of lands.]—The defendant listed his property with the plaintiffs, real estate agents, for sale. They then introduced to him a probable purchaser who afterwards arranged with the defendant an exchange of some lots of his own for the defendant's property:—Held, that the plaintiffs were entitled to one-half the commission that they would have earned if they had effected a sale of the property.

Thordarson v. Jones, 17 Man. R. 295.

— Sale of mining land — Commission — Change of purchaser—Continued transaction.]—M., owner of mining lands, agreed to give G. a commission for effecting a sale thereof. G. introduced a purchaser to M. and a contract for sale of the lands to said purchaser was executed. This was replaced by a later contract by which the sale price was reduced in consideration of an incumbrance on the property being paid off by the purchaser who borrowed the money for the purpose and assigned his interest in the contract to the lender, also signing a release in favour of M. of any claim against him on the contracts. M. afterwards sold the mining lands to a person buying for the lenders of the money to pay off the incumbrance. In an action by G. for his commission:—Held, that he was entitled to the commission on the full amount received for the land as finally sold. Held, also, that the sale of the land was not a transaction independent of the contract with the purchaser introduced by G. but was a continuance thereof.

Glendinning v. Cavanagh, 40 Can. S.C.R. 414.

—Commission on sale of land—Substantial compliance with authority.]—A real estate

agent employed to find a purchaser for land, who finds a purchaser ready and willing to purchase upon terms which, although not identical with those in contemplation at the time of his employment, are satisfactory to the owner, is entitled to compensation for his services, notwithstanding that no sale is actually made by reason of refusal of the owner to sell the property for reasons unconnected with the terms of purchase. McKenzie v. Champion (1885), 12 S.C.R. 649, followed:—Semble, where in the proposed vendor's instructions to the agent there is not something to indicate that it was his intention to give the agent authority to sell, it will be inferred that the authority extended only to finding a purchaser.

Boyle v. Grassick, 6 Terr. L.R. 232.

—Broker selling on grain exchange—Contract in broker's name—Liability of principal—Board rules—Indemnity.]—On 14th August, 1907, the defendant, who resided in the State of Nebraska, wrote the following letter to the plaintiffs, grain dealers at Winnipeg, Man.: "Yours of recent date enclosing market report received. I shall be north in about four weeks to look after the new crop and, if you can sell No. 2 oats for 37c. or better, in store at Fort William, you had better sell 4,000 bushels for me, and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then." The plaintiffs, who were also brokers on the Winnipeg Grain Exchange, sold the oats at 38½ cents on the "Board," without disclosing the name of their principal, for October delivery, becoming personally liable for the performance of the contract according to the rules of the Exchange. Upon defendant refusing to deliver the oats the plaintiffs purchased the quantity of oats so sold at an advance in price in order to make the delivery and brought the action to recover the amount of their loss thus sustained:—Held, reversing the judgment appealed from (18 Man. R. 111), that the authority so given did not authorize the plaintiffs to make a sale under the Grain Exchange Rules binding upon their principal; that no contract binding upon the principal outside of these rules had been entered into, and, consequently, that he was not liable to indemnify them for any loss sustained by reason of their contract.

Butler v. Murphy, 41 Can. S.C.R. 618.

Stockbrokers — Order to purchase shares —Payment—Principal and agent.]—
Deslauriers v. Forget, 4 E.L.R. 363 (Que.).

—Real estate agent — Commission — Time limit for procuring purchaser—Waiver.]—
Donovan v. Hyde, 3 E.L.R. 302 (Que.).

—Sale of real estate—Absence of contract —Services rendered—Quantum meruit.]—
Daneau v. Lemieux, 4 E.L.R. 93 (Que.).

—Agreement to carry stocks on margin—Wrongful sale—Measure of damages.]—
Vanbuskirk v. Smith, 1 E.L.R. 383 (N. S.).

— Commission on sale of land—Duty of agent—Sale without agent's knowledge.]—Plaintiffs, as executors, sued on a promissory note. Defendant counterclaimed for commission on sale of land, it appearing that deceased had promised him a commission if he could procure a purchaser. The defendant interested a party in the property, but the latter, finding it impossible to raise sufficient money to carry the sale through, mentioned the property to a third party, who went to the deceased and purchased on the terms stated to the defendant without defendant's knowledge, and without the deceased being aware that the purchasers had learned that the property was for sale through any efforts on the defendant's part:—Held, that in order to entitle the agent to commission on sale of land it must be shown that the sale is the direct result of the agent's efforts, and it is not sufficient that he mention the property to another person who is not his agent, nor the agent of the purchaser, and who afterwards mentions it to a third party, who purchases.

Vachoe v. Straton, 2 Sask. R. 72.

—Commission on sale of land.]—Action for commission for finding and introducing a purchaser for land owned by defendant. The plaintiffs were carpenters occupying a shop on the property as tenants of defendant. They were not real estate agents but had occasionally earned commissions on sales. Plaintiffs had discussed price and terms with defendant on several occasions with the view of their effecting a sale and on one occasion had introduced to him a prospective purchaser, and it was agreed that if that sale went through plantiff should be entitled to a commission, but no general agency to sell had been conferred upon them. One Forrester, passing by the property and thinking that it might be suitable for his purpose, entered the plaintiff's shop and inquired of the plaintiff Robertson if the property was for sale. Robertson informed him it was. Did he know the owner? Yes, Mr. Carstens. And the price? $16,000. Could it not be bought for less? Robertson would inquire and at once called up the defendant by telephone. What followed is thus stated in the judgment of the majority of the Court, reversing in part the findings of fact by the trial Judge. Robertson told the defendant he had a prospective purchaser for his property and asked his best

terms. Defendant said $15,000. Robertson then asked if defendant would pay his commission out of that and defendant said he would. Robertson told defendant he would have the purchaser call and see him. He then quoted the new price to Forrester, wrote defendant's name and address on a card which he handed to Forrester and asked him to present it to defendant when they met. Defendant met Forrester by appointment the same evening, when after some negotiation he gave Forrester an option on the premises for $14,000 cash. The sale was completed next day for that sum. Forrester did not mention Robertson's name to the defendant and the latter said he did not associate Forrester with his telephone conversation with Robertson. Defendant saw plaintiffs a few hours after the completion of the sale when plaintiffs promptly claimed their commission:—Held, that the defendant was put upon inquiry when a prospective purchaser appeared a few hours after the conversation with Robertson and he should have ascertained that Forrester was the person referred to by Robertson, and that, upon the above findings, the plaintiffs were entitled to commission on the $14,000 at the usual rate.

Robertson v. Carstens, 18 Man. R. 227.

—Failure to keep an appointment—Travelling and necessary expenses incurred in consequence of the appointment—Agent who acts in his own name.]—A party who, in execution of a promise of sale, makes an appointment with the intending purchaser to effect the sale and sign the deed, but who is unable to do so on the day fixed, through legal hindrances and want of authorization of part owners and sellers under age, is liable in damages to the purchaser for his travelling and other necessary expenses. Nor is he relieved therefrom by the fact that he is merely the agent of the owners, having acted in his own name, without disclosing the names of his principals.

Laurin v. Thibaudeau, 34 Que. S.C. 503.

—Agent's commission on sale of land — Purchaser found by plaintiffs—Sale negotiated apart from plaintiffs.]—

Duck v. Daniels, 7 W.L.R. 770 (B.C.).

— Real estate agent — Municipal by-law — Recovery of commission notwithstanding want of license.]—

Horner v. Stevenson, 7 W.L.R. 794 (Alta.).

—Sale of land—Contract for payment of commission.]—

Elvin v. Clough, 7 W.L.R. 762 (Man.).

—Sale of land—Procuring purchaser ready and willing to buy.]—

Egan v. Simon, 11 W.L.R. 319 (Man.).

—Commission on sale of land — Failure to prove contract of employment as agent.]—

Coward Investment Co. v. Lloyd, 11 W. L. R. 339 (Man.).

—Commission on sale of land—Failure to procure purchaser able to carry out purchase.]—

Coward Investment Co. v. Lloyd, 12 W. L. R. 497 (Man.).

—Commission on exchange of properties—Exchange effected with agent's partner.]—

Onsum v. Hunt, 12 W.L.R. 680 (Alta.).

—Sale of land—Efforts to obtain purchaser —Contract for payment for services.]—

Sam Chong v. Lee, 11 W.L.R. 200 (B.C.).

—Commission on sale of hotel property — Principal declining to complete sale.]—

Cuthbert v. Campbell, 12 W.L.R. 219 (B. C.).

—Commission on sale of land—Purchaser found by principal — Subsequent negotiations with agent.]—

Lawrence v. Moore, 3 W.L.R. 139 (Man.).

—Vendor refusing to complete—Broker's commission—Remuneration for procuring purchaser.]—A broker instructed to sell lands for a price to be deposited in a bank pending arrival of clear title, procured a purchaser who made the deposit to his own credit without appropriating it to any special purpose. On refusal by the vendor to complete the bargain, the broker sued him for a commission or remuneration for the services rendered:—Held, reversing the judgment appealed from (Yates v. Reser. 1 Sask. L.R. 247), that there had not been such compliance with the terms of the instructions as would entitle the broker to recover commission or remuneration for his services in procuring a purchaser.

Reser v. Yates, 41 Can. S.C.R. 577.

—Commission on sale of land—Purchaser found by principal—Agent's services in effecting sale.]—The defendant (appellant) employed the plaintiff (respondent) to find a purchaser for certain lands at a certain price clear of all commission. The land was subsequently sold to a purchaser found by the principal, but at a price less than that at which it was listed. The agent performed some services in connection with the sale, but was unable to sell at the price authorized:—Held, that as the agent was not instrumental in bringing the vendor and purchaser together and as his employment was of a special character, namely, to sell the land at a specified price which he was unable to do, he was not entitled to a commission or to recover for his services upon a quantum meruit.

Munro v. Beischel, 1 Sask. R. 238.

—Commission on sale of land—Vendor ignorant that purchaser sent by agent.]—A vendor who has placed his property in the hands of his agent for sale on commission will not be liable to the agent for commission if he afterwards sells to a purchaser in ignorance that such purchaser has been sent to him by the agent. Locators v. Clough (1908), 17 M.R. 659, unless there are circumstances sufficient to put the vendor upon inquiry as to whether the purchaser was not in fact sent to him by the agent. In this case the circumstances set forth in the judgment were held to be such as to put the defendants upon such inquiry and that, as their manager had failed to make sufficient inquiry, and the purchaser had in fact been sent by the plaintiff, the defendants were liable for his commission on the sale.

Hughes v. Houghton Land Co., 18 Man. R. 686.

—Commission on sale of land—Implied representation of authority.]—One Meredith, then a director of the defendant company, in a conversation with the plaintiff, assured him that if he, the plaintiff, would procure a purchaser for the property in question owned by the company, he felt sure the company would quote the price at $550,000 and, in the event of a sale, would pay the plaintiff a commission of $50,000, but any abatement of the price down to $500,000 was to be borne by the plaintiff. There was no evidence that Meredith had any authority to sell the property or employ an agent to find a purchaser. After Meredith became president of the company, the property was sold for exactly $500,000 by the company to a purchaser to whom it had been introduced by the plaintiff to the knowledge of Meredith:—Held, that the company was not liable to the plaintiff either for a commission on the sale or for the value of his services as on a quantum meruit. Held, also, that Meredith was not liable to the plaintiff for any misrepresentation of authority from the company to enter into the alleged contract with the plaintiff, or for failing to prevent the company from selling the property for $500,000 or less.

Bent v. Arrowhead, 18 Man. R. 632.

— Sale of immovable on commission — Implied mandate.]—A principal who commits the sale of an immovable to a real estate agent, on commission, for a period of six months, and, after the expiration of that time, renews the mandate, under modified conditions, for a further period of six months, and afterwards, himself sells the property, owes no commission to the agent. The facts (a) that the latter had put up an advertisement board on the property with his address thereon which was not removed after the period of the renewed mandate up to the time of the sale, (b) that the purchaser, whose attention was attracted by this advertisement, first applied to the agent before dealing with the owner, and (c) that the latter had written a letter giving the agent liberty to sell at a figure clear to himself (the owner), higher than that afterwards obtained, do not imply a continuance of the agency, nor an undertaking to pay a commission, nor do they afford a commencement of proof in writing of such an undertaking.

Donovan v. Hyde, 18 Que. K.B. 310.

—Listing land for sale or exchange—Purchaser using knowledge gained from agents to open negotiations with vendor.]—Defendant listed with plaintiffs for sale or exchange ten acres of land. One Callaghan opened negotiations for an exchange While the deal was being transacted defendant telephoned plaintiffs asking if any disposition of his property had been effected, and was replied to in the negative. He then said that he withdrew the property, and at or about the same time, consummated a deal for the property mentioned by Callaghan to the plaintiffs, Callaghan having opened up negotiations with him direct:—Held, that the relationship of vendor and purchaser had been brought about by the plaintiffs, and that Callaghan had endeavoured, by approaching defendant, to deprive them of their commission.

Lalande v. Caravan, 14 B.C.R. 298.

—Agent's commission on sale of land — Agreement entered into, but sale not completed—Commission not earned.]—

McCuish v. Cook, 10 W.L.R. 349 (Man.).

—Agent's commission on sale of land — Contract of agency — Construction — Termination — Quantum meruit.]—

Buckworth v. Nelson and Fort Sheppard Ry. Co. 9 W.L.R. 490 (B.C.).

—Sub-agent — Failure to establish employment as agent.]—

McGill v. Levasseur, 4 W.L.R. 14 (N. W. T.).

—Agent's commission on sale of land — Conflicting evidence — Corroboration.]—

Scott v. Benjamin, 2 W.L.R. 528 (Terr.).

—Buying grain on margin for customer—Gambling transaction — Recovery of money deposited with broker—Costs.]—

Donald v. Edwards-Woods Co., 4 W.L.R. 128 (Terr.).

—Agent's commission on purchase of land —Agent bringing vendor and purchaser together—Negotiations broken off — Subsequent renewal and conclusion at higher price without intervention of agent.]—

Philip v. Bauer, 5 W.L.R. 187 (B.C.).

—Agent's commission on sale of land — Sale made but afterwards rescinded.]— Carruthers v. Fischer, 5 W.L.R. 42 (Man.).

—Agent's commission on sale of land — Agent bringing vendor and purchaser together—Land subsequently sold on different terms.]—

Ings v. Ross, 6 W.L.R. 612 (N.W.T.).

BUILDERS.

See WORK AND LABOUR.

BURGLARY.

Possession of stolen property — Inference of guilt—Lapse of time.] — The jury in a criminal trial may be sent back for further deliberation when, upon being polled, one of the jurors dissents from the verdict of "guilty" announced by the foreman; and a subsequent unanimous verdict of "guilty" may properly be accepted. Upon the trial of the prisoner for burglary and burglariously stealing property, the Judge in his charge to the jury remarked that if they did not believe the evidence of a certain witness, they were "brought face to face with the fact that the prisoner is found in possession of a pouch which was stolen . . . and that he has not given a satisfactory explanation of how he came into possession of it":—Held, that the Judge did not thereby suggest to the jury that the prisoner might have given evidence in his own behalf, or that an inference unfavourable to him might be drawn from the fact that he had not done so. The burglary was on the 18th or 19th December, 1903, and the prisoner was arrested on the 16th February, 1904, with one of the articles stolen upon his person. Held, that the Judge could not properly have rule, in all the circumstances of the case, that the lapse of time was so great as absolutely to repel any presumption that the prisoner was concerned in the burglary; and that the possession of the article and other circumstances warranted the jury in drawing an inference of guilt. Leave to appeal was refused, and rulings of Street, J., at the trial, were affirmed.

Rex v. Burdell, 11 O.L.R. 440 (C.A.).

BY-LAW.

See COMPANY; MUNICIPAL LAW.

CABS.

By-law respecting cab stands—Cab waiting for hire.]—A livery stable keeper made an agreement with the proprietors of a hotel to keep at all times three carriages in attendance at the hotel ready for immediate use by guests, each carriage to be deemed as hired by the proprietors, from the time of attendance until dismissed or engaged for use by a guest, at the rate of one cent an hour, and the proprietors made themselves responsible for the payment by guests of the fees properly chargeable:—Held, that in keeping carriages in attendance pursuant to this agreement the livery stable keeper was not guilty of a breach of a municipal by-law providing that no cab should stand upon any street while waiting for hire or engagement, or while unengaged. Conviction quashed.

Rex. v. Maher, 10 O.L.R. 102, 10 Can. Cr. Cas. 25.

CANADA TEMPERANCE ACT.

Serving summons outside county of issue.]—The defendant, residing in the county of Saint John, was personally served there with a summons issued by a justice of Carleton County for an offence under Part II. of the Canadian Temperance Act. He did not appear and was convicted in his absence:—Held, that such service was good under s. 658 of the Criminal Code, and on proof of such service the magistrate could proceed ex parte to convict. Prior to the Act 8-9 Edw. II. (Dom.) c. 9, amending the Criminal Code, a magistrate might issue a summons for an offence against the Canada Temperance Act without taking evidence substantiating the information upon which he could exercise his judgment and discretion as to whether summons should issue or not.

The King v. Dibblee; Ex parte O'Regan, 39 N.B.R. 378.

—Judicial notice—Proclamation of Part II. for county—Expiry date.]—1. Where a statute declares that judicial notice shall be taken of certain official proclamations, the latter must be taken as proved, although there was no formal request for such judicial notice. 2. Where a proclamation bringing into force the second part of the Canada Temperance Act in any county was issued several years prior to the offence charged thereunder and remains unrevoked, it is not necessary to prove the date of liquor license expiry on which the proclamation would take effect, as none of such licenses could legally be in force for more than one year.

Ex parte Edwards, 16 Can. Cr. Cas. 522 (N.S.).

—Evidence to support conviction—Certiorari.]—The Court will not quash a conviction had under the Canada Temperance Act on the ground that there is no evi-

dence of the offence. (Ex parte Daley, 27 N.B.R. 129, approved.) Here, in the opinion of the Court there was evidence in support of the conviction.

The King v. Nickerson; Ex parte O'Regan, 39 N.B.R. 428.

—Jurisdiction — "Absence" — Magistrate acting for another.]—The word "absence" in s. 65 of the City of Moncton Incorporation Act, 53 Vict. c. 60, does not mean absence from the place of trial, but inability to attend to the business of the Court. Here the police magistrate was in the court room during part of the trials, but during the trials was obliged to attend before a commissioner appointed by the Provincial Government to inquire into his official conduct.

The King v. Steeves; Ex parte Cormier, 39 N.B.R. 435.

—Summons—Irregularity—Dismissal of information—New summons for same offence.]

Rex v. Johnson, 9 E.L.R. 37 (N.S.).

Conviction for first offence—Costs.]—Defendant was convicted before a stipendiary magistrate for unlawfully selling intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act, being a first offence, and was adjudged, for such offence, to forfeit and pay the sum of $50 penalty and $23.05 costs, and in default of payment to be imprisoned for the term of two months:—Held, that the conviction was good, and that the application to set the same aside must be dismissed. The proceedings being under the Liberty of the Subject Act, no costs were allowed. Since the amendment of the Canada Temperance Act, Acts of 1888, c. 51 and c. 34, s. 14, it is clear that the mode of enforcing payment of the penalty is to be fixed and included in the conviction.

The King v. Whiting, 43 N.S.R. 332.
14 Can. Cr. Cas. 414.

Warehousing liquor—Government railway.]—The Crown, not being expressly mentioned in the Canada Temperance Act, R.S.C. 1906, c. 152, is not bound thereby, and therefore a station agent of the Intercolonial Railway, a Government railway, cannot be convicted under s. 117 of the Act as amended by 7-8 Edw. VII. (Dom.) c. 71, for warehousing and keeping for delivery, in the course of his duty as station agent, intoxicating liquor brought to his station by the railway.

The King v. Marsh; Ex parte Walker, 39 N.B.R. 329.

—County stipendiary magistrates—Quashing search warrant.]—The effects of Acts N.S. 1903-04, c. 37, ss. 2 and 3, and Acts 1905, c. 11, as amending R. S. N. S. 1900, c. 33, is only to regulate the appointment of magistrates after those statutes, and does not interfere with the jurisdiction of appointees before the amendments. A search warrant issued under the Canada Temperance Act is not an "order or conviction" within the meaning of R. S. N. S., c. 40, s. 6, and need not be quashed in order to maintain an action for trespass against the justice who issued it.

Johnston v. McDougall, 44 N.S.R. 265.

—Parish Court commissioner — Jurisdiction —Two informations tried together.]—A Parish Court commissioner by the Act respecting Parish Courts, C. S. 1903, c. 120, s 17, is given the power conferred upon two justices by the Dominion Act respecting summary convictions, Part XV. of the Criminal Code, and has therefore jurisdiction to try offences under the Canada Temperance Act, R.S.C. 1906, c. 152. Two informations were laid against the defendant under the Canada Temperance Act for unlawfully selling intoxicating liquor; the first charging a sale between June 25 and September 20, 1909; and the second charging a sale between July 1 and September 20, 1909. After hearing the first information, the magistrate proceeded with and heard the second; and after the second had been heard the defendant was convicted of both offences. There was evidence in the first case of a sale to W. and in the second case evidence of a sale to P.:—Held, the convictions were good, there being evidence of a distinct offence in each case. The refusal of the commissioner to adjourn in order to procure attendance of counsel is a matter in his discretion and does not go to his jurisdiction.

The King v. Alexander; ex parte Monahan, 39 N.B.R. 430.

—Substitutional service of summons—Delivery to inmate of last place of abode.]—The jurisdiction of the magistrate to proceed ex parte on the return of a summons attaches only on proof of service and where service was made substitutionally upon a brother of the accused at the defendant's hotel upon failure to find the defendant himself, proof that the brother served 'stayed at the hotel most of the time" is insufficient to show that he was an "inmate" of the defendant's last or most usual place of abode within Code s. 658, and the conviction made in defendant's absence was set aside.

The King v. Franey, 16 Can. Cr. Cas. 441.

—Jurisdiction—Summons, service of.]—The defendant residing in the city of St. John was served there with a summons issued by a justice of Carleton county for unlawfully causing intoxicating liquor at the city of St. John in the county of St. John to be shipped into the county of Carleton, contrary to Part II. of the Canada Temperance Act, R.S.C. 1906, c. 152.

The defendant appeared on the trial by counsel and gave evidence in his own defence, but was convicted:—Held, affirming the conviction, that the justice was given jurisdiction over the offence by sub-s. 4 of s. 127 of the Canada Temperance Act, amended by 7-8 Edw. VII. (Dom.) c. 71, and also by ss. 584 (b) and 707 of the Criminal Code and that the defendant by appearing waived any defect in the service of the summons. Since the Act 9 Edw. VII. (Dom.) c. 9, amending s. 717 of the Criminal Code, R.S.C. 1906, c. 146, it is not necessary for the prosecutor to negative exceptions in ss. 117 and 127 of the Canada Temperance Act.

The King v. Dibblee; Ex parte McIntyre, 39 N.B.R. 361.

—Unlawfully bringing liquor into county —Withdrawal of information—Second information for same offence.]—Section 138 of the Canada Temperance Act, R.S.C. 1906, c. 152 and ss. 1124 and 1125 of the Criminal Code, R.S.C. 1906, c. 146 are applicable to offences under the amendments to the Canada Temperance Act, 7-8 Edw. VII. (Dom.) c. 71, and it is therefore unnecessary to negative exceptions in proceedings for such offences. Upon the trial of an information for violation of the Canada Temperance Act after some evidence taken, the prosecutor, having some doubt as to the magistrate's jurisdiction, asked that the information be withdrawn. No one appeared for the defendant, and the magistrate gave a certificate of withdrawal stating the facts:—Held, that this was not equivalent to a dismissal of the information and not a bar to a subsequent information. (Ex parte Case, 28 N.B.R. 652 followed.)

The King v. Nickerson; Ex parte Mitchell, 39 N.B.R. 316.

—Conviction — Evidence — Certiorari.]—Certiorari having been taken away in proceedings for violation of the Canada Temperance Act a conviction for having unlawfully kept for delivery intoxicating liquor will not be interfered with though there is insufficient evidence of the offence charged, the magistrate having jurisdiction over the person and the offence. Upon a conviction against the agent of an express company for having unlawfully kept for delivery intoxicating liquor in violation of the Canada Temperance Act, R.S.C. 1906, c. 152, amended 7-8 Edw. VII. (Dom.) c. 71, certiorari will not be granted on the ground (1) no evidence that the defendant had any knowledge that the packages kept by him contained intoxicating liquor or (2) no evidence that the liquor received was not for personal or private use or (3) no evidence that the liquor was brought into the county where the offence was committed in violation of the Act. (Ex parte Daley, 27 N.B.R. 129, followed.)

The King v. Hornbrook; Ex parte Morison, 39 N.B.R. 298, 16 Can. Cr. Cas. 28.

—Replevin—Officer seizing under search warrant goods in custodia legis.]—Liquor consigned to McK. was seized under a search warrant issued under Part II. of the Canada Temperance Act, R.S.C. 1906, c. 152, s. 136, on information of C., a liquor license inspector, and given into C.'s custody for safe keeping. The warrant was issued by the proper officer and was regular and valid on its face. McK. replevied the goods from C. who put in a claim of property under C.S. 1903, c. 111, s. 361:—Held, reversing the judgment of the County Court Judge, that C. was entitled to retain possession of the liquor until it should be disposed of according to law, such possession being necessary to the carrying out of the Act. Semble—An appeal lies direct to the Supreme Court of New Brunswick from the judgment of a County Court Judge on a claim of property under C.S. 1903, c. 111, s. 361.

McKeen v. Colpitts, 39 N.B.R. 256, 14 Can. Cr. Cas. 488.

— Magistrate — Interest — Action pending between defendant's husband and magistrate.]—A bona fide action brought by the husband of a defendant against a stipendiary magistrate, before whom an information is laid, for a violation of the second part of the Canada Temperance Act, is sufficient to disqualify him.

Ex parte Scribner, 32 N.B.R. 175, distinguished.

Ex parte Hannah Gallagher, 34 N.B.R. 413, 4 Can. Cr. Cas. 486.

—Two informations for same offence — Withdrawal of one after hearing of evidence—Power of magistrate to allow — Concurrent proceedings.]—1. After the evidence has been heard in summary proceedings the Justice is not bound either to convict or discharge the defendant; he may allow the prosecutor to withdraw the charge. 2. Such withdrawal may be allowed even when another information covering the same offence has been laid by the same prosecutor against the same defendant, and the determination thereof is still pending.

Ex parte Wyman, 34 N.B.R. 608, 5 Can. Cr. Cas. 58.

—Conviction by parish Court commissioner—Jurisdiction—Plea of autrefois acquit —Commencement of prosecution.]—Where a person is convicted of an offence under the Canada Temperance Act, committed at a time falling within the period covered by a previous information upon which he was acquitted, in order to sustain a plea of autrefois acquit he must show that the offence for which he was convicted and

that for which he was acquitted were identical. The laying of the information is the commencement of the prosecution. Whether the sale of the liquor was by the consent or contrary to the order of the defendant is a question for the magistrate. Section 103 (d), c. 106 of R.S.C. (the Canada Temperance Act), in so far as it attempts to confer upon parish Court commissioners jurisdiction to try offences against the Act is ultra vires of the Parliament of Canada.

Ex parte Flanagan, 34 N.B.R. 577.
5 Can. Cr. Cas. 82.

—Magistrate—Bias—Pecuniary interest — Disqualification.]—Both the police and the sitting magistrate of the city of M. were residents and ratepayers thereof, and the police magistrate was in receipt of a fixed salary from the city as court commissioner. Fines imposed for violation of the Canada Temperance Act therein were paid over to the treasurer of the city, by him placed to the credit of its general funds and used to meet unforeseen expenses. The city, by one of its policemen employed for the purpose of enforcing the Act, was the prosecutor in all the cases:—Held, that there was no disqualification of either the police or the sitting magistrate by reason of pecuniary interest, nor was there such a probability of bias on the part of either by reason of their being corporators of the city, which was the virtual prosecutor, as to invalidate convictions made by them for violations of the Canada Temperance Act in the said city of M. Ex parte Driscoll, 27 N.B.R. 216, considered. Section 872 of the Criminal Code, 1892, allows imprisonment without the awarding of distress.

Ex parte Gorman, 34 N.B.R. 397.
4 Can. Cr. Cas. 305.

Conviction by justices—Defective proceedings—Information laid before one justice only—Quashing conviction—Certiorari.]—Rex v. Hennessy; Ex parte Pallen, 3 E. L.R. 427 (N.B.).

—Selling liquor between certain dates — Autrefois acquit—Onus of proving identity of charges.] — 1. A defendant, pleading a former acquittal in answer to a summary proceeding for an offence must show that the two charges are identical and where the offence is that of keeping liquor for sale between certain dates, the mere fact that the prior charge was for keeping liquor for sale between the same dates will not alone prove the identity of the offences. 2. The second charge may be properly based either upon the information in the first charge resworn after the dismissal of that charge for irregularity in the summons or upon a fresh information.

The King v. Johnson, 17 Can Cr. Cas. (N.S.).

—Third offence—Recitals of former convictions—Certificates of former convictions.]—Rex v. Woodlock, 1 E.L.R. 160 (N.S.).

— Inspector — Appointment by municipal council.]—Lawson v. Town of Glace Bay, 4 E.L.R. 49 (N.S.).

—Keeping liquor for sale—Previous conviction for same offence on previous day—Continuing offence—Evidence of liquor being the same—Magistrate's refusal to give evidence.]—Rex v. Murray, 2 E.L.R. 80 (N.S.).

—Second offence — Conviction — Costs of conveying to gaol.]—Re LeBlanc, 7 E.L.R. 94 (N.S.).

— Conviction—Magistrate disqualified by receipt of fines—Prisoner's right to inspect documents—Variance between warrant and conviction—Proof of date of information.]—Rex v. Donovan, 2 E.L.R. 214 (N.S.).

— Express company—Delivery of liquor C.O.D.]—A consignment of liquor was shipped by Dominion Express from Amherst to Moncton, C.O.D., and delivered to the purchaser at the latter place by the agent of the company upon payment of the price:—Held, that the agent was not guilty of an offence against the Canada Temperance Act. Rule absolute for certiorari to remove conviction.

Ex parte Trenholm, 37 C.L.J. 43 (S.C. N.B.).

—Dismissal of charge by justices—Appeal by prosecutor to County Court—Jurisdiction of Judge to allow costs of appeal against defendant.]—Upon the trial of an information charging defendant with a violation of the provisions of the second part of the Canada Temperance Act, before two justices of the peace, the justices dismissed the charge and made a formal order of dismissal. From the order so made the prosecutor appealed to the County Court, and, the appeal having been heard, it was ordered that the order made by the justices be set aside and quashed, and that defendant be convicted of the offence charged, and that he pay, in addition to the fine imposed, etc., the prosecutor's costs, amounting to the sum of $27.16, and that the same be levied by distress, etc.:—Held, (Ritchie and Henry, JJ., dissenting), that the County Court Judge had jurisdiction to include in the penalty imposed the costs of appeal to that Court.

The Queen v. Hawbolt, 33 N.S.R. 165, 4 Can. Cr. Cas. 229.

—Jurisdiction of provincial magistrates to try offences against.]—Defendant was convicted before two justices of the peace for the County of Kings of the offence of hav-

ing unlawfully kept for sale in his hotel at K., in said county, intoxicating liquors, contrary to the provisions of the second part of the Canada Temperance Act then in force in said county. The conviction was attacked on the following, among other grounds: (1) Because the justices who made the conviction were not clothed with jurisdiction by proper legislative authority to sit as a Court of summary criminal jurisdiction. (2) Because the justices had no jurisdiction to adjourn the trial from the hour named in the summons to a later hour of the same day, and, in so adjourning, lost jurisdiction. (3) Because the justices, at the time they made the adjournment, had no evidence before them to prove the service of the summons:—Held, that the Provincial Legislature having made provision for the appointment of justices of the peace, and having conferred jurisdiction upon them to impose penalties and punishments for the enforcement of provincial statutes, it was competent for the Parliament of Canada, by statute, to provide that punishments and penalties for the enforcement of laws of the Parliament of Canada might be recovered and inflicted before these Courts. Held, therefore, that the magistrates had jurisdiction, and that the motion to quash the conviction must be dismissed. Held, that the justices having met at the hour appointed did not lose jurisdiction by the fact of their having adjourned the hearing until a later hour of the same day. Held, that proof of the service of the summons being a part of the hearing it was not necessary that the justices should have had such proof before them as a preliminary to making the adjournment. Held, that the delay in the hearing of the case from the hour of ten o'clock in the morning until two o'clock in the afternoon of the same day was not unreasonable.

The King v. Wipper, 34 N.S.R. 202.
5 Can. Cr. Cas. 17.

— Stipendiary magistrate for county — Jurisdiction where offence committed in incorporated town—R.S.N.S. (1900), c. 33.] —Defendant was convicted by the stipendiary magistrate in and for the County of Cape Breton, of the offence of having kept for sale upon his premises intoxicating liquors, contrary to the provisions of the second part of the Canada Temperance Act. The offence for which defendant was convicted was committed within the limits of the town of Sydney, an incorporated town in the County of Cape Breton. Under the provisions of R.S.N.S., 1900, c. 33, relative to the appointment and authority of stipendiary magistrates, it is enacted that "every stipendiary magistrate shall have jurisdiction, power and authority throughout the whole of the county for which he is appointed":—Held, that in the absence of legislation giving exclusive jurisdiction to the stipendiary magistrate for the town of Sydney, the words of the statute must be construed as including that part of the county embraced within the limits of the town. Held, that s. 14 of c. 33, which was relied upon as indicating a contrary intention, was not to be given a construction, but was merely intended to give certain powers to stipendiary magistrates for the counties, where exclusive jurisdiction had been conferred upon the magistrates for incorporated towns. Appeal allowed and order below reversed with costs, including costs of the appeal.

The King v. Giovanetti, 34 N.S.R. 505.
5 Can. Cr. Cas. 157.

—Conviction made in absence of defendant—Question as to previous conviction under s. 115, sub-s. (a).]—On application to quash a conviction for a fourth offence against the provisions of the Canada Temperance Act, on the ground that the question whether defendant had been previously convicted was not addressed to the defendant, as required by s. 115 sub-s. (a) of the Act:—Held, dismissing the application with costs, that it was not necessary that the question referred to should be addressed to defendant in a case where he was represented by counsel. Held, that if defendant could be adequately represented by counsel in pleading to and trying the main case (which it was clear he might be, under ss. 850, 854, 855, 856 and 857 of the Code), he could equally be represented by counsel in respect to this inquiry.

The King v. O'Hearon, 34 N.S.R. 491.
5 Can. Cr. Cas. 187, 531.

—Prohibition—Justices of the peace—Disqualification — Interest — Membership in temperance alliance—Canada Temperance Act.]—(1) Justices of the peace, who belong to an association (a temperance alliance) of which the president is the party prosecuting, and to which association any fine to be imposed upon the accused for the offence against the liquor law with which he is charged would be paid under resolution of the municipal council, are disqualified from trying the charge, and will be prevented by a writ of prohibition from so doing.

Daigneault v. Emerson, 20 Que. S.C. 310,
5 Can. Cr. Cas. 534.

—Sale of intoxicating liquors—Judicial sale by sheriff.]—The Canada Temperance Act does not prohibit judicial sales of intoxicating liquors. Under a warrant of distress upon a convicton for an offence against the second part of the Canada Temperance Act, the defendant's property must be levied on, though it consists of intoxicat-

ing liquors only, and is in a place where the second part of the Act is in force. On a habeas corpus application under Consol. Stat, N.B. c. 41, s.4, it may be shown that the constable's return to the warrant of distress that there was not sufficient property to satisfy it, is false, and that therefore the commitment based thereon, under which the party is imprisoned, was improperly issued.

Ex parte Fitzpatrick, 5 Can. Cr. Cas. 191.

—Canada Temperance Act—Intoxicating liquors sent by express, C.O.D.—Sale by express agent.]—The agent of an express company in the county of W., where the Canada Temperance Act was in force, in the ordinary course of business, delivered a parcel containing intoxicating liquor, by the person to whom it was addressed, and collected from him the price thereof, the liquor, by the buyer's instructions, having been sent to him by express, C.O.D. The sale of the liquor was effected at a place outside of the county of W.:—Held (per Tuck, C.J., Hanington, Barker and McLeod, JJ., Landry, J., dubitante), that the agent could not be convicted of selling intoxicating liquor contrary to the provisions of the said Act.

The Queen v. Cahill, 35 N.B.R. 240.
6 Can. Cr. Cas. 204.

—Third offence under—What necessary to constitute.]—An information for a first offence under the Canada Temperance Act was laid on the 13th of May, and a conviction had thereon on the 27th of May, for an offence on the 8th of May. Information for a second offence was laid on the 6th of August, and a conviction had thereon on the 19th of August for an offence between the 1st of June and the 11th of July. An information for a third offence was laid on the 10th of October, and a conviction had thereon on the 2nd of November, for an offence on July 12th:—Held, per Hanington and Landry, JJ., that a third offence to be punishable as such must be one committed after a conviction for the second offence, and the third conviction in this case was bad. Per Barker and Gregory, JJ.:—That the conviction was bad because the information for a second offence had not been laid before the commission of the offence for which the third conviction was made.

The King v. Marsh; Ex parte McCoy, 36 N.B.R. 186, 7 Can. Cr. Cas. 485.

—Informations for similar offences pending at same time.]—Defendant was summoned to appear before the stipendiary magistrate of Sydney, C.B., to answer two informations for selling intoxicating liquor in violation of the second part of the Canada Temperance Act. Evidence was heard in both cases, and both cases were then adjourned until a subsequent day, when judgment was given, convicting defendant under one information and quashing the other:—Held, that the conviction must be quashed, the magistrate having heard evidence in both cases, and had them pending before him when he made the conviction, and the evidence in the one case, although dismissed, being calculated, under the circumstances disclosed, to influence the magistrate in the case in which defendant was convicted. R. v McBerny, 26 N.S.R. 327, followed.

Rex v. Burke, 36 N.S.R. 408, 8 Can. Cr. Cas. 14.

—Third offence—Conviction—Omission to recite that information for first offence preceded third offence.]— (1) A conviction for a third offence under the Canada Temperance Act is valid if it follows the statutory form without reciting that such third offence was committed after information laid for the first offence, if such was in fact the case. (2) The fact that the information for the first offence had preceded the commission of the alleged third offence as required by statute, may be shown by affidavit filed in answer to a certiorari application.

The King v. Swan, 8 Can. Cr. Cas. 86, (Townshend, J.).

—Local vote—Bringing into effect in county—Subsequent establishment of city within the county.] — (1) The prohibitory clauses of the Canada Temperance Act remain in force in the whole district which comprised the "county" when the Order-in-Council proclaiming Part II. of the Act came into operation in the county, notwithstanding that a portion thereof has since been incorporated as a city. (2) Semble, the detaching from a district which has adopted a prohibitory liquor law on a part of its territory and the addition of such part to another district, leaves the portion of territory so dealt with still subject to such liquor law.

The King v. McMullin, (N.S.), 9 Can. Cr. Cas. 531, 38 N.S.R. 129.

—Sale of liquor to be disposed of contrary to law—Action for price dismissed.] —To an action by plaintiff for goods sold and delivered, defendant pleaded that plaintiff's claim, if any, was for the price of intoxicating liquors sold by plaintiff to defendant, at North Sydney, in the county of Cape Breton, the plaintiff well knowing that the same were to be sold, and were actually sold, within said county, in which the second part of the Canada Temperance Act was, at the time of such sale, in force and effect. The date of purchase of the liquor, and the price, were admitted; also, that plaintiff knew that the Canada Temperance Act was in force in North Sydney,

where defendant was carrying on business as a dealer in intoxicating liquors; also that the order for the liquor was given by defendant to an agent of plaintiff at North Sydney, such order being subject to the approval of plaintiff. Defendant proved that the liquor in question was purchased through D., with whom he had dealt as an agent for the sale of liquor for a number of years, and that, when he made the purchase, D. was aware that the defendant was in the retail trade:—Held, dismissing plaintiff's appeal with costs, that there was sufficient ground to justify the judgment for defendant.

Ross v. Morrison, 36 N.S.R. 518.

—Imprisonment in default of payment of fine—Provision for enforcing payment.]—A conviction made against defendant for an offence against the Canada Temperance Act was sought to be quashed because the stipendiary magistrate by whom the same was made ordered that defendant, in default of paying the fine and costs in the conviction mentioned, should be imprisoned in the common gaol, etc., for the term of three months unless the several sums in said conviction mentioned were sooner paid:—Held, following The Queen v. Horton, 31 N.S.R. 217, 3 Can. Cr. Cas. 84, that the term of imprisonment being imposed by way of punishment, and not as a term of imprisonment to be inflicted in default of payment of the penalty, the provision for enforcing payment of the pecuniary penalty was to be found in the Criminal Code of Canada, s. 872, as amended in 1894 and 1900, and the application to quash must be dismissed with costs.

Rex v. Blank, 38 N.S.R. 337; 10 Can. Cr. Cas. 358.

—Third offence—Certificate of prior convictions—Identity of accused — Action against magistrate—Disqualification.]—In the absence of an admission by the accused of the fact of previous convictions, certificates of such previous convictions are under section 115 sufficient proof of such convictions, and it is not necessary that evidence apart from such convictions should be given of the identity of the accused with the person formerly convicted, where he was present at the trial and did not raise the question of identity. A magistrate is not disqualified from trying a charge under the Act by reason of a writ having been made out and sent to the sheriff for service in an action by the accused against the magistrate for alleged misconduct as a judicial officer, where the writ was not served before the conviction was made.

The King v. Byron; Ex parte Batson, 37 N.B.R. 383.

Ex parte Batson, 10 Can. Cr. Cas. 240.

—Information — Amendment charging another offence — Adjournment.]—On the trial of an offence under the Canada Temperance Act, the information may be amended or altered, and any other offence under the Act substituted and the trial continued to conviction without an adjournment, if the defendant is present and does not allege he is misled and ask for an adjournment.

The King v. Byron; Ex parte Batson, 37 N.B.R. 386, 10 Can. Cr. Cas. 240.

—Stipendiary magistrate—Appointment of —Proof — Towns Incorporation Act, 1896.]—T. was convicted of an offence against the Canada Temperance Act by C., who, in making the conviction, professed to be acting as stipendiary magistrate of the county of W. No record of his appointment to this office could be found either in the minutes of the Executive Council or in the office of the Provincial Secretary; but there was a record of his appointment to the office of stipendiary magistrate of the Parish of S. C. swore (and herein he was corroborated) that upon it being discovered that his commission as stipendiary magistrate of the Parish of S. was illegal, a new commission, appointing him stipendiary magistrate of the county of W., was issued to him, which commission had been lost, but under which he had been acting without objection for many years. Afterwards, when the town of S. was carved out of the parish of S. and incorporated under the Towns Incorporation Act, C. was appointed police magistrate of the town. Sub-section 2 of section 131 of the Towns Incorporation Act provides, inter alia, that on an appointment of a police magistrate for a town incorporated thereunder, the appointment and commission of a police or stipendiary magistrate theretofore acting in such town shall thereupon ipso facto be cancelled, and he shall cease to hold office as such police or stipendiary magistrate:—Held, that there was sufficient proof of C. having been duly commissioned to act as stipendiary magistrate of the county of W., and that under the above sub-section he did not vacate such office upon being appointed police magistrate of the town of S.

Rex v. Cahill; Ex parte Tait, 37 N.B.R. 18, 10 Can. Cr. Cas. 513.

—Proof that liquor was intoxicating — Certificate of analysis—Agreement of counsel—Improper evidence.]—G., L. and C. were convicted for keeping liquor for sale contrary to the Canada Temperance Act. Orders nisi to quash the convictions were granted on the ground that improper evidence was admitted, without which there was no evidence that the beer was intoxicating. The evidence objected to was the certificate of one P., an analyst, of the

percentage of absolute alcohol in the beer sold. Affidavits of the prosecutor, his counsel, and the magistrate, were read on the return of the orders stating that on the trial of a prior complaint against one T., P., a chemist and analyst, gave evidence, and it was agreed between the counsel for the prosecution and the counsel for the accused that his evidence might be used in the cases against the accused. In affidavits in reply the accused denied the alleged agreement, and no reference was made to it in the magistrate's return:—Held, that there being some evidence to justify the conviction, the orders must be discharged.

The King v. Kay; Ex parte Gallant, 37 N.B.R. 72.

—Conviction—Jurisdiction of stipendiary magistrate making—Effect of amending Act—R.S.C. c. 33—Acts of 1904, c. 11.]—Defendant was convicted at Canning in the county of Kings of an offence against the Canada Temperance Act alleged to have been committed at Aldershot in said county. The stipendiary magistrate who made the conviction was appointed under the authority of R.S.C. c. 33, in which it was provided that "one or more stipendiary magistrates may be appointed by the Governor-in-Council for each county in the province to hold office during pleasure." Subsequent to the appointment, and before the making of the conviction, the Act respecting the appointment of stipendiary magistrates was amended by the Acts of 1905, c. 11, by striking out the word "county" and substituting therefor the word "municipality." No new appointment was made for the municipality of Kings under the amending Act, and the boundaries of the municipality were the same as those of the county:—Held, that the stipendiary magistrate before whom the matter was heard had not lost jurisdiction to act, and that the application for a certiorari and to set aside the conviction made by him must be dismissed.

The King v. Townshend (No. 1), 39 N. S.R. 172, 11 Can. Cr. Cas. 94.

—Warrant to search and order for destruction of liquor—Procedure—Form inconsistent with provisions of Act.]—On motion for a writ of certiorari to remove into the Supreme Court a record of search warrant made by two justices of the peace authorizing and requiring the constables to whom the warrant was directed to enter the premises of defendant and there search for intoxicating liquor, and also, an order for the destruction of liquor made by the same justices three days later:—Held, that under, the provisions of the Canada Temperance Act, ss. 108, 109, as amended by the Statutes of Canada, 1888, c. 34, the warrant to search for liquor unlawfully kept for sale may precede the prosecution for the penalty for unlawfully keeping for sale. Also, it is not necessary under the amended Act to set out causes of suspicion or particulars of the offence in the information upon which the warrant is issued, such particulars not being ascertainable until after the goods are seized. Also, the sense of the enactment in this respect being at variance with the form given in the statute, the direction in the form is not to be followed. If otherwise, the direction was sufficiently complied with, there being an allegation that liquor was unlawfully kept for sale and the place being sufficiently indicated.

The King v. Townshend (No. 2), 39 N. S. R. 189; 11 Can. Cr. Cas. 115.

—Conviction—Penalty—"Not less than $50."]—(1) A commitment on conviction for an offence against Part II. of the Canada Temperance Act is a commitment in a criminal case and a Judge of the Supreme Court of Canada has power to issue a writ of habeas corpus. (2) Under Part II. of the Canada Temperance Act which enacts that a fine may be imposed of "not less than $50" for a first offence and of "not less than $100" for a second offence, the magistrate cannot impose a fine of more than $50 for a first offence. (3) On application to a Judge of the Supreme Court of Canada for a writ of habeas corpus he may refer the same to the full Court which has jurisdiction to hear and dispose of it.

Re Placide Richard, 38 Can. S.C.R. 394, 12 Can. Cr. Cas. 204.

—Fine—Imprisonment in default—Delay in issuing warrant of commitment.]—(1) Section 739 of the Revised Criminal Code, 1906, applies to authorize imprisonment forthwith for non-payment of a fine imposed for a first offence under the Canada Temperance Act without the necessity of distress, notwithstanding that the statutory form T to the latter Act giving a form of conviction for a first offence thereunder is drawn as for a distress in default of payment. (2) Form T to the Canada Temperance Act, R.S.C. 1906, c. 152, is not to be deemed to be exclusive of all other forms of convictions for a first offence, and the effect of sections 135 and 151 (formerly 51 Vict. c. 34, ss. 9 and 14), is to authorize an alternative adjudication of imprisonment without distress and a corresponding form of conviction framed under the Criminal Code. (3) Upon a summary conviction imposing a fine and imprisonment in default of payment forthwith, a delay of twenty-nine days in issuing the warrant of commitment will not affect its validity.

The King v. McKinnon, 12 Can. Cr. Cas. 414.

—Action for goods illegally taken and detained—Goods seized under warrant.]—In an action against defendants (a police constable and a Scott Act inspector) for the wrongful seizure and detention of a quantity of intoxicating liquors, the evidence showed that the liquors were seized upon the premises of S., who had been several times convicted and fined for violations of the Canada Temperance Act. Both plaintiff and S. swore that the liquors in question were the property of plaintiff and were not kept for sale. In the absence of any evidence to the contrary, the trial Judge gave judgment in favour of plaintiff for a return of the goods, but deprived him of costs on the ground of doubt as to the truthfulness of the evidence, and suspicion as to the purpose for which the liquor was meant to be used:—Held, that the illegal purpose was relevant and there was no reason for interfering with the discretion of the Judge.

Fraser v. Watters, 41 N.S.R. 201.

—Issue of search warrant before prosecution—Writ of certiorari refused—Practice as to special leave to appeal in Criminal cases.]—Under the Canada Temperance Act, 1888 (51 Vict. c. 34), a search warrant was issued and duly executed, and large quantities of intoxicating liquor found in the hotel and premises searched and a conviction of the appellant subsequently obtained in regard thereto, with a consequent order for the destruction of the liquor:—Held, that the Supreme Court of Nova Scotia, having dismissed applications for writs of certiorari to remove into the said Court the record of the said search warrant and destruction order, special leave to appeal therefrom must be refused. The decision was plainly right, having regard to s. 10 of the Act under which the warrant was issued.

Townsend v. Cox [1907] A.C. 514.
12 Can. Cr. Cas. 509.

—First offence—Penalty.]—A conviction for a first offence against the second part of the Canada Temperance Act, imposing a penalty of $200 under c. 41 of the Acts of the Parliament of Canada (1904), which imposes a penalty for a first offence of not less than $50, is a good conviction. Semble, that such a conviction would not be sustained if it imposed such an exorbitant penalty as to imply that the convicting magistrate acted from motives that were not judicial.

Rex v. Kay; Ex parte Henry Cormier, 38 N.B.R. 3, 12 Can. Cr. Cas. 339.

—Imprisonment without option of a fine.]—Chapter 41 of the Canada Statutes, 1904, enacting "Every one who by himself, etc., ... keeps for sale, etc. . . . any intoxicating liquor in violation of the second part of the Canada Temperance Act shall, on summary conviction, be liable to a penalty for the first offence of not less than $50, or imprisonment for a term not exceeding one month, etc. . . . " gives an alternative penalty so that either a fine or a term of imprisonment may be imposed.

Rex v. Kay, 38 N.B.R. 1.

—Police magistrate for parish—Jurisdiction in county—Offences committed in city or town.]—A police magistrate appointed under 46 Vict. c. 37, for the county of Westmoreland, with civil jurisdiction within the parish of Shediac, has jurisdiction to try offences against the Canada Temperance Act committed at the city of Moncton, and such jurisdiction is not restricted by the "Act relating to the jurisdiction of police or stipendiary magistrates." (2 Edw. VII. c. 11), giving police or stipendiary magistrates appointed for a parish jurisdiction for the county in which such parishes are situate, and providing that such magistrate shall have no jurisdiction over offences committed within the limits of any city or incorporated town.

The King v. McQueen, 38 N.B.R. 48.

—Necessity of two justices receiving information.]—A conviction under 51 Vict. c. 34, s. 8, amending s. 105 of the Canada Temperance Act, made by two justices of the peace on an information purporting on its face to have been taken and signed by only one of them, was affirmed on argument on the return of a rule nisi to quash the conviction removed by certiorari.

The King v. Hennessy, 38 N.B.R. 103.

—Conviction—Magistrate—Bias or interest—Search warrant for liquor.]—On December 7th information was laid against M. for keeping intoxicating liquors for sale on or about the 6th, and on the 11th a search warrant was granted, under which the premises of M. were searched and a quantity of liquor claimed by plaintiff seized. M. was convicted on the 20th December for keeping liquor for sale on the 6th of the same month in contravention of the provisions of the Canada Temperance Act, and on the 21st an order for the destruction of the liquor was made by the stipendiary magistrate who made the conviction:—Held, that it must be assumed that the magistrate was satisfied when he made the order for destruction of the liquor, that the liquor to which the order applied, was that which had been the subject of the conviction, and his decision on this point was final. Also that it was not necessary that the information for the search warrant should precede the information for the search. Objection was taken to the magistrate's acting on

the ground of interest in the result:—Held, affirming the judgment of the trial Judge, that the magistrate was not incapacitated from acting on account of interest in the result, there being no other justice who could act in the making of the order, and if he were held disqualified, the provisions of the Act would be defeated. Held, also, that it made no difference to whom the liquor seized belonged if it were in fact being kept for sale in violation of the Act.

McNeil v. McGillivray, 42 N.S.R. 133.

—Amendment—Application to localities previously adopting—Sentence of imprisonment—Absence of accused.]—An amendment to the Canada Temperance Act, authorizing imprisonment without the option of a fine for a first offence, applies to localities that had adopted the Act prior to the amendment. If the accused has proper notice of the proceedings, and is aware that judgment may be pronounced against him, and he might have been present, it is no objection to the conviction that judgment was pronounced and sentence of imprisonment imposed in his absence. A conviction which states in terms that the accused is convicted of the offence charged, though not in the words of the Act, is sufficient, and will not be quashed on certiorari.

The King v. Kay; Ex parte Landry, 38 N.B.R. 332.

—Amendment—Application to localities previously adopting—Previous conviction for same offence.]—The amendment to the Canada Temperance Act (Rev. Stat. of Can. 1906, c. 152, s. 127) authorizes imprisonment for a term not exceeding one month, with or without hard labour, without the option of a fine for a first offence (a), and applies to localities that had adopted the Act prior to the amendment. Where information is laid before a magistrate he acquires jurisdiction over the offence charged, and his jurisdiction is not ousted by a subsequent information before and determination by another magistrate of the same offence. If a party charged with an offence, sets up as a defence a previous conviction for the same offence, the onus in on him to prove the identity of the offences.

The King v. Kay; Ex parte Gallagher, 38 N.B.R. 325.

—Variance between information and summons—Conviction against accused in his absence.]—On an informaton for keeping intoxicating liquor for sale contrary to the Canada Temperance Act the accused was summoned to answer a charge of selling, he did not appear and a conviction was made for keeping for sale:—Held, that as the accused had not been summoned to answer the information laid, the magistrate had never acquired jurisdiction over the person, and the conviction was bad, and was not cured by s. 669 or s. 724 of the Criminal Code.

The King v. Kay; Ex parte Melanson, 38 N.B.R. 362.

—Commencing prosecution within three months after the offence—Jurisdiction.]—A conviction under the Canada Temperance Act for selling between two dates, where one day in such period would be more than three months before the date of laying the information, is bad. (See s. 134).

The King v. Kay; Ex parte Hebert, 39 N.B.R. 67.

Ex parte Hebert, 15 Can. Cr. Cas. 165.

—Sale by druggist—Physician's prescription—"Repeat once only."]—A prescription for ten ounces of gin signed by a physician containing the words "use for medicine only" and "repeat once only," and the name of the purchaser, is not sufficient to justify a druggist in making a second sale of the liquor under the Canada Temperance Act, R.S.C. 1906, c. 152, s. 125.

The King v. Kay; Ex parte Nugent, 39 N.B.R. 135, 15 Can. Cr. Cas. 276.

—Second offence — Time of, as regards prosecution for prior offence.] — (1) A second offence under the Canada Temperance Act to be punishable as such must be one committed after conviction for the first offence, and a summary conviction made as for a second offence committed after the information was laid for the first offence, but before conviction thereon, is bad. (2) Sec. 143 of the Canada Temperance Act does not displace the common law rule in that respect. (3) The information for the second offence must allege the previous conviction.

The King v. Jordan, 15 Can. Cr. Cas. 130.

—Percentage of spirits.]—The Court will not quash a conviction under the Canada Temperance Act, R.S.C. 1906, c. 152, for selling liquor when there is some evidence to sustain the conviction, although that evidence is little more than opinion. (Ex parte Daley, 27 N.B.R. 129, followed.) Liquor containing a little over ½ per cent. of spirits may be an intoxicating liquor under the Act.

The King v. Kay; Ex parte Horsman, 3 N.B.R. 129, 15 Can. Cr. Cas. 280.

—Bias—Evidence obtained by illegal search warrant.]—The fact that the police magistrate of the city of Moncton is a member of the Board of Police Commissioners for that city as established by 7 Edw. VII. c. 97, does not disqualify him from hearing an information laid by a

police officer who was appointed by such board. The Police Commissioners merely exercise a function of the provincial government and are not responsible for the acts of the police officers they appoint. The validity of a conviction under the Canada Temperance Act R.S.C. 1906, c. 152, is not affected by the fact that the evidence upon which the conviction is based was obtained by means of a search warrant, the information for which was insufficient. —Semble, that the police officers of the city of Moncton have authority to make a seizure of liquor outside the city limits.

The King v. Kay; Ex parte Wilson, 39 N.B.R. 124, 15 Can. Cr. Cas. 264.

—"Intoxicating liquor"—"Malt liquor."] —Beer manufactured from malt, although not in fact intoxicating, is a "malt liquor," and therefore an "intoxicating liquor" within the meaning of the Canada Temperance Act. Upon a charge for unlawfully selling intoxicating liquor in violation of the Canada Temperance Act, it is not necessary to prove knowledge on the part of the defendant that the liquor sold was intoxicating.

The King v. Marsh; Ex parte Lindsay, 39 N.B.R. 119.

Ex parte Lindsay, 15 Can. Cr. Cas. 252.

—Search warrant for liquor—Informant executing warrant as chief of police.] — The fact that the informant as chief of police laid the information for and executed a search warrant under the Canada Temperance Act will not invalidate a summary conviction for keeping liquor for sale although based upon the result of the search under the warrant.

Ex parte Dewar, 39 N.B.R. 143, 15 Can. Cr. Cas. 273.

—Search warrant and order for destruction of liquors—Action against justices.]— (1) Under the Canada Temperance Amendment Act of 1888, justices of the peace have jurisdiction to issue a search warrant to search for and seize liquors, on information laid therefor, notwithstanding that no prosecution in relation thereto has been brought or is pending. (2) An order under which liquors seized under warrant were destroyed, and following a conviction consequent on such search, must be quashed before an action can be brought or maintained against the justices who made such warrant and order.

Townsend v. Beckwith, 42 N.S.R. 307, 14 Can. Cr. Cas. 353.

CANALS.

See SHIPPING.

CAPIAS.

See ARREST.

CARNAL KNOWLEDGE.

Carnal knowledge of girl under fourteen —Second count for illicit connection when girl over fourteen—Trial of defendant on both.]—The indictment against the prisoner contained two counts: (1) under s. 301 of the Criminal Code, for carnal knowledge in 1907 of a girl under fourteen years of age; (2) under s. 211, for illicit connection in 1909 with the same girl, tnen being over fourteen and under sixteen years of age, and of previously chaste character. The trial proceeded on both counts, but at its close the Judge struck out the second count on the ground that, the girl having sworn to the connection charged in the first count, she was not chaste at the time of the connection charged in the second count. The jury found the accused guilty under the first count. According to the report of the proceedings at the trial, no request was made for separate trials on the two counts; but it was stated in argument that such a request had been made. The jury were were plainly told that evidence admitted upon the second count was not admissible upon, and not to be applied to, the first count. The trial Judge recorded a conviction and refused to reserve a case; the defendant asked for leave to appeal and for a direction to the Judge to state a case:— Held, that it was within the power of the Court to try the prisoner upon the two counts at the same time (ss. 856, 857 of the Code); it was a matter for the discretion of the trial Judge; if the question as to the manner of trial was one of law, a reserved case was properly refused; and, if not one of law, there was no power to reserve a case. Held, also, that, as the evidence applicable only on the second count was withdrawn from the jury, the defendant was not, as a matter of law, prejudiced by that evidence, whether admissible or inadmissible on the second count. During the trial the child of the prosecutrix, the issue, as she swore, of her connection with the accused in 1909, was produced and shown to the jury, and its resemblance to the defendant pointed out. Held, not improper nor inadmissible. Per Meredith, J.A.:—It would be better and more regular to have the likeness testified to by witnesses.

Rex v. Hughes, 22 O.L.R. 344.

Carnal knowledge of young girl by householder upon his own premises—Proof of knowledge of age.]—The defendant was charged with an offence against s. 217 of the Criminal Code, which provides that "every one who, being the owner or occupier of any premises . . . induces or knowingly suffers any girl under the age of eighteen years to resort to or be in or upon such premises for the purpose of being unlaw-

fully or carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence . . .:"—Held, that it was not necessary for the Crown to prove that the defendant knew that the girl was under the age of eighteen years. Held, also, Maclaren and Magee, JJ. A., dissenting, that it is not an offence, within the section, for the owner of the premises to induce or suffer a girl within the prescribed age to be thereon for the purpose of himself having connection with her; the object of the section is to forbid the use of premises as assignation-houses to which young girls may, or may be induced, to resort; the section is applicable to cases of permission, not commission.

Rex v. Sam Sing, 22 O.L.R. 613.

—Bawdy house.]—See DISORDERLY HOUSE.

CARRIERS.

Express company—Conditions of carriage —Knowledge of consignor.]—The assent necessary to form a contract cannot exist on the part of a party who is ignorance of its purpose. Hence, the acceptance by the shipper of the receipt of an express company who carries goods for him does not constitute an agreement on his part to conform to the conditions printed on the back which are neither read over nor explained to him, especially if he is unable to read or write. The carrier is liable for the loss of goods carried up to their value at their destination but not for the profit that the owner might have made by selling them if nothing took place when the contract for carriage was made to make him aware that such would be the consequence of his failure to execute it.

Black v. Canadian Express Co., Q.R. 36 S.C. 499.

Express company—Wrong-billing—Negligence—Excessive tolls.]—On an application to recover damages for the company's alleged negligence in way-billing a skiff to the wrong address, and charging excess tolls for sending it in a roundabout course to its proper destination, it being in dispute who was responsible for the erroneous way-billing:—Held, the board could only investigate the error in computing express tolls.

Rogers v. Canadian Express Co., 9 Can. Ry. Cas. 480.

—Perishable article—Loss through unavoidable delay.]—Defendants, an express company, undertook to forward a quantity of fresh fish for plaintiffs from Port Mulgrave, in the Province of Nova Scotia, to New York, and the evidence showed that defendants spared no effort to have the fish forwarded with all possible despatch, but on account of the journals of the car upon which they were placed heating, the car was delayed at two points, and when the fish arrived at their destination they were spoiled, and that the accident which caused the delay was one which could not have been avoided:—Held, that the trial Judge erred in not submitting to the jury questions tendered on behalf of the defendants, and intended to secure the finding of the jury as to where the defendants were negligent or failed in their undertaking, such finding being material to the decision of the case. The jury found in answer to the only question submitted that defendant company did not deliver the fish within a reasonable time, looking at all the circumstances of the case:—Held, that the latter finding was against the weight of evidence and could not stand, and that there must be a new trial.

Matthews v. The Canadian Express Co., 44 N.S.R. 202.

Ferryman — Transportation of live animals — Responsibility for loss of animal.]—(1) To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation. Therefore the owner of a boat propelled by oars and rowed for hire across a river from time to time, by employees usually occupied in other ways, does not fall within the definition of a common carrier. (2) Where a traveller put his horses upon a ferry boat of the above description with side-rails only 15 inches high, saw the risk to which his animals were exposed, and kept them under his own charge during the crossing, he is not entitled to recover from the owner of the ferry boat the value of a horse which became frightened, jumped overboard and was drowned where the accident occurred through no fault of omission or commission on the part of the carrier or his employees, but from the restless disposition of the horse and the inability of the owner to keep him quiet.

Roussel v. Aumais, 18 Que. S.C. 474.

—Licensed expressman—Carrying goods for hire—Liability for loss by fire.]—The defendant, duly licensed as an expressman by virtue of a city by-law, was engaged to carry for hire a load of furniture to the railway station in one of his wagons. Before delivery the goods were destroyed by fire, not caused by the act of God or the King's enemies, and not arising from any inherent quality or defect of the goods themselves:—Held, that the defendant was

acting as a common carrier, and, as such, not having limited his liability by any condition or contract, was responsible for the loss. Brind v. Dale, 2 C. & P. 207, doubted; Farley v. Lavery, 54 S.W. Reporter 840 (U.S.), concurred in.

Culver v. Lester, 37 C.L.J. 421 (McDougall, Co. J.).

See RAILWAYS; SHIPPING.

—Express companies—Connecting lines — Responsibility for goods damaged during transit—Limited responsibility, and knowledge thereof by consignor.]—An express company is not responsible for the damages to goods entrusted for carriage, when the accident happened on another and connecting line of transfer, and the bill of lading contained a clause by which the company was relieved from any liability if the loss or injury happened at a place beyond its lines or control.

Neil v. American Express Co., 20 Que. S.C. 253 (Lynch, J., Circuit Court.).

—Shipping receipt—Limitation of liability —Negligence—Connecting lines—Wrongful conversion—Sale of goods for non-payment of freight.]—Conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of "the safe keeping and carriage of the goods," even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier. A shipping receipt with terms as above was for carriage by the defendants' line and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with plaintiff but delivered the receipt to his agent at the point of the shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shown by a clause stamped across the receipt, of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants:—Held, that the plaintiff's agent at the shipping point had no authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants, and that they were not exempted by the terms of the shipping receipt from liability for their full value. As the evidence showed definitely what damages had been sustained, and there being no good reason for remitting the case back for a new trial, the Supreme Court of Canada, in reversing the judgment appealed from (9 B.C. 82), ordered that the damages should be reduced to those proved in respect of the goods sold and converted. Armour, J., however, was of opinion that the judgment of Craig, J., at the trial, including damages for the loss on other goods, should be restored.

T. G. Wilson v. Canadian Development Company, 33 Can. S.C.R. 432, on appeal from the Supreme Court of British Columbia, sitting in appeal from the Territorial Court of Yukon Territory.

—Agreement as to cost of transportation—Obligation to show bills of lading.]—The appellant agreed with the agent of the company, respondent, at a fixed price for the transportation of goods from France. The respondent having carried a package to Montreal, to the appellant's address, refused to deliver it unless he paid $11.84 for disbursements and cost of transportation, and this without the production of bills of lading and waybills, of which the originals had been sent to New York:—Held, reversing the judgment of Charland, J., that the respondent company could not arbitrarily, and as a condition of delivery, impose upon the plaintiff the payment of this sum, except upon verification and subsequent rebate for overcharge, if any, and that it was liable to indemnify him for such damages as he may have suffered on account of the non-delivery of the package.

Poindron v. American Express Co., 12 Que. K.B. 311.

—Non-delivery and conversion of goods—Termination of transitus—Conditional refusal of consignee to accept.]—Trees consigned by the plaintiffs to one C. at Aylmer, Quebec, were delivered by a railway company, by mistake, at Aylmer, Ontario. The defendants, pursuant to a message received from the railway company, "Ship by express C.'s trees to Aylmer, Quebec," carried the trees as far as Ottawa, and were about to send them on by wagon to Aylmer, Quebec, when C., who was the only person known in the transaction by the defendants, appeared at Ottawa and said to the defendant's agent that he would not accept the trees until he saw one F. There were no further communications between the defendants and C. The defendants held the goods and sought out the consignors and notified them of C.'s refusal:—Held, in an action by the consignors

for damages for non-delivery and conversion of the trees, that the defendants' contract was not one to deliver the goods to C. at Aylmer and not elsewhere, and his refusal to accept, even if not absolute, was such as dispensed with any further action on the part of the defendants till they had a message from C. that he was ready and willing to receive; and this never having come, the defendants acted reasonably in holding the goods and notifying the consignors, and were not liable for the loss. The findings of the jury not having supplied material for a final disposition of the case, the Court, acting under Con. Rule 615, instead of directing a new trial, set aside the findings and gave judgment on the whole case for the defendants, deeming that if the proper questions had been put to the jury they could have been answered only in one way.

Smith et al. v. Canadian Express Co., 12 O.L.R. 84 (D.C.).

—Carriers—Express company—Contract to forward perishable goods—Delay in transmission.]—The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract:—Held, that the defendants' engagement implied that a safe and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train in Winnipeg by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers. A special condition that the defendants should not be liable for loss or damage unless it should be proved to have occurred from the gross negligence of the defendants or their servants, did not avail the defendants, because the railway companies were to be regarded as the defendants' servants, and the negligence was to be accounted gross negligence. Another condition was that a claim for loss or damage should be presented to the defendants in writing "at this office:"—Held, that presentation at the head office of the defendants satisfied this requirement.

James Co. v. Dominion Express Co., 13 O.L.R. 211 (D.C.).

—Express company — Damages direct and remote.]—Damages for breach of contract must be direct and none are recoverable that are indirect or remote. Hence, where a carrier for hire loses a piece of machinery, sent through him for repairs, the owner is not entitled to recover from him, as damages, the loss incurred through having been deprived of the use of it for a season.

Thiauville v. Canadian Express Co., 33 Que. S.C. 403.

—Carriage by express—Liability for safety of goods—Onus of proof.]—(1) An express company that formally undertakes to forward goods is not a mere agent or intermediary between the shipper and the actual carriers. It is itself a common carrier, and, as such, liable for the safe carriage and delivery of the goods, and the onus of proof is on it to show that loss of them is due to irresistible force or the act of God. (2) A clause in a bill of lading for goods forwarded by express that the company will not be bound in case of loss beyond a stated amount unless their value be declared in it, is valid and binding.

Dominion Express Co. v. Rutenberg, 18 Que. K.B. 50.

—Lost luggage—Contract of carriage—Receipt—Condition limiting liability.]—The defendants were an incorporated company, a main part of whose business was to carry and deliver baggage or luggage for customers, to and from railways, steamboats, and other public conveyances. The plaintiff, who was a passenger on a steamer, on his arrival at the wharf in Toronto handed the steamer check for his trunk to his father-in-law, R., to have the trunk sent up to R.'s house. R., who was an employee in the Customs, handed the check to H., also a Customs officer, and asked him to pass the trunk and have it sent up to the house. H. gave D., the defendants' agent, on the wharf, the check and twenty-five cents which R. had given him, told him to have the trunk sent up to R.'s house, and walked away. D. then gave the money to S., a soliciting agent of the defendants, and proceeded to take the steamer check off the trunk. H. returned in about fifteen minutes after he had left the check and the money with D., and asked him for a receipt for the trunk. S. then wrote out the receipt and handed it to H., who looked at but did not read it, nor was his attention called to any terms upon it. He knew, however, that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About an hour and a half thereafter H. handed the check to R., who passed it on to the plaintiff, who did not read it till about ten days afterwards. The receipt was a document which had legibly printed on its face a notice by which the defendants agreed to receive and forward the article for which the receipt was given, subject to a condition that they should "not be liable for any loss or damage of any trunk . . . for over $50." The receipt was in a form generally used by the defendants in the course of their business, and no proof was given that their agents who did the work of receiving and receipting for baggage had authority to receive it on any other footing. The trunk was lost or stolen: but without negligence on the part

of the defendants. The defendants tendered to the plaintiff $50 as in full discharge of their liability under their contract, which the plaintiff refused, and brought this action:—Held, that the plaintiff was entitled to recover the full value of the trunk and its contents, inasmuch as the defendants, who as common carriers were liable to their customer for the full value of the property entrusted to their care in the absence of notice, brought home to the customer, that their liability was limited to a certain sum, had failed to discharge the onus which lay upon them to show that the plaintiff at the time when he made his contract with the defendants had received notice that their liability was limited, or that the stipulation limiting their liability had been at any time accepted by him as a term of his contract.

Lamont v. Canadian Transfer Co., 19 O.L.R. 291.

Carriage of goods—Freight rates.]—
Pacific Cold Storage Co. v. Troughton, W. L.R. 529 (Y.T.).

—Breach of contract to carry safely—Negligence — Injury to passenger—Hotelkeeper —Conveyance of guest from station—Hire of omnibus.]—
Barker v. Pollock, 4 W.L.R. 327 (Terr.).

—Negligence — Liability — Bill of lading—Contract—Protective conditions — Value of goods not stated — Force majeure.]—
Dominion Express Co. v. Rutenberg, 5 E. L.R. 314 (Que.).

—Damage to goods — Contract limiting liability—Negligence — Fraud — Goods deposited in customs warehouse.]—
Normandin v. National Express Co., 4 E.L.R. 558. (Que.).

— Contract for carriage of goods—Action for damages for breach by failure to deliver in time — Lien for freight—Evidence.]—
Ludwig v. Beede, 8 W.L.R. 973 (Y.T.).

—Express companies—Dangerous commodities—Refusal to carry.]—Application to the Board for an order directing the express companies operating in Canada to receive and carry a certain commodity. The express companies contended that the Board had no jurisdiction to order them to carry any class of commodity and refused to carry the said commodity because it was dangerous and liable to explode:—Held, under the relevant provisions of the Railway Act, ss. 317, 348-354, express companies are at liberty to exercise their own discretion in refusing to carry by express any particular commodity.

Canadian and Dominion Express Cos. v Commercial Acetylene Co., 9 Can. Ry. Cas. 172.

—By railway.]—See RAILWAY; ELECTRIC RAILWAY.

—By Water.]—See SHIPPING.

CAVEAT.

Under registry laws.]—
See REGISTRY LAWS.

—Against probate.]—
See WILLS, I.

CATTLE.

See ANIMALS.

CEMETERY.

Distinction between "lot" owner and "grave" owner.]—The petitioner acquired two graves in the cemetery of company respondent. Subsequently he acquired two other graves. Owners of lots for which they have paid $20 are entitled by law to become shareholders in the cemetery company, and the petitioner had paid more than this amount. But the four graves did not form a complete lot on the plan of the cemetery, there being a fifth grave belonging to another person in the same lot. On a petition for a writ of mandamus to compel the respondent to enter his name as a shareholder:—Held, that the price alone did not entitle the petitioner to the privilege of becoming a shareholder; the land acquired must form a complete lot. The distinction between a "lot" owner and a "grave" owner, which had always been recognized since the organization of the company, though not set forth in the charter or by-laws, was a reasonable one, and the owner of one or more graves forming only a part of a lot, was not entitled to be classed as a shareholder, or to have the graves entered as a lot in the books of the company.

Hart v. Mount Royal Cemetery Co., 18 Que. S.C. 515 (Davidson, J.).

—Family burial ground—Land-locked plot —Reservation in deed—Interference with graves—Right of descendants to restrain.]—Persons having an estate or interest in a plot of ground set apart and used as a family burying ground, in which the bodies of ancestors and relatives are interred, may maintain an action to restrain destruction of, injury to, or interference with the graves or the gravestones or monuments upon or over them. Moreland v. Richardson (1856), 22 Beav. 596, and (1858), 24 Beav. 33, followed. Part of a farm was set apart as a family burial

plot in or about the year 1827, and in 1838 a parcel of the farm was conveyed to the defendant's predecessor in title, "save and except about one-quarter of an acre of said lands used as a burying ground." In 1890 one of the family erected on the plot, or what he supposed to be the plot, a monument to two of his ancestors, and surrounded the supposed plot with a hedge:—Held, upon the evidence, affirming the judgment of Teetzel, J., that there was a burying ground in respect of which the reservation was made in the deed of 1838; that there was not an abandonment; that the hedge planted in 1890 enclosed a portion at any rate of the original plot; that neither the defendant nor any of his predecessors in title had acquired a possessory or other title to the plot; and that the plaintiffs had shown a sufficient interest in or title to the plot to enable them to maintain the action. The plot being a land-locked piece of ground, reserved out of a grant of the surrounding property, there was an implied way of necessity to and from it, limited to the purposes for which the plot was expressed to be reserved.

May v. Belson, 10 O.L.R. 686 (C.A.).

CERTIORARI.

Status of prosecutor as applicant—Recognizance.]—Rules 1279 et seq., made by the Supreme Court of Judicature for Ontario on the 27th March, 1908, pursuant to ss. 576 and 1126 of the Criminal Code, requiring among other things, a recognizance or deposit in all cases in which it is desired to move to quash a conviction, order, warrant, or inquisition, do not apply where the prosecutor is moving for a certiorari; the prosecutor in effect moves on behalf of the Crown, and the Crown is not bound by the Rules, not being expressly named. Where magistrates, having dismissed a complaint under the Indian Act, ordered that the costs should be paid by the prosecutor; and a warrant was issued by one of the magistrates for the arrest of the prosecutor and for his imprisonment for thirty days unless the costs were sooner paid:—Held, that the prosecutor was entitled to a certiorari to remove the order and all the proceedings into the High Court, although he had not given security by recognizance or deposit, and the application was not made within six months, as required by the Rules.

Re Martin and Garlow, 20 O.L.R. 295.
15 Can. Cr. Cas. 446.

—Certiorari where right of review.]—Where a right of appeal or review exists, certiorari will be granted only under exceptional circumstances.

The King v. Murray; Ex parte Damboise, 39 N.B.R. 265; 16 Can. Cr. Cas. 292.

—Jurisdiction of inferior tribunal.]—On application for a writ of certiorari the Court has only to inquire whether or not the inferior tribunal exceeded its jurisdiction or if, in the proceedings taken, it followed the rules prescribed by law. The writ will not be granted if the applicant complains only that he did not receive justice and that the decision of the inferior tribunal was wrong.

Wightman v. City of Montreal, 11 Que. P.R. 318.

—Removing interlocutory order of County Court Judge.]—Certiorari will not be granted to remove an order of a County Court Judge setting aside a judgment obtained in such County Court and letting the defendant in to defend.

Ex parte Joiens, 39 N.B.R. 589.

—Return to writ—Declaration—Misdescription.]—If the Judge who grants an application for the issue of a writ of certiorari does not fix a date for its return the prothonotary may do so. It is not necessary that a declaration should accompany the writ. The error of designating the official who rendered the judgment attacked as coroner instead of justice of the peace is not fatal. The Judge of the Lower Court made a party to the proceedings on certiorari has no interest in the litigation and cannot, by exception to the form, complain of irregularities in the procedure even that of having been served with a copy of the writ instead of the original.

Lynch v. McMahon, 11 Que. P.R. 116 (Sup. Ct.), and see Lavoie v. Lanctot 11 Que. P.R. 184 (Sup. Ct.).

Irregularities—Prejudice.]—A judgment of the Recorder's Court will not be quashed on certiorari for irregularities which do not prevent justice being done.

Re Huot and Weir, 3 Que. P.R. 502 (S.C.).

—Certiorari—Restrictive statute.] — A statute which declares that convictions thereunder shall not be removed by certiorari into any superior Court is not a bar to the issue of a certiorari upon the ground of improper conduct of the magistrate by which the accused was deprived of a fair trial.

Re Sing Kee, 8 B.C.R. 20.
5 Can. Cr. Cas. 86.

—Summary conviction — Amendment on certiorari.]—The powers of amendment conferred by Code s. 889 in respect of convictions removed by certiorari do not apply where there is an inherent defect in procedure which has deprived the accused of a fair trial, ex. qr. a view of the locus in quo taken by the magistrate in the absence of the parties.

Re Sing Kee, 8 B.C.R. 20.
5 Can. Cr. Cas. 86.

—Summary conviction—Finding on a question of fact—No review on certiorari.]—The magistrate's finding in a summary conviction upon a question of fact within his jurisdiction will not be reviewed upon certiorari, and the same can be attacked only by way of appeal from the conviction.

R. v. Urquhart, 4 Can. Cr. Cas. 256 (Ont.).

—Transient traders—Conviction—Certiorari—Statute taking away right to—Want of jurisdiction.]—There is no power to pass a by-law or to convict under the transient traders' clauses of the Municipal Act in respect to a person living at an hotel and taking orders there for clothing to be made in a place outside of the municipality, out of material corresponding with samples exhibited. Notwithstanding the amendment to s. 7 of the Ontario Summary Convictions Act, by s. 14 of 2 Edw. VII., c. 12, taking away the right to a certiorari, a conviction made by a magistrate without jurisdiction may be removed by certiorari; and where the offence for which a conviction is made is found not to come within the statute defining the offence, or the municipal by-law defining the offence is ultra vires of the statute which gives the power to pass a by-law, there is such absence of jurisdiction as warrants the issue of a certiorari.

Rex v. St. Pierre, 4 O.L.R. 75, 5 Can. Cr. Cas. 365.

—When the appropriate remedy—Effect of statute taking away right of certiorari—Want of jurisdiction—Double remedy of certiorari and appeal—Discretion to refuse writ—Cr. Code, ss. 886, 887.]—(1) Certiorari and not appeal, is the appropriate remedy to raise the question of want of jurisdiction, e.g., whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. (2) A statutory provision taking away the right to certiorari does not deprive the Superior Court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction. (3) Where there is a defect in the jurisdiction of justices or inferior Courts, the common law right of certiorari should not be refused merely because a new trial might be had by means of an appeal. (4) Even when an appeal is pending a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. (5) A writ of certiorari may be claimed by the Crown as a matter of right on application of the Attorney-General without the production of any affidavit. (6) Except where applied for on behalf of the Crown, a certiorari is not a writ "of course," and the Court must be satisfied that there is a sufficient ground for issuing it. (7) No more latitude is given the Court for the exercise of its discretion in granting or refusing a certiorari than in respect to other applications which are in the discretion of the Court.

Re Ruggles, 35 N.S.R. 57.
5 Can. Cr. Cas. 163.

—Transmission of proceedings—Deposit of money—Rule nisi—Art. 833 (2) C.C.P.]—A justice of the peace whose judgment is attacked by certiorari must, in transmitting to the Court the documents in the cause, deposit at the same time all moneys received by him in virtue of his conviction. If he does not do so a rule nisi may be issued to compel him to make such deposit.

Mercier v. Plamondon, 21 Que. S.C. 335 (Sup. Ct.).

—Security—Deposit of cash without written condition—Preliminary objection to certiorari.]—(1) Where a deposit of cash is made, under s. 892 of the Code, or under N.W.T. Rule 13 of 1900, in lieu of a recognizance in certiorari proceedings to quash a summary conviction, it is not necessary that the applicant should file at the same time a written document setting forth the condition upon which the deposit is made. (2) Preliminary objections to a writ of certiorari removing a conviction must be raised promptly and by a substantive motion to quash the writ.

The Queen v. Davidson, 4 Terr. L.R. 425. 6 Can. Cr. Cas. 117.

—Conviction—Motion to quash in criminal matter—Costs—Jurisdiction.]—On a motion to quash a conviction, such conviction being in a criminal matter, and not merely for a penalty imposed by or under provincial legislation, no jurisdiction is conferred on the High Court to give costs to the applicant against the prosecutor or magistrate.

Rex v. Bennett, 4 O.L.R. 205, 5 Can. Cr. Cas 456 (Div. Ct.).

—Motion to quash, convictions dismissed—Matter held not properly before Court in absence of writ of certiorari and proper return thereto.]—An application to quash two convictions for violations of the Canada Temperance Act was made, upon reading an affidavit of the defendant, and an order made by a Judge of the Court for a return of papers, and the return thereto. The order and return were made in connection with a previous application of the defendant for his discharge from imprisonment:—Held, dismissing the application with costs, that there being no writ of certiorari, and no proper return thereto, the matter was not properly before the Court,

and the Court had no jurisdiction to quash the convictions. Held, that the mere fact of the papers referred to being found on the files of the Court was not sufficient to constitute a cause in Court, in respect to which the application to quash the convictions could be made. Semble, that a writ which required the sending up of papers in two distinct suits would be liable to attack on the ground of multifariousness.

The King v. McDonald (No. 2), 35 N.S. R. 323, 5 Can. Cr. Cas. 279.

—Judgment of recorder—Art. 1292 C.C.P.] —A writ of certiorari will not issue to review the decision of the Recorder of Montreal in a matter within his jurisdiction, and the Superior Court cannot, on certiorari, inquire whether his judgment was well or ill-founded.

Wolf v. Weir, 4 Que. P.R. 430 (Sup. Ct.).

—Conviction — Scienter — Irregularity — Code s. 889.]—Conviction of defendant under 60-61 Vict. c. 11 (D), as amended by 1 Edw. VII. c. 13 (D), for unlawfully causing the importation of an alien from the United States into Canada under contract to perform labour in Canada by working at a factory, quashed as bad on its face, because not stating that he "knowingly" did the act charged, which indeed neither did the information allege: —Held, also, that this omission from the information and conviction was not a mere irregularity or informality or insufficiency within the meaning of section 889 of the Criminal Code, 55-56 Vict. c. 9 (D).

Rex v. Hayes, 5 O.L.R. 198 (D.C.). 6 Can. Cr. Cas. 357.

—Acquiescence in judgment.]—Acquiescence of a person summoned in a judgment by a justice of the peace in a matter of summary conviction, divests him of the right of appeal by way of certiorari, even within the period limited therefor.

Meunier v. Beauchamp and Guénette, 5 Que. P.R. 280.

—Appreciation of evidence—Art. 1292 C.C.P.] — In matters of certiorari, the Court cannot inquire as to evidence taken before the magistrate.

Wing Lee v. Choquette, 5 Que. P.R. 461.

—Certiorari—Second application after dismissal of first.]—Where an application for a writ of certiorari has been dismissed, the Court will not entertain another application for the same purpose, although the first was dismissed on a preliminary objection.

Rex v. Geiser, 9 B.C.R. 503 (Irving, J.). 7 Can. Cr. Cas. 172.

—Removal of proceedings by certiorari — Subsequent issue of commitment—Invalidity—Amendment.] — The defendant was convicted on the 3rd February, 1903, before a Judge designated under s. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and to pay a penalty of $400. On the same day a warrant was issued by the Judge, committing the defendant to gaol in pursuance of the conviction, and under this warrant he was arrested and lodged in gaol. On the 30th January, 1903, a writ of certiorari was issued to the Judge and a county Crown attorney, commanding them to send to the High Court of Justice all summonses, proceedings, etc., had before the Judge, against the defendant and two others. This was served on the Judge on the 2nd February, before the date of the conviction and before the issue of the warrant:—Held, that the proceedings against the defendant were removed from the Court below by the issue and service of the certiorari, and that the subsequent proceedings were void. By 2 Edw. VII. c. 12, s. 15 (O), the provisions of the Criminal Code respecting amendment of proceedings before justices of the peace are made applicable to all cases of prosecutions under provincial Acts. Held, not to apply to proceedings under the Liquor Act, 1902. Semble, that in a conviction of this kind it was no objection, on habeas corpus that the name of the informant did not appear, nor that the prisoner was prosecuted under the name of "Foster," whereas his name was "Forster." Semble, also, that there was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings; but, at all events, there was no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable.

Rex v. Foster, 5 O.L.R. 624 (Street, J.). 7 Can. Cr. Cas. 46.

—Commitment for trial—Recognizance.]—A certiorari will not go to remove a commitment for trial made by a justice of the peace for an indictable offence.

The King v. Leahy; Ex parte Garland, 35 N.B.R. 509. 8 Can. Cr. Cas. 385.

—To Commissioner's Court — Petition — Procedure.]—The petition for a writ of certiorari should be served on the parties interested and notice of its presentation given to them.

Rex v. Warren, Q.R. 25 S.C. 31 (Sup. Ct.).

Summary conviction — No offence — Certiorari — Costs.] — There is no jurisdiction

on certiorari proceedings to award costs against a justice or informant unless at any rate they have been guilty of misconduct, but where a justice after notice of certiorari proceedings is served on him proceeds to a distress and sale he will not be protected from any damages to which on the quashing of the conviction he may, without such protection, be liable.

Regina v. Simpson, 3 Terr. L.R. 475.

—Form of conviction for several offences.] —Where a liquor license statute expressly provides that several charges may be included in the one information, and the magistrate adjudges the accused guilty upon each charge, it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by the one conviction adjudging a forfeiture in respect of each offence.

R. v. Whiffin, 4 Can. Cr. Cas., 3 Terr. L. R. 3.

—Amended conviction — Costs.] — Where a magistrate returns an amended conviction in certiorari proceedings and the conviction is sustained only by reason of the amendment, costs of the certiorari proceedings should not be awarded against the applicant.

R. v. Whiffin, 4 Can. Cr. Cas 14, 3 Terr. L.R. 3.

—Unlawful distress — Conviction set aside — Certiorari — Costs.] — Plaintiff had been convicted by defendant, a justice of the peace, and adjudged to pay a fine of $10.00 and $8.15 costs. To satisfy the fine, two cows were seized and sold under distress warrant by one Stoddart, a constable, for $61.00. The sale of the first cow realized more than sufficient to pay the fine and all costs, but nevertheless the constable sold the second cow. Subsequently the conviction was brought up by certiorari and quashed by Wetmore, J. who held that he had no jurisdiction to make an order as to costs on such proceedings, but left the plaintiff to recover at law as damages such costs as he might be entitled to, if any. The plaintiff brought action claiming damages accordingly:—Held, (1) That the constable was not the servant or agent of the justice in making the seizure or sale, but in as much as the justice had received from the constable the full proceeds of the sale, he had thereby adopted the constable's unlawful acts. (2) That the measure of damages for the unlawful sale was the market value of the cows sold. (3) That the plaintiff was entitled to recover from the justice as damages his taxed costs of certiorari proceedings in as much as the quashing of the conviction was a condition precedent to the plaintiff's right to sue under Imperial Statute 11 and 12 Vict. c. 44, s. 2, in force in the Territories.

Simpson v. Mann, 6 Terr. L.R. 445.

—Forum — Judge in chambers — Court in banc not sitting.]—

R. v. Hunter, 5 W.L.R. 268 (Man.).

— Recognizance on application — Dismissing motion for irregularity in recognizance affidavits — No leave reserved to renew.] — Where an application for a certiorari to remove a summary conviction was made on the ground that there had been no effective service of the magistrate's summons but the motion was dismissed on the technical objection that the affidavits to the recognizance filed on the certiorari application were insufficient, a fresh application for a certiorari upon the same ground as the first cannot be made to another Judge after remedying the technical defect, unless leave has been reserved so to do on the first application.

The King v. McKay, 17 Can. Cr. Cas (N. S.).

—Motion to issue same after delay fixed—C.P. 1292.]—A party who has obtained a writ of certiorari must cause the same to be issued and returned within the delay fixed when his application was granted, and cannot, by motion, obtain leave to issue it afterwards.

Joannette v. Buller, 6 Que. P.R. 146 (Davidson, J.).

—Costs of conveying to gaol.]—The Superior Court has jurisdiction to review, by way of certiorari, every decision of a justice of the peace, even in criminal matters. A Recorder has no right, on imposing a fine and costs of suit with imprisonment on default of payment, to make payment of the expenses of conveyance to prison, in addition to such costs, a condition precedent to the discharge of the debtor, and such order will be quashed on certiorari.

Leonard v. Pelletier, Q.R. 24 S.C. 331. 9 Can. Cr. Cas. 19.

—Justice of the peace—Minute of conviction—Quashing.]—Where a justice of the peace convicts or makes an order against a defendant, and a minute or memorandum of such is then made, the fact that no formal conviction has been drawn up is no reason why the conviction should not be quashed. The Court has jurisdiction by virtue of section 119 O.J.A. to award the costs of a motion to quash a conviction under an Ontario statute against either the justice of the peace or informant. Rex v. Bennett (1902), 4 O.L.R. 205, distinguished.

Rex v. Mancion, 8 O.L.R. 24, 8 Can. Cr. Cas. 218.

—Rule nisi to quash conviction—Jurisdiction of single Judge — British Columbia practice.]—The British Columbia Supreme Court, sitting en banc as the Full Court,

will not hear a motion for a rule nisi to quash a conviction, as the motion might be made to a single Judge under the B.C. Supreme Court Act, section 5.

The King v. Tanghe, 10 B.C.R. 297, 8 Can. Cr. Cas. 160.

—Jurisdiction—Recorder's Court.] — The sole duty of the higher Court on proceedings by certiorari is to inquire if the inferior tribunal has acted within the scope of its jurisdiction and has followed the forms and rules prescribed for the proceedings, and in the latter case the writ will not be sustained unless the applicant shows that he has been prejudiced. Hence, the writ will be quashed and the conviction of the inferior Court maintained if the applicant, not alleging any serious irregularity in procedure, complains only that he has not received justice and that the decision of the inferior Court is wrong.

Carpentier v. Lapointe, Q.R. 25 S.C. 395 (Sup. Ct.).

—Deposit of fine and costs—Quashing of certiorari—Return of deposit.]—One Wing Tle, the plaintiff's assignor, having been condemned to pay a fine and costs for violation of the License Act, proceeded against his conviction by certiorari after having served a portion of his term of imprisonment imposed in default of payment. On applying for the certiorari he deposited with the defendant clerk of the peace at Montreal, $114.83, amount of fine and costs, and $50 for subsequent costs as provided by Art. 217 of the Quebec License Act (63 Vict. c. 12). The writ of certiorari having been quashed, Wing Tle returned to jail and offered to serve the balance of his term claiming at the same time a return of said sum of $114.83 from defendant which was refused:—Held, that such deposit was only required as security and could not be turned into a payment of the fine and costs; that the application for certiorari could not deprive the person convicted of his option to submit to the term of imprisonment to which he had been condemned in default of payment, that the writ of certiorari in suspending the execution of the sentence, had, when it was quashed, only the effect of rendering Wing Tle liable to payment or imprisonment as before it issued and if he chose imprisonment he was entitled to be reimbursed the amount of the deposit representing the fine and costs.

Wing v. Sicotte, Q.R. 26 S.C. 387 (Ct. Rev.). 10 Can. Cr. Cas. 171.

—Return of conviction to Appellate Court.]—(1) Where a justice making return of a summary conviction to the Court to which an appeal is given forwards therewith papers purporting to be depositions upon which the conviction is founded, such Court, if one having certiorari jurisdiction, may, upon a motion to quash the conviction take cognizance of such depositions without a writ of certiorari being issued and return made thereto. (2) Apart from Code s. 888 it is the duty of the justice to return the information and depositions with the conviction.

The King v. Rondeau, (N.W.T.), 9 Can. Cr. Cas. 523; 5 Terr. L.R. 478.

—Jurisdiction to quash conviction without Territories practice.]—See CRIMINAL LAW.

—Motion to extend delay for return of writ.]—There must be continuous diligence throughout the stages of applying for a writ of certiorari, causing it to issue, and proceeding to judgment upon it; and where the delay fixed for the return of the writ is allowed to lapse without any step being taken to obtain a new order, the petitioner cannot afterwards obtain an extension of the delay; and especially where more than two years have elapsed since the expiration of the delay, and the reason for not complying with the original order is not shown.

Joanette v. Weir, 26 Que. S.C. 288 (Davidson, J.).

—Question of fact—Art. 5617 R.S.Q.] — There is no appeal to the Superior or Circuit Courts by way of certiorari from decisions of Courts of inferior jurisdiction, on the ground of mal jugé, or where the Judge of the lower Court has failed to properly appreciate the evidence.

Calvert v. Perrault, 26 Que. S.C. 94 (Champagne, J.).

—Summary conviction—Appeal from — Certiorari after failure of—Misconduct of justice—Want of jurisdiction.]—Section 887 of the Criminal Code, which enacts that "no writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace, if the defendant has appealed from such conviction or order to any court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal" does not deprive the Court of the right to quash a conviction on certiorari, where the convicting justice acted as a partizan in collusion with the prosecutor and without jurisdiction, even though an appeal had been taken which had failed by reason of the refusal of the justice to make the return required by law.

The King v. Delegarde; Ex parte Cowan, 36 N.B.R. 503; 9 Can. Cr. Cas. 454.

—Conviction—Payment of part of penalty —Warrant of commitment—Certiorari.]—When a person is in custody under a war-

rant of commitment, founded on a good conviction, the Court will not quash the commitment on certiorari, even if it is illegal. The proper procedure is by way of habeas corpus.

The King v. Melanson; Ex parte Bertin, 36 N.B.R. 577; 10 Can. Cr. Cas. 65.

—Parties—Recorder's Court.] — A certiorari against a decision of one of the recorders of the city and district of Montreal may be issued against the recorder personally and not necessarily against the Court. If this objection as to parties can be made it should be made by the recorder himself and not by the party who obtained the judgment attacked.

Poirier v. Weir, 7 Que. P.R. 69 (Sup Ct.).

—Civil proceeding—Summary conviction—Complaint under city by-law—Order dismissing—Quashing order.]—An order dismissing a complaint under the Summary Convictions Act in a civil matter may be quashed on certiorari. An order nisi granted by a single Judge under Rule 7 of the General Rules of Michaelmas Term, 1899, if not entered to show cause will on proof of service be made absolute, and the Court will not consider and determine the sufficiency of the grounds on which the order was granted.

The King v. Ritchie; Ex parte Sancall, 37 N.B.R. 206.

—Summary conviction—Civil proceeding—Corporation—Recognizance preliminary to certiorari—Deposit in lieu of recognizance.]—(1) Where a corporation cannot enter into a recognizance, it can only comply with section 4 of the Manitoba Summary Convictions Act, R.S.M. 1902, c. 163 (requiring the entering into of a recognizance or making a deposit with the justice of the peace or magistrate as a necessary preliminary to the application for a certiorari to quash a conviction), by making such deposit. (2) A recognizance under that section is defective if it is conditioned for the due prosecution of "a writ of certiorari issued," etc., instead of a writ to be issued. (3) Following Ex parte Tomlinson (1869), 20 L.T. 324, and Regina v. Robinet (1894), 16 P.R. 49, the defendant company should have leave to make the necessary deposit with the convicting magistrate within fourteen days, and then to renew the motion.

Re Western Co-operative Construction Co. and Brodsky, 15 Man. R. 681.

—Justice of the peace—Order for payment of costs—No conviction—Order quashing—Condition.]—After a magistrate had entered upon the hearing of a complaint of having used insulting and abusive language, the charge, at the complainant's instance, actuated apparently by compassion, was withdrawn, the accused to pay the costs. Subsequently, such costs not having been paid, the magistrate, in the absence of, and without convicting the accused of any offence, made an order directing the payment by her of the costs; and, in default of payment, directing the same should be levied by distress, and, in default of sufficient distress, directing imprisonment. The costs were then paid by the accused, but before launching this application they were tendered back to accused and refused:—Held, that the order was invalid and was directed to be quashed without costs, but conditionally—under sections 889 to 896 of the Criminal Code made applicable by 1 Edw. VII. c. 13, s. 1 (O.)—that no action should be brought against the magistrate, etc., otherwise the motion was to be dismissed with costs.

Rex v. Morningstar, 11 O.L.R. 318 (D. C.); 11 Can. Cr. Cas. 15.

—Summary conviction—Amendment.] — Semble, the Court will not on certiorari amend a summary conviction when by so doing it has to exercise a discretion confided to the justice.

The King v. Charest; Ex parte Daigle, 37 N.B.R. 492, 15 Can. Cr. Cas. 55.

—Statutory limitation—Expiry of time—Delay occasioned by Judge.]—

See DRAINAGE.

Re the Trecothic Marsh, 37 Can. S.C.R. 79.

—Summary conviction—Title to land — Want of jurisdiction—Appeal—Certiorari.] —The right of the Court to grant a certiorari is not taken away by section 887 of the Criminal Code in the matter of a conviction under the Code for destroying a part of a line fence, made by a justice acting without jurisdiction by reason that the title to land was in dispute, from which conviction an appeal was taken to the County Court under section 879 of the Code, and dismissed, without consideration of the merits, on the ground that the appeal had not been perfected.

The King v. O'Brien; Ex parte Roy, 38 N.B.R. 109.

—Rules of 1899 (N.B.)—Rule nisi under—Directions as to service—Order for hearing.]—The Court refused to discharge a rule nisi to quash an order for review removed by certiorari granted in term under the Rules of Michaelmas term, 1899, on objection that it did not direct within what time and upon whom the rule and affidavits upon which it was granted should be served. McLeod, J., dissenting. If an application for review of a judgment in a civil cause tried in an inferior Court be made

more than thirty days after judgment, the reviewing Judge may, in the exercise of his discretion, require an explanation of the delay, but such explanation is not essential to jurisdiction to hear the merits and affidavits explaining the delay may be received at any time during the hearing. An order for review setting aside a verdict for the plaintiff and directing that unless the plaintiff bring the cause down to another trial within two months, the verdict entered for the plaintiff be reversed, is a proper order and within the power of the reviewing Judge under the statute.

The King v. Wilson, 37 N.B.R. 650.

—Summary conviction—Excessive term of imprisonment imposed—Power of Court to amend.]—(1) Where upon the return to a writ of certiorari the Court, upon perusal of the depositions, has no doubt as to the commission of the offence for which the defendant has been tried and convicted, but the conviction is defective in awarding a longer term of imprisonment than the statute permits, the Court has power, under ss. 883, 889 of the Code, to amend the conviction so as to make it conform to the law. (2) It is not necessary, before making such amendment, that the Court should retry the case by having the witnesses orally examined before it.

R. v. McKenzie, 41 N.S.R. 178, 12 Can. Cr. Cas. 435.

—Canada Temperance Act (51 Vict. c. 34), s. 10—Issue of search warrant before prosecution—Writ of certiorari refused—Practice as to special leave to appeal in criminal cases.]—Under the Canada Temperance Act, 1888 (51 Vict. c. 34), a search warrant was issued and duly executed, and large quantities of intoxicating liquor found in the hotel and premises searched and a conviction of the appellant subsequently obtained in regard thereto, with a consequent order for the destruction of the liquor:—Held, that, the Supreme Court of Nova Scotia, having dismissed application for writs of certiorari to remove into the said Court the record of the said search warrant and destruction order, special leave to appeal therefrom must be refused. The decision was plainly right, having regard to s. 10 of the Act under which the warrant was issued.

Townsend v. Cox [1907] A.C. 514.
12 Can. Cr. Cas. 509.

—Irregular conviction — Amendment by justice on return.]—In the return to a writ of certiorari to remove two convictions with a view to quashing the same on the grounds that they did not follow the minute of adjudication, and were made on an information and summons for a single offence; the convicting magistrate returned the original convictions and an amended conviction in which the objections were cured:—Held, the magistrate had power to amend, and the rule nisi to quash should be discharged. A conviction will not be quashed because the costs are ordered to be paid to the party aggrieved instead of the prosecutor.

The King v. O'Brien; Ex parte Grey, 37 N.B.R. 604.

—Hackmen's tariff—Merits of the conviction.]—When the arguments urged in support of a writ of certiorari attack the merits of the conviction, they then constitute an appeal, and no appeal can be taken by means of a writ of certiorari.

Lescarbeau v. Poirier, 8 Que. P.R. 415.

—Jurisdiction—Conviction for breach of a municipal by-law.]—A Judge in Chambers has jurisdiction to order the issue of a writ of certiorari to bring up the record of a conviction for a breach of a municipal by-law, if the application is made when neither the Court of Appeal nor the full Court of King's Bench is sitting. But all further proceedings after the return of the writ must be taken in one or other of these Courts.

Re Hunter, 16 Man. R. 489.

—Summary conviction — Jurisdiction of magistrate.]—(1) The jurisdiction of an inferior Court must appear on the face of the proceedings or it will be presumed to have acted without jurisdiction. Therefore a summary conviction under the "Liquor License Act" which does not state where the offence was committed, or even that it was committed in Manitoba, should be quashed. (2) Notwithstanding section 887 of the Criminal Code, 1892, certiorari proceedings may be maintained although there has been an appeal from the conviction, upon any ground which impeaches the jurisdiction of the magistrate.

Johnston v. O'Reilly, 16 Man. R. 405, 12 Can. Cr. Cas. 218.

—Incomplete return—Motion to correct—Practice.]—To a writ of certiorari to remove a conviction, the magistrate certified that he had sent "the transcript of the proceedings against P.G. whereof in the same writ mention is made with all things touching the same to our Lord the King," etc., and he annexed the certificate, the original proceedings and the conviction to the writ:—Held, that the return was incomplete, as the certificate did not authenticate the proceedings returned to be the original proceedings and conviction commanded by the writ. If the magistrate, through ignorance or error and with no intention of disobeying the writ, makes an incomplete or improper return the prac-

tice is to move that the proceedings be sent back for correction and not to move for an attachment for contempt in not obeying the writ.

The King v. Kay; Ex parte Gallagher, 38 N.B.R. 228.

—Rule nisi to quash conviction—No cause shown.]—A rule nisi to quash a conviction will be made absolute as a matter of course on proof of due service and on production of the writ of certiorari with a proper return thereto, if no one appears to show cause.

Rex v. Sweeney; Ex parte Cormier, 38 N.B.R. 6.

—Entitling proceedings.]—Proceedings to obtain a writ of certiorari to quash a conviction where an order quashing it is not asked upon the return of the application for the writ, do not require to show the name of the informant, as part of the style of cause.

R. v. Harris, 6 Terr. L.R. 376.

—Security for costs—Cr. Code 1126.]—No general rule ordering a petitioner on a writ of certiorari to give security for the costs and other charges of the case, is in existence in the province of Quebec.

Tierney v. Choquet, 9 Que. P.R. 229.

—Recognizance on certiorari—Certiorari refused with costs—Demand and non-payment—Application for attachment.]—(1) Nova Scotia Crown Rule No. 28 is a general order of Court as to security for costs on certiorari under Cr. Code s. 1126, and a recognizance given thereunder may be enforced by attachment under Code s. 1096. (2) Section 1126 of the Code applies as well to a recognizance required to be given on the application for the writ of certiorari, as to a recognizance given after return made to the writ, if, upon the former, the Court may order that the conviction be quashed on the return of the writ without further order.

The King v. Townsend (No. 5), 13 Can. Cr. Cas. 209; 43 N.S.R. 1.

—Separate offences—One penalty.]—Where a summary conviction is in form for two separate offences, and shows that the penalty adjudged is for both although within the legal limit for one, but one of the offences is defectively described, the conviction must be quashed on certiorari; it cannot be amended by striking out the offence defectively described as the Court has no power to make a fresh adjudication by apportioning the penalty which was discretionary with the magistrate.

The King v. Code, 13 Can. Cr. Cas. 372 (Sask.).

—Appeal—Right of appeal from single Judge.]—No appeal lies in British Columbia to the Full Court from the decision of a single Judge quashing a conviction under the Criminal Code on the return to a certiorari.

The King v. Carroll, 14 B.C.R. 116, 14 Can. Cr. Cas. 338.

—Return of writ.]—An order for certiorari granted under the New Brunswick Rules 1889, must make the writ returnable at the term of the Court next following the date of the order.

Ex parte Kay; In re Hogan, 39 N.B.R. 54.

—Grounds for—Conviction—Prejudice.] — The writ of certiorari will only be granted when the proceedings complained of contain grave irregularities and there is reason to believe that justice has not been or will not be done. An application for the writ on the ground that the applicant had been convicted by the record of Montreal without the evidence being reduced to writing will be refused if it does not appear that he was prejudiced thereby.

Hill v. City of Montreal, 10 Que. P.R. 122.

—Removal of stay of proceedings.]—The stay of proceedings in the form of order given by New Brunswick Rules, Michaelmas Term, 1899, for a certiorari expires on the return of the rule nisi to quash.

Ex parte Melanson, 39 N.B.R. 8.

—Omission to read evidence over to witnesses—Affidavit to vary return.] — The provision of s. 721, sub-s. 3 of the Criminal Code, requiring the evidence to be read over to the witnesses on the trial of an information or complaint is a matter of procedure, and its omission does not go to the jurisdiction of the magistrate. Ex parte Gallagher, 38 N.B.R. 498, followed. The Court will not hear an affidavit contradicting the return of a magistrate as to what matter was put in evidence at the trial before him. Per Barker, C.J.:—Under the rule of Michaelmas Term, 1899, the grounds for certiorari must be stated specifically so that the other party may know the exact points relied on.

The King v. Kay; Ex parte Steeves, 39 N.B.R. 2, 15 Can. Cr. Cas. 160.

CHAMPERTY.

Action by assignee of claim—Agreement to divide.]—The plaintiff sued for a money claim absolutely assigned to him by a document which authorized him to sue and recover, and, out of the proceeds, first to pay costs, and then to divide what remained equally between the assignors and assignee. In retaining a solicitor to prosecute the action the plaintiff pledged his

own credit, and had no right of indemnity against the assignors:—Held, a champertous assignment; and champerty is not obsolete, but is defined, forbidden, and the agreement is made invalid by R.S.O. 1897, c. 327, ss. 1 and 2. When the action is brought by the assignee, in his own name, and the assignment is shown to be champertous, the Court treats it as "invalid" and void for all purposes; and, the illegality appearing, refuses, upon grounds of public policy, its aid to the plaintiff whose title is tainted by illegality. Power v. Phelan (1884), 4 Dorion (Quebec) 57, approved. And the action was dismissed upon an issue of law determined under Con. Rule 259 and a motion for judgment under Con. Rule 616.

Colville v. Small, 22 O.L.R. 33.

Sale of litigious rights for share in proceeds—Illegality—Retrait successoral.] — The heirs of one M. induced several persons related to them either by consanguinity or by affinity to assist them as plaintiffs in the prosecution of a lawsuit for the recovery of lands belonging to the succession of an ancestor, and, in consideration of the necessary funds to be furnished by these persons, six of the respondents and the mis-en-cause, entered into the agreement sued on, by which said plaintiffs conveyed to each of the seven persons giving the assistance one-tenth of whatever might be recovered should they be successful in the lawsuit. The present action au pétitoire et en partage was brought by the respondents who furnished such funds, for specific performance of this agreement:—Held, reversing the judgment appealed from, Davies, J., dissenting, that the agreement could not be enforced as it was tainted with champerty, notwithstanding that the consanguinity or affinity of the persons in whose favour the conveyance had been made might have entitled them to maintain the suit without remuneration as the price of the assistance. Held, further, 1. That there could be no objection to the demande au pétitoire being joined in the action for specific performance. 2. That the defence of retrait de droits litigieux could not avail in favour of the defendants, as it is an exception which can be set up only by the debtor of the litigious right in question. Powell v. Watters, 28 Can. S.C.R. 133, referred to. 3. That as the conveyance affected a specified share of an immovable the exception of retrait successoral could not be set up under Art. 710 C.C. Baxter v. Phillips, 23 Can. S.C.R. 317, and Leclere v. Beaudry, 10 L.C. Jur. 20, referred to. Moreover, in the present case, the controversy does not relate to the succession, and, in any event, the assignor cannot exercise the droit de retrait successoral. Semble, however, that the retention of a fractional interest in the property might have the effect of preserving the right to retrait successoral. 4 That the laws relating to champerty were introduced into Lower Canada by the Quebec Act, 1774, as part of the criminal law of England and as a law of public order, the principles of which and the reasons for which apply as well to the province of Quebec as to England and the other provinces of the Dominion of Canada. Price v. Mercier, 18 Can. S.C.R. 303, referred to.

Meloche v. Déguire, 34 Can. S.C.R. 24; 8 Can. Cr. Cas. 89.

—Mineral claims—Title to land—Champerty.] — In Briggs v. Newswander (32 Can. S.C.R. 405), the plaintiff was held entitled to a conveyance from defendants of a quarter interest in certain mineral claims. In that action Newswander et al. were only nominal defendants, the real estate in the claims being in F. After the judgment was given plaintiff conveyed nine-tenths of his interest to G., the expressed consideration being moneys advanced and an undertaking by G. to pay the costs of that action and another brought by Briggs, and by a subsequent deed, which recited the proceedings in the action and the deed of the nine-tenths, he conveyed to G., the remaining one-tenth of his interest, the consideration of that deed being $500, payable by instalments. Briggs afterwards assigned the above-mentioned judgment and his interest in the claims to F. In an action by G. against F. for a declaration that he was entitled to the quarter interest:—Held, affirming the judgment appealed from, Briggs v. Fleutot, 10 B.C.R. 309, that the transfer to G. of the nine-tenths was champertous and the Court would not interfere to assist one claiming under a title so acquired. Held, also, that the transfer of one-tenth was valid, being for a good consideration and severable from the remainder of the interest.

Giegerich v. Fleutot, 35 Can. S.C.R. 327.

—Administration—Creditor's claim.]—See LIMITATIONS OF ACTIONS.

Cannon v. Howland (1889, 1 S.C. Cas. 119.

—Solicitor and client—Share in proceeds of litigation.]—See SOLICITOR and CLIENT.

—Litigious rights—Attorney—Security for retainer—Assignment of judgment.]—The assignment by a plaintiff to his attorney of the amount recovered in the action as collateral security for his retainer in the cause is not subject to the nullity arising from the provisions of Article 1485 C.C. respecting the acquisition of litigious rights by the officials therein named.

Lamothe v. Montreal Street Railway Co., Q.R. 16 K.B. 1.

—Litigious rights.]—(1) A number of persons having small claims of the same kind can put them into one hand for the purpose of recovering the same by suit in a single action, and the exception of litigious rights does not then apply. (2) A defend ant cannot make a plea of litigious rights subsidiary to a plea to the merits.

Elliott v. Lynch, 9 Que. P.R. 313.

Action by assignee of claim — Agreement to divide fruits—Illegality.] — The judgment of Middleton, J., 22 O.L.R. 33, dismissing the action, upon the ground that it could not be maintained because the plaintiff's title to the chose in action was asserted under a champertous assignment, was affirmed by a Divisional Court. The general principle is, that all champertous agreements are void; and, if a party to a champertous agreement must rely upon it to sustain an action, he fails; but, if he, although a party to such an agreement, can make out his case without the agreement, its existence does not void the right of action he has without it. Per Riddell, J.—Leave to amend by adding the plaintiff's assignors or substituting them as plaintiffs, refused.

Colville v. Small, 22 O.L.R. 426 (D.C.).

—Maintenance—Agreement to assist party to action—Consideration.]—Plaintiff, who had been a shareholder and secretary of a mining company for a number of years and had charge of its books and an intimate knowledge of its affairs, entered into an agreement in writing with defendant, the principal shareholder of the company, to give him certain assistance for the purpose of enabling him to win a suit then pending between defendant and another shareholder in relation to an option upon an adjoining property originally held by the company, but which defendant had had transferred to himself. In consideration of the proposed assistance, defendant agreed to pay plaintiff a sum of money in cash in the event of his winning the suit, and a further sum when a sale of the property was effected. At the time of the agreement plaintiff had ceased to be a shareholder and had been paid his salary as secretary, and no interest, either legal or equitable, was shown to justify his interference in the litigation:—Held, allowing defendant's appeal with costs, that the contract was illegal on the ground of maintenance and that plaintiff could not recover.

Craig v. Thompson, 42 N.S.R. 150.

—Maintenance—Malicious motive.]—A defendant against whom a lawsuit has been successfully prosecuted cannot recover the costs incurred for his defence as damages for the unlawful maintenance of the suit by a third party who has not thereby been guilty of maliciously prosecuting unnecessary litigation. Bradlaugh v. Newdegate, 11 Q.B.D. 1, distinguished; Giegerich v. Fleutot, 35 Can. S.C.R. 327, referred to. Judgment appealed from 12 B.C.R. 272, affirmed.

Newswander v. Giegerich, 39 Can. S.C.R. 354.

CHATTEL MORTGAGE.

See BILLS OF SALE.

CHEQUES.

See BILLS AND NOTES.

CHILDREN.

Extradition — Kidnapping or child-stealing—Possession and lawful charge of a child—One parent taking child from the other.]—(1) When the custody of a child has been assigned by competent judicial authority to one of its parents to the exclusion of the other, the latter is guilty of the crime of kidnapping or child-stealing in taking it away from the control and possession of such parent. (2) The crime of kidnapping or child-stealing is committed by one who takes and removes a child under the age of fourteen years, so as to keep or conceal it from the person to whom the lawful charge of it is judicially assigned, even though such person has not, nor has had, the actual possession if it. (3) The offence of kidnapping or child-stealing, as above described, is an extraditable crime under the extradition treaty between Great Britain and the United States.

Ex parte Lorenz, 14 Que. K.B. 273 (Hall, J.), 9 Can. Cr. Cas. 158.

—Habeas corpus—Child of tender years—Guardianship of mother—Art. 1114 C.P.Q. —Judicial discretion.]—The interest of a child of tender years must alone be the guide of the Judge in matters of habeas corpus; in the present case, the wife having taken action against the husband for separation a mensa et thoro on the ground of ill-treatment, and the child being of the age of seventeen months, the guardianship of the child was allowed to remain with the mother.

Leduc v. Beauchamp, 7 Que. P.R. 441 (Davidson, J.).

— Habeas corpus — Custody of child — Restraint of liberty.]—Habeas corpus will not be granted to a mother who claims a

child of years of discretion who is not restrained of its liberty. Where the respondent on a petition for such habeas corpus claims the right to keep the child, thereby giving probable cause for belief that the child is restrained of liberty, the writ of habeas corpus will be quashed, but without costs.

Pickering v. Caloran, 7 Que. P.R. 350 (Loranger, J.).

—Habeas corpus—Custody of child—Married woman—Foreign domicile.]—(1) In a proceeding to have the custody of a child in a Court of civil jurisdiction, a writ of habeas corpus should not issue where it does not appear that the child is illegally deprived of his liberty. (2) A married woman residing in a foreign country requires authorization to bring suit in the Courts of the Province of Quebec.

Garcin v. Croteau, Q.R. 27 S.C. 198 (Sup. Ct.).

CHINESE IMMIGRATION.

Chinese Immigration Act—Exemption from entry tax—Onus on applicant.]—The Chinese Immigration Act, by s. 7, imposes an entry tax upon all immigrants of Chinese origin coming into Canada, but by subs. (c.) exempts merchants and certain other persons, who are required to substantiate their status to the satisfaction of the controller of customs, subject to the approval of the minister of customs:—Held, that an applicant dissatisfied with the controller's decision, should proceed by way of appeal to the minister of customs, and that if it should ultimately become necessary to apply to the Court for assistance, the proceeding should be by mandamus and not by habeas corpus.

Re Lee Him, 15 B.C.R. 163; 16 Can. Cr. Cas. 383, affirmed 15 B.C.R. 390 (C.A.)

—Recovery of penalty—Jurisdiction of stipendiary magistrate.]—On application to quash the judgment of a stipendiary magistrate removed into this Court by certiorari, in an action brought before the magistrate to recover the head tax of $500 payable by a person of Chinese origin on entering Canada, R.S.C., c. 95, s. 7:—Held, dismissing the application with costs and ordering a procedendo (1) It is competent for the Parliament of Canada to confer upon a provincial Court (stipendiary magistrate's) having jurisdiction in respect to matters of debt not exceeding $80, jurisdiction in respect to amount above that sum. Attorney-General v. Flint, 16 S.C.C. 707; Valin v. Langlois, 5 App. Cas. 114; The King v. Wipper, 34 N.S.R. 202, followed. (2) Where the procedure of the Court provides for trial by jury and the use of a jury is not inappropriate in the case, the employment of the jury is not ground for attacking the judgment of the magistrate. Per Russell, J.:—Parliament, in making use of the Court, must be understood to have adopted its procedure. In any case the point as to the use of the jury was not open, not having been taken in the notice or motion for the certiorari. (Crown Rule 33.)

Attorney-General for Canada v. Sam Chak, 44 N.S.R. 19.

—Arrest for alleged evasion—Damages.]—Plaintiff was arrested on the 30th August, 1907, at the instance of defendant, a preventive officer, acting under instructions from the collector of customs, for an attempted evasion of the provisions of the Chinese Immigration Act, R.S.C. c. 95, and was detained for some days in custody without a warrant having been issued, and without having been brought before a magistrate for examination. Plaintiff brought an action claiming damages for such arrest and detention, on the trial of which the learned Judge directed the jury among other things, that defendant was only liable from the time he preferred a charge against plaintiff, which was on the 6th day of September. The jury came into Court and the foreman announced that they found a verdict for defendant, and handed in a memorandum to that effect. On another piece of paper handed in, signed by the foreman but not attached to the verdict, was a memorandum to the effect that the jury found that plaintiff was entitled to $1 a day, $7, and his solicitor was entitled to the sum of $40 for securing his release. This the learned trial Judge treated as a verdict for plaintiff, and ordered judgment accordingly in favour of plaintiff for the sum of $47 with costs to be taxed:—Held, setting aside the verdict and ordering a new trial, with costs, that the only matter in respect to which defendant could be held liable was the detention between the date of the arrest and the date (6th September) when the charges were laid before the magistrate, or whether plaintiff, having been arrested (justifiably) without warrant, was not held an unreasonable length of time before being brought before the magistrate. Also, that defendant was entitled to costs of his application to have the entry of the verdict made in accordance with the oral announcement of the jury, and the entry thereof made by the prothonotary.

Sam Chak v. Campbell, 44 N.S.R. 25.

—Head tax—Habeas corpus.]—

Re Brown, 8 E.L.R. 137.

Chinese Immigration Act, 63 and 64 Vict. c. 32—Prostitute—Affidavits of Chinamen in English language.]—Evidence of the general reputation of a house in which a Chinese immigrant had lived is admissible in habeas corpus proceedings directed

against the collector of customs who is detaining such immigrant for deportation to China on the ground that she is a prostitute. An affidavit drawn up in a language not understood by the deponent, may be read in Court if it appears from the jurat that it was first read over and interpreted to deponent. In Re Ah Gway (1893), 2 B.C. 343, not followed.

In Re Fong Yuk and Chinese Immigration Act, 8 B.C.R. 118.

—Chinese Immigration Act—Habeas corpus.]—Chinese immigrants who are not included in the privilege mentioned in the statute respecting Chinese immigration, travelling from their country to the American frontier on the representation that they have the right of entry into the United States of America, which right is subsequently refused by the American authorities, have no right to be afterwards liberated on habeas corpus.

Chew v. The Canadian Pacific Ry. Co., and Shang v. Canadian Pacific Ry. Co., 5 Que.. P.R. 453 (Superior Court).

—Chinese Immigration Act—63-64 Vict. (Can.) c. 32—Habeas corpus.]—Chinese immigrants who are refused admission in the United States, and do not appeal from the decision so rendered against them, are not entitled to a writ of habeas corpus, while being transported from the United States to China, in conformity with the agreement between the United States and the Canadian Pacific Railway Co.

Chew and C. P. R. Co., 6 Que. P.R. 14 (King's Bench, appeal side).

—Deportation of Chinaman refused admittance to United States—Habeas corpus.]—Where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States on the understanding that if he is refused admittance to the States he will be deported to China by the company, is refused admittance to the States and is being deported, he will not be granted his discharge on habeas corpus proceedings as the contract is not illegal and under the Chinese Immigration Act, 1900, deportation is proper.

In re Lee San, 7 Can. Cr. Cas. 427, 10 B.C.R. 270.

Arrest — Personation — False certificate — Habeas corpus.]—

The King v. Seventeen Chinamen, 3 E.L. R. 551 (N.S.).

—Infraction — Deportation before conviction — Power of Minister of Trade and Commerce.]—

Rex v. Dutton; Re Woo Jin, 5 E.L.R. 543 (N.S.).

—Chinese immigrants in transit through Canada—Detention by railway company.]—Where immigrants of Chinese origin are merely passing through Canada, under a contract with a railway company for their transportation to a point or destination beyond the limits of Canada, the railway company (under the provisions of 63-64 Vict. c. 32, since repealed by 3 Edward VII. c. 8) were justified in detaining them, and in refusing them permission to remain on Canadian territory, they not having complied with the provisions of the Act 63-64 Vict. (Can)., c. 32, then in force, applicable to Chinese immigrants entering Canada with intention to remain therein.

Re Wing Toy and Canadian Pacific Railway Company, 13 Que. K.B. 172, 4 Can. Ry. Cas. 410.

CHOSE IN ACTION.

Assignment as security—Notice to debtor —Right of assignee to moneys collected by assignor.]—The plaintiffs had an assignment from one Thomas of all his book debts, notes and other choses in action as security for their claim, but did not notify the debtors or any of the other creditors of Thomas although they knew there were such creditors. They allowed Thomas to collect the accounts and pay over the proceeds to them. The defendants, not knowing of the assignment, and having a large claim against Thomas, induced him to allow them to receive the proceeds of the collections of some of the debts and a number of the promissory notes covered by the assignment, and the plaintiffs brought this action to recover these moneys and notes including some received after notice of the plaintiffs claim:—Held, that the defendants were equitable assignees of all such moneys and notes as they had reduced into possession before receiving notice of the assignment and were entitled to retain them, but that the plaintiffs were entitled to judgment for all collections of book debts made by the defendants after receipt of such notice. Held, also, that there was no estoppel against the plaintiffs by reason of their failure to notify the defendants of their assignment.

Bank of British North America v. Wood, 15 Man. R. 633, 14 W.L.R. 34.

—Assignment of chose in action—Future earnings—"Wages".]—The plaintiff, having a judgment for the payment of money against the defendant, on the 29th July, 1910, caused a garnishee summons to be served upon a company for whom the defendant was doing certain work, whereupon the company paid into Court $127.20, which was claimed by H., under an assignment from the defendant, dated the 16th July, 1910, of "all moneys

due or to accrue due to me by the . . . company for wages or work of teams for the month of July, 1910." It appeared that the work was hauling with teams of horses owned by the defendant and driven by himself and men employed by him. It also appeared that the assignment was given mainly, if not wholly, for past advances, and that the money paid into Court comprised earnings not accrued due at the date of the assignment:—Held, that these future earnings of the defendant were not "wages" within the meaning of the Act (c. 2 of 1909) respecting assignments of wages or salaries to be earned in future—and mentioning "wages" in the assignment did not alter their real character—and the moneys were validly assigned. Semble, that, if the earnings were wages, the claimant could not take the benefit of the exception in the latter part of s. 1 of the Act, as the defendant gave the assignment simply to secure past and present advances in money, and not to secure "a past indebtedness for necessaries" or "an account for necessaries to be thereafter supplied"—even if he did use in the past, or intended to use in the future, such moneys for necessaries. Held, also, that, as the claimant did not know that the plaintiff had recovered judgment against the defendant, Rule 768 did not apply.

Coppey v. Lear, 15 W.L.R. 354 (Man.).

—Assignment of chose in action — Absence of notice.]—D. being financially embarrassed, an agreement was made by him with the plaintiff, representing his creditors, and the defendants, for a lease of D.'s business premises to the defendants, and an assignment of the rents accruing under the lease to the plaintiff as trustee for D.'s creditors. This arrangement was carried out, and the lease and assignment executed at a meeting at which D., the plaintiff, and the defendants were all present: — Held, that the lease and assignment formed one entire agreement, to which the defendants were parties; and therefore, in an action by the plaintiff for rent due, it was not necessary to show notice of the assignment to the defendants, in pursuance of the provisions of the statute regarding notice of assignments of choses in action.

Lavell v. McDonald, 15 W.L.R. 243 (Alta.).

Equitable assignment—Order — Specific fund.]—The Dominion Government was indebted to Bull, for transport services rendered during the N.W. Rebellion. On the 25th July, W., a Government transport officer, notified Bull by letter to put in his account, certified, to the H. B. Co., Winnipeg, "where it will be paid." Bull, being indebted to the plaintiffs, wired them 1st August: "Will send order on transport account, payable in Winnipeg." Bull also wrote to the plaintiffs 4th August, enclosing a copy of W.'s letter, and an order reading "4th August. To the H. B. Co., Winnipeg. Please pay Messrs. G. F. & J. Galt, or order, amount of my account." This order was presented to the company, but payment was refused for the reason assigned that the Government had stopped payment of transport accounts. Subsequently Bull made a general assignment for the benefit of his creditors to the defendant, to whom the Government eventually paid the amount of Bull's claim. The plaintiff sought to recover the amount from the defendant, as money had and received to their use:—Held, that the order per se did not constitute an equitable assignment.

Galt v. Smith, 1 Terr. L.R. 129.

—Assignment of chose in action—Trading corporation acting as trustee.]—A trading corporation created by letters patent under the Manitoba Joint Stock Companies Act has power to take an assignment of a chose in action and hold and collect it by suit for the benefit of the assignor. In re Rockwood, etc., Agricultural Society (1899), 12 M.R. 655; The Queen v. Reed (1880), 5 Q.B.D. 483, and Ashbury Railway Carriage Co. v. Riche (1875), L.R. 7 H.L. 653, distinguished. And a debtor, who has no interest in an assignment of the claim against him and is in no way prejudiced by it, cannot raise any objection to the competency of the assignee to take the assignment and to sue upon the claim. Walker v. Bradford Old Bank (1884), 12 Q.B.D. 511, followed.

Stobart v. Forbes, 13 Man. R. 184 (Dubuc, J.).

—Joint stock company—Transfer of rights and obligations—Amalgamation of companies—Signification of transfer of debt.]—(1) A transfer of the assets of one joint stock company to another does not merge the two companies into one. (2) A sale or transfer of a debt in Quebec does not vest the transferee or purchaser with a right of action against the debtor unless the transfer has been signified to him. (3) The necessity for such signification is not removed by proof of the debtor's knowledge of such transfer. (4) Signification of the action is insufficient and does not take the place of the signification to which the debtor is entitled.

Maple Leaf Rubber Co., Limited v. Brodie, 18 Que. S.C. 352.

—Assignment of debt—Exception to form —New cause of action.]—Testamentary executors may recover the balance due on a debt assigned to them as executors. If in answer to an exception to the form they set up and produce documents con-

ferring on them powers larger than they would have by virtue of the law alone this part of the reply will not be rejected on motion as tending to make a new cause of action.

Francis v. Rhine, 3 Que. P.R. 320 (S.C.).

—Money order—Indorsement of—Parol assignment.]—Defendant, under contract to build for one Walker, purchased the materials from plaintiffs who subsequently got judgment against him, and who garnished the moneys due from Walker to defendant under the contract. Moneys due the contractor were to be paid on the certificate of the architect, Grant. Before the garnishee proceedings defendant had accepted the following order drawn upon him by Nicholas & Barker, to whom he he was indebted on a sub-contract: "Please pay to Champion & White the sum of $270 and charge the same to my account for plastering Place Block, Hastings street, W., in full to date;" which order the defendant thus indorsed in favour of Grant: "Please pay that order and charge to my account on contract for Robert Walker Block on Hastings street, city":—Held, in interpleader, by the full Court, affirming McColl, C.J., that apart from the order there was a parol assignment specifically appropriating to the assignees the sum in question, of the moneys to arise out of the contract.

B. C. Mills Lumber and Trading Co. v. Mitchell, 8 B.C.R. 71.

—Assignment of debt—Curator—Purchase of claims—Litigious rights.]—A creditor of an insolvent has no interest to enable him to contend that the assignee of another creditor did not give valuable consideration and that the assignment was not served on the debtor. Nothing in the law prevents the curator of a vacant insolvent succession from purchasing from creditors of the succession their claims against it. The plea of litigious rights can only avail if the debtor who makes it offers to reimburse the purchaser for what he has paid out.

Johnson v. Sharswood, 3 Que. P.R. 473 (S.C.).

—Assignment of debt—Set off—Insolvency.]—The debtor of an insolvent (not in bankruptcy) may acquire the debt of a third party against said insolvent, and after service of the assignment of the debt the compensation is operative de plein droit between the two debts.

Villeneuve v. Matte, 11 Que. K.B. 192.

—Assignment of debt—Set off—Insolvency Act—Statute of Elizabeth—Execution—Interest in partnership—Sale.]—Action by husband and wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets and business of a partnership. The assignment was made in February, 1896, as security for a part due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, and placed execution in the sheriff's hands in July, 1896. Under that execution, the sheriff, without making any actual seizure of the partnership assets, purported to sell and convey to the wife, in October, 1896, all the undivided share or interest of the assignor exigible under execution in the partnership assets or business. This action was begun in November, 1898:—Held, that the assignment was not invalid under the Bank Act, nor under the Statute of Elizabeth, there being no evidence that it was made with intent to delay and defraud the husband in his action against the assignor. Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity. Per Armour, C.J.O.:—Debts are not included in the expression "goods, wares and merchandise," as used in the Bank Act. The effect of placing the execution in the sheriff's hands was to bind the goods of the partnership, so that they were liable to be seized, but no seizure of any specific assets having been made, and all the assets of the partnership having been sold, realized and disposed of, the execution creditor lost any benefit which he might have derived from the seizure of any specific assets, and the sale thereunder of the undivided interest of the execution debtor therein; and nothing passed to the wife by the sale to her. Judgment of a Divisional Court, 1 O.L.R. 303, 1901 C.A.D. 69 affirmed.

Rennie v. Quebec Bank, 3 O.L.R. 541 (C.A.).

—Assignment of debt—Notice—Cause of action.]—Where a debt has been assigned by way of mortgage, but no notice in writing of the assignment has been given to the debtor, the cause of action still remains in assignor.

Okell Morris & Co. v. Dickson, 9 B.C.R. 151.

—Assignment of debt due partnership.]—See PARTNERSHIP.

—Assignment of debt—Service.]—It is not necessary for the authentication of an assignment of debt to be made through the medium of a notary. (See now Bank of Toronto v. St. Lawrence Fire Ins. Co., [1903] A.C. 59).

Bayard v. Drouin, Q.R. 22 S.C. 420 (Sup. Ct.), affirmed on review 31st January, 1903.

—Assignment of debt—Action by assignee.]—The plaintiff had assigned to the Colonial Investment & Loan Co. a claim against the defendant. The debtor afterwards agreed to the transfer so that there was the mutual assent of the assignee and the person whose debt was assigned whereby the latter became the debtor of the assignee:—Held, that under these circumstances the assignee cannot maintain an action against the debtor in the name of the assignor even though the deed of transfer, to which the debtor was not a party, authorized the assignee to use the assignor's name. The assignee should take action in his own name.

Montreal Loan & Investment Co. v. Plourde, Q.R. 23 S.C. 399 (Sup. Ct.).

—Signification to debtor of transfer of debt—"Third person"—Civil Code, Arts. 1570 and 1571.]—Under Arts. 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of the act of sale of his debt need not be by a notarial act:—Quaere, whether the debtor is a "third person" within the meaning of the latter section against whom signification is necessary in order to perfect possession. Murphy v. Bury (1895), 24 Can. S.C. 688, doubted. The institution of an action against the debtor is itself a sufficient signification of the transfer of the debt.

Bank of Toronto v. St. Lawrence Fire Ins. Co. [1903] A.C. 59, 2 Com. L.R. (Can.) 42.

—Assignment of—Notice to debtor—Sufficiency.]—A creditor of the defendants to whom they owed $184.98, being $124.80 for oak lumber, and 60.13 for basswood lumber, assigned his claim to the plaintiff. The only notice, however, which the defendants had of this assignment was in a letter from the plaintiff stating that he had an order from the creditor for the amount due in respect to a purchase of "oak lumber" bought by the defendants' agent. The plaintiffs drew on the defendants for the whole amount, who refused to accept the draft on the ground that they had no order from their vendor to do so. Thereupon the present action was brought:—Held, that though there was sufficient to put the defendants upon enquiry in the notice they received, yet it was not sufficiently clear and express to entitle the plaintiff to sue in his own name without making the assignor a party, under the section of the Judicature Act relating to assignments of choses in action.

McMillan v. Orillia Export Lumber Co., 6 O.L.R. 126 (Street, J.).

—Chose in action—Equitable assignment—Form of—Verbal agreement.]—No writing or any particular form of words is necessary to constitute an equitable assignment, an intention to pass the beneficial interest being all that is required. Hughes v. Chambers (1902), 22 C.L.T. 333 approved. A client, who was indebted to a solicitor for costs incurred, informed him that, on the receipt by the solicitor of certain moneys, which he was instructed to collect for the client, he was to pay certain obligations of the client, including the client's bill of costs:—Held, that this constituted a good equitable assignment.

Re McRae Estate, 6 O.L.R. 238 (Britton, J.).

—Litigious right—Sale of.]—The exception of litigious rights cannot be raised in an action claiming payment of a debt included in the sale en bloc of property and debts even though the debt in question may be of litigious nature.

Brossard v. Banque du Peuple, Q.R. 13 K.B. 148.

—Transferee or prete-nom—Right to sue in his own name.]—Held (affirming the judgment of the Superior Court, Lemieux, J., 24 Que. S.C., p. 119):—Where fraud is not alleged, the transferee of a debt, under a transfer duly served upon the debtor, is entitled to sue for the recovery of such debt in his own name, although, in fact, the claim was transferred to him for collection only.

Deserres v. Dastous, 24 Que. S.C. 420 (C.R.).

—Chose in action—Assignment of money payable "in respect of the contract."]—Held, affirming the decision of Street, J., 6 O.L.R. 428, that the assignment to the claimants of moneys to become due and payable "in respect of a certain contract" for municipal drainage work, included the damages awarded to the contractor by the judgment in Bourque v. City of Ottawa, 6 O.L.R. 287, and therefore these moneys were not attachable by a judgment creditor of the contractor.

Graham v. Bourque, 6 O.L.R. 700 (D.C.).

—Book debts included in chattel mortgage.]—See BILL OF SALE.

Robinson v. Empey, 10 B.C.R. 466.

—Transfer of claim—Adding assignee as party.]—A party suing upon a claim which was, before action served, transferred to another, may ask by dilatory exception that the plaintiff be ordered to add the assignee as a plaintiff.

Honan v. Anderson, 7 Que. P.R. 170.

—Service on debtor of notice of change of creditor.]—(1) A transferee of a debt cannot sue his transferor's debtor for the recovery of the same without first serving a copy of the transfer on the debtor, or, at least, serving a copy thereof on the

defendant, with the action. (2) Service of the action alone is not sufficient notice of the transfer and is not a sufficient compliance with the law.

D. W. Karn Co. v. Lough, 26 Que. S.C. 64 (Rochon, J.).

—Sale of debts and rights of action — Signification—Delivery to debtor of a copy of the act of sale.]—An action wherein it is not alleged that the signification of the act of sale was made nor that a copy of it was delivered to the debtor, nor that it is produced with the action, will be dismissed on an inscription-in-law.

Maller v. Levinton, 7 Que. P.R. 17, C.R.

—Sale of debts by curator—Evidence of debt—Return or abatement of price.]—The sale of debts includes the obligation to deliver the evidence of the debts. A curator to an assignment who sells the debts without warranty and at the risk and peril of the purchaser, is obliged to deliver to the latter the notes, if any, of the debtors, and the details of accounts due on sales of goods. In default of so doing, the purchaser has a right of action against him for the return or diminution of the price, as the case may be, and costs will be given against the curator up to the time of delivery of the evidence of indebtedness.

Thibaudeau v. Paradis, Q.R. 28 S.C. 475 (Ct. Rev.).

—Assignment of moneys under a contract to secure advances—Equitable assignment.]—A firm of contractors having a contract with a town desiring advances from a bank, assigned "all or any money, or moneys due or which may become due from the corporation of the town," and thereafter the cheques for all moneys coming to the contractors, payable to their order, were handed to the bank. The contractors subsequently by assignment as follows: "We hereby, for and in consideration of advances heretofore made . . . assign, transfer and make over to" (another branch of the same bank) "as a general and continuing collateral security, balance of the account" against the town assigned to the bank. It was admitted that the bank knew that there was but one contract upon which the contractors would be entitled to receive money from the town, and that the assignments were simply taken as security for the advances made or to be made to the contractors:—Held, that the assignments to the bank were good equitable assignments, and that no notice of them to the town was necessary.

Sovereign Bank v. International Portland Cement Co., 14 O.L.R. 511 (Riddell, J.).

—Damages — Assignment of claim for.]—The plaintiff brought this action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time, and in respect to which he claimed under assignment from his master:—Held, that the action was properly dismissed as to the latter claim upon the ground that it was not an assignable chose in action.

McCormack v. Toronto R.W. Co., 6 Can. Cr. Cas. 474, 13 O.L.R. 656.

—Equitable assignment—Priority.]—Held, that a signature inserted in such a manner as to govern the whole instrument is a sufficient signature. 2. That under the provisions of c. 41 of the Consolidated Ordinances, 1898, an assignment of an undefined portion of a future debt is valid. 3. That as between two claimants under assignments of different dates where the fund has not been paid over by the stake holder that assignment which is first in point of time has priority, notwithstanding that the last assignee has first given notice of the assignment.

Re A. B. Miller, 1 Sask. R. 91.

—Assignment of book debts to creditor—Notice.]—Plaintiffs were assignees of certain book debts, notice of the assignment of which was not given to the debtors. Subsequently the debts were paid by cheques to the assignor who was collecting them for the plaintiffs under an arrangement with them. The defendants who were also creditors of the assignor and who had notice of the assignment obtained possession of the cheques from a clerk of the assignor:—Held, that the plaintiffs were entitled to recover the amount of the cheques, as absence of notice to the debtors under sub-s. 5 of s. 58 of the Judicature Act could not be taken advantage of by the defendants, after the debtors had paid the agent of the assignees.

Eby-Blain Co. v. Montreal Packing Co., 17 O.L.R. 292.

—Assignment of debt—Service on debtor—Costs.]—The service of a sale or transfer of a chirographic debt is not a condition precedent to the bringing of an action by the assignee to recover the amount of it from the debtor. The summons, which informs the latter of the transfer, and proof of it (in this case by its production) suffice to give the plaintiff a useful possession of the debt as against the debtor at the time of the hearing of the merits of the case. The Court is then in a position to know the grounds of the action and can take into account the faults and mistakes of the parties in the adjudication of costs.

Brunel v. Cloutier, Q.R. 33 S.C. 408 (Sup. Ct.).

—Privilege—Assignment of debt—Hypothecary action—Service.]—The assignee of

a debt privileged and registered under the provisions of Art. 2013a et seq. C.C., can only maintain an hypothecary action against the person in possession of the immovable affected after service of the assignment of the debtor. Service on the person in possession is not sufficient.

Demers v. Byrd, Q.R. 17 K.B. 303.

Assignment of future debts — Earnings by use of machinery sold — Machinery rented to third person.]—

American-Abell Co. v. Hay, 11 W.L.R. 471, 594 (Alta.).

— Assignment — Set-off — Notice — Contract.]—

American-Abell Engine & Thresher Co. v. Leutenbach, 11 W.L.R. 329 (Sask.).

—Assignment—Validity — Agreement.]—

Brown v. Thomas, 5 W.L.R. 332 (Man.).

—Assignment of moneys due — Conflicting evidence.]—

Greetham v. Gilroy, 11 W.L.R. 395 (Sask.).

—Informal order for payment of money — Equitable assignment.]—

Handley v. Crow's Nest Pass Lumber Co., 11 W.L.R. 210 (B.C.).

— Right of assignee to sue—Claim for price of goods sold.]—

Miller v. Williams, 3 W.L.R. 264 (Y.T.).

—Champertous assignment.]—

See CHAMPERTY.

—Assignment of — Order for payment of money — Validity as assignment — Signature of assignor — Assignment of future debts.]—

Re Miller and American-Abell Engine & Thresher Co., 7 W.L.R. 839 (Sask.).

—Assignment of debt—Security for loan—Advance payment—Account.]—When the person to whom a debt payable in future has been assigned as security for a loan to the assignor, and on condition that it will be re-assigned on payment of the loan within a time agreed upon, receives payment of the debt before it is due he is obliged to account to the assignor and pay him the difference between the loan and the amount received even after expiration of the time within which the loan was to be repaid.

Hus v. Lemaire, Q.R. 33 S.C. 266 (Sup. Ct.).

—Constituted rents—Transfer of rents — Service on debtors.]—Although the capital of constituted rents which takes the place of the rents since abolition of the seignorial tenure are declared immovable by the law the right to receive such rents is not a real right but amounts to a mere personal debt which cannot be acquired by prescription. The sale or transfer of constituted rents only gives a useful right to the transferee as against debtors by service of the transfer upon the latter in the manner provided for by Arts. 1571, 1571c. C.C. and Art, 5612 R.S.Q.

Mailhot v. Brimbois, Q.R. 32 S.C. 542 (Ct. Rev.).

—Possession of land—Good faith—Right to payment for improvements—Transfer of rights.]—The right of a person who, in good faith, is in possession of land to remain so until reimbursed for his improvements and expenses is transferable, there being no law forbidding it. The sale of an immovable with the rights and improvements of the vendor, includes the right to retain possession until so reimbursed. When the purchaser of an immovable, sued in revendication, sets up a right to retain possession transferred to him by his vendor, the plaintiff cannot set off against this a personal debt of said vendor assigned to him though it was for part of the price of the immovable which the vendor himself owed to his auteur. The person in possession of an immovable belonging to another, who proves that he purchased from a former possessor for a legal consideration, that he has held possession, by himself and auteurs as owner to the knowledge of the real owner's agent for fifteen years and paid the municipal taxes for that time, is sufficient evidence of possession in good faith which entitles him to reimbursement for improvements and expenses. The acknowledgment of a fact in a document filed by a party to an action is evidence against him of such fact in another action.

Fréchette v. Gagné, Q.R. 36 S.C. 300.

CHOSE JUGEE.

See RES JUDICATA.

CHURCH LAW.

Wardens—Incapacity—Contractor.]—The churches in the Roman Catholic parishes of Quebec are public corporations and the churchwardens hold a public office. Therefore, a course to the writ of quo warranto is open to any interested party who, being ineligible, is elected to and performs the duties of, such office. A contractor to perform work on, or furnish materials for, a church is ineligible for the office of churchwarden. When rights or privileges are acquired for the future by the exercise of an elective public charge, the Court wisely uses its discretionary power in permitting

the issue of the writ of quo warranto on the day before the expiration of the term for which the incumbent was elected.

Hamelin v. Dugal, Q.R. 38 S.C. 196 (Sup. Ct.).

Election of churchwardens—Right to vote—Resident parishioners—Householders—Custom.]—The words "paroissiens tenant feu et lieu" in Art. 3438 par. 3. R.S.Q., and the word "householder," used in the English version of that article, comprise and designate all heads of families, even married sons living with their parents, working, lodging and boarding with them, and such married sons have, under the text of said law, a right to vote at the election of churchwardens. Unmarried sons living in the same way with their parents are not "paroissiens tenant feu et lieu" and cannot vote at such election. One cannot invoke the custom followed in a particular parish or in the surrounding parishes for interpretation of said article, the law overriding the custom which has authority only in the absence of a positive enactment.

Plante v. Guévremont, 18 Que. S.C. 401 (C.R.).

—Methodist church—Power of trustees — Allotment of free seats—Power to rent pews—47 Vict. c. 88 (O.)—47 Vict. c. 146 (D.).]—Under the trusts sets out in the schedules to the above Acts the trustees of a Methodist church have no power to allot free seats to particular members of a congregation. They have, however, the power to rent pews at a reasonable rent.

Trustees Methodist Church v. Keyes, 3 O.L.R. 165.

—Religious institutions—"Acquisition" of land—After life estate—Seven years holding—When commencing.] — The seven years during which a religious institution may hold land after its "acquisition" under s. 19 of R.S.O. 1877, c. 216 (now s. 24 of R.S.O. 1897, c. 307), does not commence to run in the case of a devise of a reversion dependent upon a life estate until the expiry of the life estate.

Re Naylor, 5 O.L.R. 153 (Boyd, C.).

—Charitable bequest—Proceeds of realty and personalty.]—A testator who died on the 12th April, 1895, by his will made the 6th September, 1894, directed land to be sold and out of the proceeds thereof and some personalty directed $2,000 to be paid to N. W. for the use of the Reformed Presbyterian Church, such sum to be expended by N. W. in the manner best calculated by him to advance the principles of that church. N. W. assigned the whole fund to the Church:—Held, a good charitable bequest. Held, also, that the assignment by N. W. to the trustees of the church was a valid exercise of the discretion given him by the will. Judgment of Boyd, C., affirmed.

Re Johnson; Chambers v. Johnson, 5 O.L.R. 459 (D.C.).

Subscription to church — Condition that subscription was to be paid out of insurance premiums.]—

Church of St. James v. Upton, 3 E.L.R. 212 (Que.).

—Members—Trustees — Meetings — Resolution authorizing new building — Regularity — Injunction.]—

Heine v. Schaffer, 2 W.L.R. 310 (Man.).

—Dispute as to ownership of land and building — Rival claimants — Difference in tenets.]—

Zacklynski v. Kerchinski, 1 W.L.R. 32 (N. W.T.).

—Obstructing clergyman at divine service—Property in church building—Indictment.]—(1) An indictment under section 171 of the Criminal Code, for unlawfully obstructing or preventing a clergyman or minister by threats or force in or from celebrating divine service or otherwise officiating in any church, chapel, etc., is sufficient without an allegation that the clergyman or minister obstructed was, at the time of the offence, in lawful charge of the church, chapel, etc. (2) To support a prosecution under that section, however, it must be proved at the trial that the clergyman or minister obstructed was, at the time of the alleged offence, either the lawful incumbent of the church or was holding service with the permission of the lawful authorities of the church. (3) A church building erected by a congregation of one religious body remains the property of those who adhere to that body, although a majority of the congregation afterwards decides to join another religious body and assumes to appoint a clergyman or priest to hold services in the church, and those who are opposed to such appointment may lawfully prevent or obstruct the person so appointed from officiating in the church.

Rex v. Wasyl Kapij, 15 Man. R. 110, 9 Can. Cr. Cas. 186.

—Title to land—Ambiguous description of grantee—"Greek Catholic Church"—Evidence.]—Where Crown lands were granted "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake," N.W.T., and it appeared that this description was ambiguous and might mean either the Greek Orthodox Church or the Greek Church in communion with the Church of Rome, it was held that the construction of the grant should be determined by the facts and circumstances antecedent to and attending the issue of the

grant, and that, in view of the evidence adduced, the words did not mean a church united with the Roman Catholic Church and subject to the jurisdiction of the Pope. Judgment appealed from reversed, the Chief Justice and Girouard, J., dissenting, on the ground that the concurrent findings of the Courts below upon matters of fact ought not to be disturbed.

Zacklynski v. Polushie [1908] A.C. 65, affirming 37 Can. S.C.R. 177.

—Offences against religion—Disturbing religious meetings.]—A person who enters a hall, leased by a religious association or body, while a meeting for religious worship is being held in it, under the direction of officers of the association, and, addressing himself to the assemblage, says he is a Catholic and a French Canadian, as most of them are, that they should not stay where they are, and calls upon them to leave, is guilty of the offence of disturbing a religious meeting under Cr. Code s. 173.

Moore v. Gauthier, 14 Que. K.B. 530.

—Incumbent of a parish—Appointment by the Bishop during pleasure—Institution and induction.]—(1) A clerk in Holy Orders of the Church of England appointed by the Lord Bishop of Montreal under his sign manual to be the incumbent of a parish during the pleasure of his Lordship, and therefore removable, is the incumbent within the meaning of section 6 of the Temporalities Act of the United Church of England and Ireland in the diocese of Montreal. As such, he forms, with the church wardens of the parish, the corporation referred to in the above section. (2) An incumbent of a parish need not be a rector. He holds his office by virtue of his appointment by the Lord Bishop of the diocese and neither "institution" nor "induction" is required to invest him with the rights and powers pertaining to it.

St. Edward's Church v. Synod of Montreal, 30 Que. S.C. 265 (Dunlop, J.).

—Rights of vestry board—Letting pews.]—(1) Recourse by way of mandamus to compel church wardens of a vestry board to let vacant pews in a parish church can be exercised only in favour of a member of the board or a parishioner who has a special interest in respect thereto. (2) The grant of a pew in a church, made in conformity with an immemorial custom, to parishioners and their wives, during their natural lives, is not contrary to law and is valid. The surviving widow has the right of enjoying the benefit of such grant to her deceased husband, even after she has re-married.

Lemay v. Parish of Ste. Croix, Q.R. 28 S.C. 528.

—Refusal of sacrament—Justification.]—A priest who threatens that he will refuse the sacraments to the school commissioners of his parish if they appoint a certain person secretary-treasurer may be liable to an action for damages by the latter. He can only claim privilege or immunity in such case if the commissioners refuse to observe a grave moral obligation, e.g., if they appoint to such position an immoral person declared to be such by competent authority.

St. Pierre v. Beaulieu, Q.R. 33 S.C. 385 (Ct. Rev.).

CIVIL ENGINEERS.

Society—Right of admission.]—The Act incorporating the Canadian Society of Civil Engineers, passed in 1898, gives to any person who practised as a civil engineer in the province at the time it was passed the right to become a member. The plaintiff, claiming that he fulfilled this requirement, presented an application for admission, the allegations of fact in which were supported, as required by law, by a deposition under oath. Upon the refusal of the society to grant his application he applied for the issue of a peremptory writ of mandamus to compel it to do so:—Held, that the Court was not called upon to decide whether or not the plaintiff was a qualified civil engineer or had gone through the course of study and acquired the knowledge of the profession, but only whether or not he had practised as a civil engineer at the time the Act was passed. One who has himself performed work demanding knowledge peculiar to a certain profession is not deemed to exercise such profession as is the one who devotes himself to it for the public and carries it on in fact, though his clientèle may be very small. The sworn deposition of the plaintiff does not constitute complete and unassailable proof of the facts it contains but is only a formality intended to prevent futile applications and merely establishes a presumption which may be rebutted.

Taché v. Canadian Society of Civil Engineers, Q.R. 26 S.C. 215 (Ct. Rev.).

CIVIL SERVICE.

Postmaster's salary—Claim for difference between amount authorized and that paid—Interest—Civil Service Act, R.S.C., c. 17—Extra allowances.]—By the Civil Service Act (R.S.C. c. 17, sched. B.), a city postmaster's salary, where the postage collections in his office amount to $20,000 and over, per annum, is fixed at a definite sum according to a scale therein provided. No discretion is vested in the Governor-in-

Council or in the Postmaster-General to make the salary more or less than the amount so provided. Notwithstanding the statute, it was the practice of the Postmaster-General to take a vote of Parliament for the payment of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute. Upon his petition to recover the difference between the said amounts:—Held, that he was entitled to recover. 2. That the provision in the 6th section of the Civil Service Act to the effect that "the collective amount of the salaries of each department shall in no case exceed that provided for by vote of Parliament for that purpose" was no bar to the suppliant's claim, even if it could be shown that, if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded. Such provision is in the nature of a direction to the officers of the Treasury who are entrusted with the safekeeping and payment of the public money, and not to the Courts of law. Collins v. The United States (15 Ct. of Clms. at p. 35) referred to. 3. The suppliant was not entitled to interest on his claim. 4. The provision in the 12th section of the Civil Service Amendment Act, 1888 (51 Vict. c. 12), that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy head, officer or employee in the Civil Service of Canada, or to any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration; and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back.

Hargrave v. The King, 8 Can. Exch. R. 62.

And see PUBLIC WORKS.

COMMISSIONER'S COURT.

Associate commissioner at hearing.]—A cause entirely heard by one commissioner can only be decided by him though another commissioner was sitting during part of the hearing.

Rex v. Warren, Q.R. 25 S.C. 78 (Sup. Ct.).

CLUB.

Resolution expelling member — Two-thirds vote—Mandamus.]—(1) A resolution of a club ordering the expulsion of one of its members, for acts deemed derogatory to the honour and dignity of the club, is not ultra vires, nor unreasonable, and will not give rise to a writ of mandamus. (2) If, however, the constitution of the club provides that such resolution shall be adopted by a two-thirds vote, that means the two-thirds of the members present at the meeting, and not of the members who actually voted at the said meeting when the vote was taken.

Lamarche v. Le Club De Chasse, 4 Que. P.R. 75.

—Association.]—See that title.

—Authority to make regulations—Expulsion of member.]—(1) A club for amusement, etc., organized under Articles 5487 et seq. of the Revised Statutes of Quebec, by which such association is authorized to make rules and regulations respecting the admission and expulsion of its members, has authority to adopt a rule providing for the expulsion of any member who commits an act "derogatory to the honour and interests of the club," although no definition be given in the rule of what constitutes such acts. (2) Where a social club has formally passed a resolution expelling a member for acts derogatory to the honour and interests of the club, it cannot afterwards, in defence to an action of the member for the rescission of the vote of expulsion, be allowed to justify such expulsion on the ground that the plaintiff had never been regularly admitted a member. (3) Where the rule of the club provided for the expulsion of a member by a two-thirds vote at a general meeting regularly called, the resolution of expulsion must be voted for by two-thirds of the active members of the club present at the time the resolution is put to the meeting.

La Marche v. Le Club De Chasse A Courre Canadien, 19 Que. S.C. 470 (Doherty, J.).

—Life member—Liability for additional contributions.]—Held, by the Court of Review (confirming the judgment of the superior Court, Tellier, J., as to the dispositif, but varying the reasons): In the case of a club incorporated under R.S.Q. 5487 et seq., the members of which are not personally responsible for the debts of the association (Article 5491), a person who has become a life member by payment of the contribution fixed by the rules and regulations then in force, is not liable to any further assessment imposed by a by-law adopted subsequent to his admission as a life member, and a bylaw purporting to levy a further contribution on such life member is null and void.

Beaudry v. Le Club St.-Antoine, 19 Que. S.C. 452.

—Public Inquiries Act, R.S.B.C. 1897, c. 99—Jurisdiction of commissioner.]—The corporation of the City of Vancouver peti-

tioned the Lieutenant-Governor-in-Council, alleging that certain societies incorporated under the provisions of the Benevolent Societies Act, were abusing their corporate powers and applying them to purposes other than those authorized by the statute, and praying that, under the powers thereby conferred, these societies be dissolved. The Lieutenant-Governor-in-Council appointed a commissioner under the authority of section 4 of the Public Inquiries Act, to inquire into the facts bearing upon the allegations contained in and the prayer of the petition:—Held, that the power of the Lieutenant-Governor-in-Council to dissolve societies created under the provisions of the Benevolent Societies Act, though not for any public purpose, is one of the powers of government exercisable by the Executive, and the investigation of the facts leading to a conclusion on the question whether that power shall be exercised, as well as the determination to exercise it, and the executive act in which the determination culminates, are all matters connected with the good government of the Province, within the meaning of section 4 of the Public Inquiries Act.

Re Railway Porters' Club, 11 B.C.R. 398.

COAST.

Municipal boundaries—North Vancouver—Itala or Eagle Island—"Shore" line or "coast" line.]—Itala or Eagle Island is within the boundaries of the municipality of North Vancouver. The meaning of "coast" line and "shore" line, considered.

Mowat v. North Vancouver, 9 B.C.R. 205.

COMMON (RIGHT OF).

Right of common — Construction of statutes—Acts of Assembly, 38 Vict. c. 42; 53 Vict. c. 73; 59 Vict. c. 69.]—Certain lands were by Order-in-Council and Act of Assembly vested in the municipality of Victoria for the use and benefit(as a common, of the inhabitants of the town of Grand Falls. By subsequent legislation they were transferred to and vested in the town of Grand Falls "to the same extent as was given to the said municipality." By another Act a portion of the common without the town limits was transferred to the said town. Upon the land within the town limits the defendant entered and commenced to erect a house. The plaintiffs thereupon brought ejectment:—Held, 1. That the action was properly brought in the name of the town of Grand Falls instead of the town council of Grand Falls. 2. That the action of ejectment would lie. 3. That the evidence showed sufficient demand of possession. 4. That it was not necessary to make a tender for improvements as the Act 38 Vict. c. 42, only applied to improvements on the land at the time of its passage. 5. That the Act 59 Vict. c. 69, does not abridge or take away any of the rights to the common within the town.

Town of Grand Falls v. Petit, 34 N.B.R. 35.

And see EASEMENT.

COMPANY.

I. CONTRACTS AND DEBENTURES.
II. SHAREHOLDERS AND DIRECTORS.
III. WINDING UP.
IV. REGISTRATION AND LICENSING.
V. TAXATION.

I. CONTRACTS AND DEBENTURES.

Promoters — Sale of business — Secret profits—Liability to account—Intention to sell shares to public.]—The plaintiff company was promoted and incorporated at the instance of and mainly through the intervention and exertions of the defendants M. and F. B. D., with the object of acquiring and taking over the business and property of two trading concerns, in both of which these two defendants were interested as shareholders or owners. These defendants were also directors and president and manager respectively of the plaintiff company. Shortly after the incorporation of the plaintiff company, the defendant F. B. D. made an offer to the company to sell the assets and goodwill of the two concerns for $65,000 in cash and the assumption by the company of liabilities amounting to $14,600. This offer was accepted by a by-law passed by the directors of the company, and both businesses were taken over. The cash payment of $65,000 was to be made with moneys derived from sales of shares in the plaintiff company, which were then being offered to the public. Moneys were not procurable in this way, as it turned out; and a promissory note for $65,000 was signed in the name of the plaintiff company by the defendant F. B. D., as managing director, indorsed by the defendants M., F. B. D., and G. R. D., and two of the other directors of the company, and discounted by a bank, through its local manager, the defendant C. The proceeds of the note were transferred to the credit of the company in the bank, and, by cheques of the company, signed by F. B. D. as manager, at least $25,947.76, representing the profit of F. B. D upon the sale of the two concerns, was divided among the four defendants:—Held, that the agreement for the sale was not made on behalf of the company by an independent board of directors, to whom full disclosure had been made, and who were

fully aware of the interests of the defendants M. and F. B. D., in the transaction. Upon the evidence, the affair was really arranged between the defendant F. B. D., the vendor, and at the same time the real manager of the plaintiff company, and the defendant M., the president of the plaintiff company, and at the same time interested in the selling concerns. It was not intended that the company should be one in which the shares are allotted to the owner of the business concerns taken over, in consideration of the transfer of the property and business; from the beginning the intention was that ready money or its equivalent should be paid for the properties and business to be acquired, and that the necessary cash should be obtained by the sale of shares to the public. Solomon v. Solomon, [1897] A.C. 22, distinguished. Held, therefore, that the defendants were accountable to the company for the sum divided among them as profits, each to the extent to which he shared therein. Judgment of MacMahon, J., reversed.

Stratford Fuel Ice Cartage and Construction Co. v. Mooney, 21 O.L.R. 426, C.A.

—Powers of trading company—Authority of president — Seal — Signature — Abbreviation of word "Limited."]—It was contended that a guaranty purporting to be given by an incorporated trading company, and signed "A. E. Thomas, Ltd.—A. E. Thomas, Pres."—the name of the company being "A E. Thomas, Limited"—did not bind the company, because it was beyond the power of the company to enter into such a guaranty, and because it was not under seal, and no authority was shown in the president to sign it, and the company's proper name was not affixed:—Held, that, the transaction being in good faith, and the bank to whom the guaranty was given having no notice of the by-laws of the company restricting the authority of the president and providing that the corporate seal should be attached to all such contracts, the bank were entitled to assume that the president had been duly clothed with the authority which he was assuming to exercise when he signed the guaranty; that the signature was sufficient to bind the company under the Statute of Frauds; and the bank were entitled to succeed in an action upon the guaranty.

Standard Bank of Canada v. A. E. Thomas, Limited, 1 O.W.N. 379, 548 (D.C.).

— Validity of debentures — Lien on land—Two-thirds vote required—Bona fide purchaser.]—

Re the Winding-up Act and Summerside Electric Co., 5 E.L.R. 129 (P.E.I.).

— Mortgage of assets — Debenture holders —Priority as against creditors' claims and liquidator's commission.]—

In re Touquay Gold Mining Co., 2 E.L.R. 39 (N.S.).

—Sale of interests in railway systems—Damages for breach—Deposit—Retention by vendor.]—The plaintiff's claim was for damages for breach by the defendant of an agreement made on the 22nd January, 1902, between M. and the defendant, and for repayment by the defendant of a sum of $250,000. The plaintiff, by his statement of claim, after setting out the instruments constituting the contract, which showed that it was to be fully performed on both sides on or before the 1st June, 1902, alleged that the defendant carried out no part of his obligations under it, but made default in the same; and on the 3rd June, 1902, by letter addressed to M. and one W., the defendant formally repudiated the contract; and that all the rights of M. and W. had been duly assigned to the plaintiff, of which express notice in writing had been given to the defendant. The action was commenced on the 26th February, 1907. By an instrument dated the 28th April, 1902, M. assigned all his interest in the contract to W., who, by an instrument dated the 10th January, 1907, after first declaring therein that he wholly abandoned any right, title, and interest which he had in the contract, purported to relinquish, assign, and transfer all his rights to the plaintiff. The contract was with reference to the acquisition by M. and W. of the defendant's interests in two Canadian railway systems, M. and W. paying therefor $10,000,000. These interests were largely in the shape of shares in the capital stock and bonds of the railway companies. Although the notice of the 3rd June, 1902, was received by M. and W., and the plaintiff was aware of it, there was no protest from any of them, nor any expression of readiness, willingness, or anxiety to perform the contract on their part, nor any steps indicating an intention or desire to have it performed, so far as the defendant was aware, until the commencement of the action. The sum of $250,000 was paid by M. and W. to the defendant as security for the due carrying out of the agreement, and it was agreed that in the event of any default being made in the payment of the money under the terms of the agreement, on the 1st June, 1902, or sooner, the $250,000 should be forfeited and remain the defendant's absolute property as liquidated damages for such default:—Held, upon the evidence, that M. and those interested with him in the contract were responsible for the failure to complete on the day named in the contract, and the plaintiff was not entitled to damages, and the defendant was entitled to retain the $250,000. Judgment of Mabee, J, affirmed. Per Moss, C.J.O., that the case was one in which, even in equity, time would be deemed to be of the essence, and the circumstances showed that the parties so regarded it. On the 3rd June, 1902, when the defendant gave the notice, the contract was at an end, and

the notice could give no right of action; the plaintiff could not maintain that the defendant, while the contract was on foot, repudiated it so as to give the plaintiff the right to treat it as at an end and sue for damages. Supposing the plaintiff entitled to recover if he could prove his readiness and willingness to complete within a reasonable time after the stipulated day, he had wholly failed to prove his readiness and willingness. No action for damages could be maintained, because there was no actionable breach by the defendant. And, if the plaintiff had sought specific performance or in the alternative damages, and failed, as he must have failed, as to specific performance, he would also fail as to damages. The conditions of the agreement as to the $250,000 were substantially the same as the law attaches to a deposit made on a contract of sale and purchase; and there was nothing in this case to take it out of the ordinary rule that, if the contract be performed, the money is brought into account as part payment of the purchase money, but, if the purchaser makes default, it may be retained. That was the contract of the parties; and there was no ground for relief against the forfeiture, if it could be treated as one; the delay alone would be a serious obstacle in the way of that relief. Per Meredith, J.A., that there was a substantial failure of the purchaser to carry out the transaction on his part; in the terms of the agreement between the parties, the $250,000 became the property of the vendor; and there was nothing in law or equity preventing the words which the parties employed being given effect to.

Sprague v. Booth, 21 O.L.R. 637 (C.A.), affirmed [1909] A.C. 576.

—Statutory contract—Bonds of railway company—Government guarantee.] — The Government of Canada, in a contract with the Grand Trunk Pacific Railway Co., published as a schedule to and confirmed by 3 Edw. VII. c. 71, agreed to guarantee the bonds of the company to be issued for a sum equal to 75% of the cost of construction of the Western division of its railway. By a later contract (sch. to 4 Edw. VII. c. 24) the Government agreed to implement its guarantee, in such manner as might be agreed upon, so as to make the proceeds of said bonds a sum equal to 75% of such cost of construction:—Held, that this second contract only imposed upon the Government the liability of guaranteeing bonds, the proceeds of which would produce a defined amount and not that of supplying, in cash or its equivalent, any deficiency there might be between the proceeds of the bonds and the said 75%.

Re Grand Trunk Pacific Bonds, 42 Can. S.C.R. 505.

Powers of general manager—Contract not under seal—Commencing business contrary to requirement of statute.]—1. A company incorporated by letters patent under the Manitoba Joint Stock Companies' Act, R.S. M. 1902, c. 30, for the purpose of buying and dealing in land, will, by the combined effect of sections 26, 31 and 64 of the Act, be bound by a contract for the sale of land signed on its behalf by one of the persons named in the letters patent as the provisional directors of the company representing himself, with the acquiescence and knowledge of the other directors, to be the general manager, although no proceedings, subsequent to the issue of the letters patent, had been taken to organize the company, no by-laws had been adopted and no directors elected, if the purchaser deals with the company in ignorance of the absence of these formalities. Allen v. Ontario & Rainy River Ry. Co. (1899), 29 O.R. 510, followed. 2. The Act speaks only of first directors and contains nothing to indicate that their authority is only temporary or limited, and, therefore, though called provisional in the letters patent, the persons named were, under section 26 of the Act, directors of the company with all the powers and duties set out in ss. 31, 64 and other sections of the Act. 3. Under s. 64 of the Act, the contract need not be under seal, nor was it necessary to prove that it was made in pursuance of any by-law or special resolution or order. 4. It makes no difference in such a case that the company had commenced business in violation of s. 22 of the Act, ten per cent. of the authorized capital not having been subscribed, nor ten per cent. of the subscribed capital paid up, for that provision should be held to be directory and not mandatory, as far as concerns dealings with strangers ignorant that it had not been complied with.

Muldowan v. German Canadian Land Co., 19 Man. R. 667.

Sale of property—Resolution authorizing conveyance.]—The Mortlach Mercantile Company being indebted to several parties, the defendant Belcher was appointed a trustee for creditors, and with his consent the business was transferred to a company known as Hudsons, Ltd., which agreed to assume the liabilities of the previous company and to pay the same in regular payments. The new company being behind with its payments, a resolution was passed authorizing the sale of the business and conveyance thereof to J. W. Hudson upon execution of certain notes, which it was found as a fact were never made. Notwithstanding, the conveyances were made by the officers of the company, and Hudson went into possession. After the delivery of these documents Belcher recovered judgment against the company, and execution was issued to the sheriff, the defendant Fletcher, who issued a warrant for seizure. The plaintiff Hudson at this time lived over the store premises in which the business was carried on. When the bailiff

arrived he found the store premises locked and Hudson refused to open, whereupon the bailiff forced an entrance. There was no connection between the living apartments and the store premises. After the seizure Hudson first verbally claimed all the goods as his. Subsequently, however, he filed a written claim, which was admitted. In an action for wrongful seizure he alleged other goods were his, and claimed damages. In an action to set aside the conveyance of the land, it appeared that at the time of the transfer Belcher was pressing his claim, that other claims were outstanding, that the goods were mortgaged in a considerable sum, and that the assets if sold would be insufficient to meet the liabilities, and that Hudson must have been aware of the state of affairs:—Held, that the notes to be given in payment of the goods not being delivered, the conveyance thereof to Hudson was not in accordance with the resolution of the company authorizing it, and was therefore invalid, and the property in the goods never passed to him. 2. That the store and dwelling, while not connected, being under one roof, the breaking by the sheriff of the door of the store premises was technically a breaking of the dwelling, and therefore an unlawful breaking. 3. That Hudson having made a formal claim in writing to certain goods after seizure, under the provisions of the rules of Court, could not afterwards allege that other of the goods seized belonged to him, and maintain an action for unlawful seizure in respect thereof. 4. That the company, at the time of the transfer of land to Hudson, being unable, if its assets were presently realized and if compelled to sell at a forced sale, to pay its debts in full, must be deemed to have been insolvent at that time, and Hudson being aware of this, and the conveyance to him being apparently to defeat the creditors of the company, the conveyance must be deemed to have been fraudulent under the Act respecting Assignments and Preferences, and should be set aside.

Hudson v. Fletcher, 2 Sask. R. 489.

—Money claim against company — Oral agreement to postpone payment till after sale of treasury stock — Consideration — Lapse of reasonable time.]—

Dalton v. Selkirk Copper Mines, 259 (B. C.).

—Sale of goods for use of company about to be formed—Action for price — Goods charged to manager of company personally —Liability.]—

Vulcan Iron Works v. Leary, 1 W.L.R. 453 (Man.).

—Transfer of assets of partnership to incorporated company — Assumption of liabilities.]—A trading partnership, indebted to the plaintiffs for goods supplied down to the 1st April, 1909, on the 10th of that month agreed to transfer all its assets and property to a new concern to be incorporated; the new company to assume the liabilities of the partnership. The company was incorporated under the Ontario Companies Act on the 15th April, 1909, and certificated as entitled to begin business on the 22nd June, 1909. After the incorporation, the partnership transferred its assets and property to the company, and the prospectus of the company, filed with the Provincial Secretary, set forth that the company had "purchased the former business and assets, subject to the liabilities of the said firm, which are to be assumed by the new company." A copy of this prospectus was sent by the company to the plaintiffs on the 6th May, 1909, with a letter regretting that the new company could not send a cheque, but saying that they "expected to be shortly in a position to meet your account," and trusted that an extension of time would be given. Correspondence followed during some months the plaintiffs pressing for payment and the company promising to pay and asking for time. A promissory note made by the company and by the members of the old partnership was in the course of the correspondence sent to the plaintiffs, but returned by them as not satisfactory. In October, 1909, the plaintiffs began this action, against the new company and the members of the old partnership, to recover payment of their debt, but did not press for judgment against the members of the partnership:—Held, that the company having made a direct promise to the creditors to pay the debt, and having negotiated for an extension of time, there was sufficient evidence of the creation of the relationship of debtor and creditor to give a direct right of action; Osborne v. Henderson (1889), 18 S.C.R. 698, distinguished. Held, also, that, notice having been given to the plaintiffs of the incorporation of the company and the taking over of the old assets and the assumption of the old liabilities, and the assent of the plaintiffs being in effect asked, and they acceding and giving time, there was sufficient evidence of an election by the plaintiffs to accept the new company as their debtor in substitution for the original debtors.

Stecker v. Ontario Seed Co., 20 O.L.R. 359.

—Novation—Taking over existing concern.] —See NOVATION.

Accommodation acceptances—Authority of secretary of company to make—Knowledge of party claiming under.]—The secretary of defendant company, whose authority was limited to the acceptance of drafts, indorsed, in the company's name, a number of drafts in which the company had no interest, for the accommodation of C. The learned trial judge found that the plaintiff bank, where the drafts were discounted,

had knowledge that the indorsements were made for the accommodation of C.:—Held, dismissing plaintiff's appeal with costs, that defendant was not liable:—Semble, that where the directors might, under the power given them delegate to the secretary power to indorse for the company, the bank taking the paper bona fide, would be entitled to assume that the secretary had such power, although it had not, as a matter of fact, been delegated.

Union Bank v. Eureka Woollen Manufacturing Co., 33 N.S.R. 302.

—**Amalgamation—Transfer of rights.**]—A transfer of the assets of one joint stock company to another does not merge the two companies into one.

Maple Leaf Rubber Co. v. Brodie, 18 Que. S.C. 352.

—**Promissory note—Indorser—Warranty.**]—The indorser of notes made by an incorporated company who claims to have paid the amount of the same to the maker which he summons en garantie in an action on the notes cannot set up the defence that the plaintiff in warranty was not capable of signing them.

Ball v. Atlantic & Lake Superior Railway Co., 3 Que. P.R. 315 (S.C.).

—**Assignment of chose in action—Trading corporation acting as trustee—Assignments Act, R.S.M., c. 7, s. 3.**]—A trading corporation created by letters patent under the Manitoba Joint Stock Companies Act has power to take an assignment of a chose in action and hold and collect it by suit for the benefit of the assignor. In re Rockwood, etc., Agricultural Society (1899), 12 M.R. 655; The Queen v. Reed (1880), 5 Q.B.D. 483, and Ashbury Railway Carriage Co. v. Riche (1875), L.R. 7 H.L. 653, distinguished.

Stobart v. Forbes, 13 Man. R. 184.

—**Reserve fund—Dissentient minority—President—Purchase for company—Secret profit—Directors—Salaries.**]—An ordinary trading company can, without special authority, set apart a reserve fund, but the majority of the shareholders cannot, against the wishes of the minority, accumulate out of the profits a reserve fund which is far larger than is required to provide for all liabilities of, and vicissitures in, the business; and where such a fund had been accumulated and portions of it had from time to time been invested, by the directors elected by the majority, in unauthorized and hazardous investments, the court, at the instance of the minority, ordered a reasonable proportion to be set aside as a reserve fund and the balance to be distributed among the shareholders as undrawn profits. The president of a company cannot, unless with the consent of all the shareholders, make a profit by selling to the company a property which he knows the company requires and which he buys, with that knowledge, for the express purpose of selling to it. The president and vice-president of a company drew for several years, without proper authority but with the acquiescence of their co-directors, elected by, and closely connected with, the majority of the shareholders, large sums, ostensibly as salaries as general manager and managing director respectively:—Held, that the propriety of the payments could be inquired into at the instance of dissatisfied shareholders, although the majority were prepared to ratify them.

Earle v. Burland, 27 Ont. App. 540.

—**Investment of company funds—Sole trustee.**]—It is not ultra vires for a company to invest in the name of a sole trustee. He is strictly accountable, but the dissentient shareholders are not entitled to an injunction against the directors and the company in respect of such investment so long as it appears to be bona fide.

Burland v. Earle, [1902] A.C. 83.

—**Purchase by director and re-sale to company.**]—Where a director purchased property without mandate from the company and under such circumstances as did not make him a trustee thereof, for the company, and thereafter re-sold the same to the company at a profit:—Held, that whether or not the company was entitled to a rescission of the contract of re-sale, it was not entitled to affirm it and at the same time treat the director as trustee of the profit made.

Burland v. Earle, [1902] A.C. 83.

—**Mining company—Purchase and sale of land—Irregularities in proceedings—Qualification—Shares held in trust.**]—A mining company subject to the provisions of the Ontario Companies Act, R.S.O. 1897, c. 191, and the Ontario Mining Companies Incorporation Act, R.S.O. 1897, c. 197, has power to buy and sell land, and a sale in good faith of all the land owned at the time by the company is not necessarily invalid, there being nothing to prevent the business of the company being continued by the purchase of other land. Nor can such a sale made in good faith be restrained at the instance of a dissentient minority of the shareholders on the ground that irregularities have occurred in the conduct of the proceedings of the company leading up to the sale, or on the ground that the approving majority are also shareholders in a rival company and are, in carrying out the sale, furthering the interest of the rival company. Judgment of Street, J., O.L.R. 654, affirmed. But any sale of mining properties such as those in question should only be held at such season of the year and under such circumstances as would afford intending purchasers the amplest opportun-

ity for inspecting and testing the products of the mines:—Held, therefore, that the plaintiffs were entitled to an injunction against the sale by auction which the defendants were intending to hold when the action was commenced. Quære, whether under the Ontario Companies Act, a person holding shares in trust is qualified to act as director?

Ritchie v. Vermillion Mining Co., 4 O.L.R. 588 (C.A.).

—Loan company — Action of foreclosure against shareholder—Rate of interest recoverable—Relation between shareholder and company—Forfeiture of shares.]—Defendant having applied for and obtained certain shares in the plaintiff company, applied for and obtained a loan of $600. The shares were allotted and the loan granted upon certain conditions, which included the payment of a membership fee, and certain monthly dues, and the execution, as collateral security, of a mortgage, which was to continue until the maturity of the shares, or until payment of the loan was made. Under the by-laws of the company the rate of interest on loans was declared to be six per cent., but under the provisions of the mortgage executed by defendant, the rate of interest payable where the stock payments, dues, and interest were not promptly paid, was 15 per cent.:—Held, that, defendant having made default in her payments, the company were entitled to payment of the amount due them, with interest at the latter rate. Held, that the contract of membership as a shareholder was distinct from the mortgage contract, and was not to be considered in the foreclosure suit. Held, that if her shares were wrongly forfeited, defendant's rights as a shareholder were to be sought in a separate action, and afforded no defence as to the foreclosure suit.

Canadian Mutual Loan, etc., Co. v. Burns, 34 N.S.R. 303.

—Hypothec — Directors — Payment.]—(1) Under the Joint Stock Companies Act of the Province of Quebec, the directors may contract a hypothec, which will be binding on the company, if made in the interest of the company. (2) A director of the company who accepts such hypothec, to secure endorsations made by himself and other directors, cannot afterwards in good faith, question the legal right of the directors to authorize the granting of such hypothec. (3) Where no proof of a protest, or the waiver of protest, is made, the indorser of a promissory note who pays, cannot recover, and he must be held to have paid without any obligation to do so; and the payment must be attributed to his own generosity. (4) Where the person who accepts an hypothec to secure the payment of certain debts, does not bind himself personally, there is no obligation on his part which renders him liable in case the debtor does not pay.

Savaria v. Paquette, 20 Que. S.C. 314 (Lynch, J.). (Affirmed on review.)

—Principal and agent—Promoters of company—Agent to solicit subscriptions — False representations—Ratification—Benefit.]—Promoters of a company employed an agent to solicit subscriptions for stock and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters:—Held, affirming the judgment of the Court of Appeal (Wilson v. Hotchkiss, 2 Ont. L.R. 261) that the latter having benefited by the sum paid by W. were liable to repay it, though they did not authorize and had no knowledge of the false representations of their agent. Held, per Strong, C.J., that neither express authority to make the representations nor subsequent ratification or participation in benefit were necessary to make the promoters liable; the rule of respondant superior applies as in other cases of agency.

Milburn v. Wilson, 31 Can. S.C.R. 481.

—Contract on behalf of, before incorporation—Ratification—Principal and agent—Implied warranty of authority—Consensus ad idem—Evidence—Burden of proof.]—In the absence of a new agreement made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract for the company is not binding on the company, although the parties afterwards carry out some of the terms of the contract and act on the supposition that is binding on the company. A person who enters into a contract, expressly as agent for a principal impliedly warrants his authority; and if he has in fact no such authority he may be sued under that implied contract, and is bound to make good to the other contracting party what that party has lost or failed to obtain by reason of the non-existence of the authority. In an action on a verbal contract, the evidence as to its terms being contradictory, showing that, if each of the parties to the contract gave in evidence a truthful statement of its terms according to his recollection, there was a misunderstanding between them as to whether a certain important provision (the existence of which was the whole basis of the action) formed part of it, the trial Judge declared himself unable to ascertain the truth, and, applying the principle laid down in Falck v. Williams, [1900] A.C. 176, that it is for the plaintiff in an action for breach of contract to show that his construction is the right one—dismissed the action.

Coit v. Dowling, 4 Terr. L.R. 464.

—Mortgage by directors—Ratification by shareholders.]—A mortgage made by the directors of a company prior to the consent of its shareholders, without which consent there was no power to borrow (B.C. Companies Act, 1890), may be ratified by the shareholders.

Adams & Burns v. Bank of Montreal, 8 B.C.R. 314.

—Lease — Forfeiture — Lessor also shareholder of tenant company.]—

See BANKRUPTCY.

Soper v. Littlejohn, 31 Can. S.C.R. 572.

—Telephone Company—Dominion and Provincial Acts.]—

See CONSTITUTIONAL LAW.

—Trustees and shareholders—Right to exercise corporate acts and make by-laws—In whom vested—Companies Act, 1890.]—The shareholders in a company incorporated under the Companies Act, 1890, have no power to interfere in the ordinary management of the company by the trustees who have the exclusive right of exercising its corporate powers and of making by-laws.

Dunsmuir v. Colonist Printing and Publishing Co., 9 B.C.R. 290 (Drake, J.).

—Sale of gas works to municipality—Arbitration as to price—Franchise—Ten per cent. addition.]—By 54 Viet. c. 107 (O), the company was protected against compulsory parting with its works and property to the city until May, 1911; but by an agreement made in 1896 it was provided that, upon the city giving one year's notice, it should have the option of purchasing and acquiring all the works, plants, appliances, and property of the company, used for light, heat and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business. The city having exercised its option:—Held, affirming the decision of Lount, J., 3 O.L.R. 637, that, in ascertaining the price to be paid by the city, the arbitrators were right in allowing nothing for the value of the earning power or franchise of the company, and in refusing to add ten per cent. to the price as upon an expropriation under R. S. O. 1887, c. 164, s. 99.

Re City of Kingston and Kingston Light, Heat and Power Co., 5 O.L.R. 348 (C.A.).

—Appointment of manager—Provisional directors—Absence of by-law and seal—Payment for service rendered.]—Plaintiff was appointed by the board of provisional directors of a company incorporated under the Ontario Joint Stock Companies Act to be a director and was at the same time appointed manager at a salary. In an action for the salary or compensation in which it appeared that the services rendered had not resulted in any benefit to the company which had never gone into operation:—Held, that as plaintiff had not been appointed manager or his payment provided for by by-law approved of by the shareholders, and as there was no contract under the corporate seal he could not recover. In re The Ontario Express and Transportation Co. (1894), 25 O.R. 587, commented on. Judgment of Lount, J., reversed.

Birney v. The Toronto Milk Co., Ltd., 5 O.L.R. 1, 1 C.L.R. 452 (D.C.).

—Power of president.]—The president of an incorporated company may institute and prosecute suits for the corporation, and appoint attorneys ad litem therefor, without express delegation of power or a resolution of the board of directors, and a power of attorney signed by the president of a foreign company, under its seal, is sufficient in law.

Standard Trust Co. v. South Shore Ry. Co., 5 Que. P.R. 257 (Davidson, J.).

—Directors' remuneration—Payment out of capital.]—The remuneration of directors for their trouble as such, even when authorized by the shareholders, can only be made out of assets properly divisible among the shareholders themselves, and not out of capital.

Re Publishers' Syndicate; Paton's Case, 5 O.L.R. 392, 2 C.L.R. 133 (C.A.).

—Mortgage by directors—Ratification by shareholders.]—A mortgage made by the directors of a company prior to the consent of its shareholders, without which consent there was no power to borrow (B.C. Companies Act, 1890), may be ratified by the shareholders.

Adams & Burns v. Bank of Montreal, 32 Can. S.C.R. 719, affirming 8 B.C.R. 314.

—Crown Franchises Regulation Act (B.C.) —Dominion company.]—

See RAILWAY.

Attorney-General v. Vancouver V. and E. Ry., 9 B.C.R. 338.

—Managing director—Powers—Breach of trust.]—The defendant promoted the formation of the plaintiff company for the manufacture of pulp, upon the understanding that slab wood from his saw mill should be used as fuel and pulp wood by the company. P., residing in England, contributed two-thirds of the capital under an agreement that he was to control the building of the mill, supply the machinery and have the selection of the manager. He was elected president and the defendant was elected managing-director of the company. The mill was erected under P.'s

plans, near the defendant's mill, and was fitted with machinery for the use of mill-wood both as pulp and fuel. A by-law provided that the managing-director should have general charge of the property and business of the company, and he was given by the directors a free hand in the management. The defendant without orders, but with the knowledge of all the directors, except P., erected at a cost of about $17,000 to the company, a fuel house and conveyors thereto from his saw mill for the conveyance of mill-wood. The expenditure was necessary if the company was to use mill-wood. The defendant supplied the company with mill-wood under an agreement that it should be paid for on the basis of its relative value to round wood for pulp and coal for fuel. The wood was invoiced by the defendant at $2.00 per thousand of mill cut, on account of which he had paid himself $52,391.30, leaving a balance due of $10,589.57. The wood was of a poor quality. No practical test was made of its relative value to round wood and coal. In the absence of any other than an approximate estimate, the Court held that it should be charged at $1.90 per cord for pulp wood and .90 per cord for fuel wood, on which basis the defendant had overpaid himself $2,432.92. The defendant resigned his position as managing-director at the end of ten months, and the company ceased to use mill-wood. The company sought to charge the defendant with the cost of the fuel house and conveyors, which were no longer of use, as an unauthorized and improper expenditure, and made for the defendant's benefit. The defendant had always been willing to have the price of the mill-wood determined by an actual test. Charges of fraud against the defendant were preferred in a number of sections of the bill, which were unsupported at the hearing:—Held, that the defendant should not be charged with the cost of the fuel house and conveyors, that the decree in plaintiffs' favor for the balance due by the defendant on overpayment should be without costs, and that the defendant should have the costs of the sections of the bill alleging fraud.

Cushing Sulphite Fibre Company, Ltd., v. Cushing (No. 5), 2 N.B. Eq. 539.

—Judgment entered against company by collusion of directors representing majority of shareholders—Remedy of minority.] —At a meeting of directors of the defendant company a resolution was passed that an action brought by plaintiff, who was president of the company and held a majority of stock, against the company, should not be defended, that plaintiff should be allowed to take judgment for the amount of his claim with interest, and that an account rendered to plaintiff by the secretary of the company should be withdrawn and treated as rendered without authority. There was ground for inferring collusion, and a question as to whether plaintiff was entitled to recover anything in his action against the company:—Held, affirming the judgment of the Chambers Judge, that the judgment entered against the company was properly set aside, and that the applicant G., the secretary of the company, was properly permitted to defend and plead a counterclaim on behalf of the company. Northwest Transportation Co. v. Beatty, 12 App. Cas. 596, distinguished. Held, also, as to the remedy in equity, that if plaintiff's claim was not properly due, and the directors, representing a majority of the shareholders, were acting collusively in allowing judgment to go by default, the applicant G., could, on behalf of himself and the others in the minority, maintain an action against plaintiff and the directors to restrain proceedings in the judgmen action. Held, also, that, by virtue of the Judicature Act, R.S. c. 135, s. 18, sub-s. 5, the applicant G., could have the remedy in the action itself.

Dimock v. Central Rawdon Mining Co., 36 N.S.R. 337.

—Sale of bonds—Notice—Purchaser for value.]—

See RAILWAY.

—Debentures—Security—Hypothec to trust company—Holder of coupons—Exclusive right of action in trustee.]—The holder of coupons is bound by conditions in the debentures to which they had been attached both as to payment and the mode of recovering the same; he is, therefore, in the same position as the owner of the debenture before the coupons were detached and, in the present case, is, like said owner, subject to a condition of a deed by which the real estate of the railway company issuing the debentures were hypothecated as security for their payment, namely, that such trustee should have the exclusive right of enforcing payment both of capital and interest, and, the Legislature having passed an Act to ratify the contract between the company and the trustee, an action taken in the name of the holder of coupons, even when the same were payable to bearer, was not well founded and was dismissed.

Levis County Railway Co. v. Fontaine, Q.R. 13 K.B. 523.

—Mining company—Subscription for stock—Renewal of note given therefor—Total failure of consideration.]—On the strength of an agreement for the formation of a mining company, setting out its objects and purposes, including the proposed transfer to it by the plaintiff of two mining locations, the defendant subscribed for 60,000 shares of stock in the plaintiff company at 10c. per share, giving two

promissory notes therefor of $3,000 each to the plaintiff company, one of which he duly paid, and the other, after being renewed, remained unpaid. The objects and purposes of the company, through no fault of the defendant, were never carried out, and became utterly impracticable; no transfer of the mining locations was ever made, and all expectations of ever successfully carrying out the agreement were abandoned:—Held, that there was a total failure of consideration, and not only was the defendant not liable on the unpaid note—the fact of its renewal in no way affecting his position—but that he was entitled to recover back the amount he had paid on the other note.

Bullion Mining Co. v. Cartwright, 10 O.L.R. 438 (D.C.).

—Purchase of land—Authority to contract—Quorum of directors—Ratification.]—The Montreal & St. Lawrence Light & Power Co., formerly called "The Chambly Mfg. Co.," had obtained from the Legislature a charter (61 Viet. c. 65 (Que.) consolidating the Acts which governed it and enlarging its powers. It had at the time an establishment and used a water power on the Richelieu near Chambly. In the summer of 1901, having in view a contract for lighting the city of Montreal, it opened negotiations with R., owner of land on the Cascades Rapids in the St. Lawrence in Beauharnois County which it wished to secure in case it obtained the lighting contract. On July 17th a resolution was passed by the directors (two only being present at the meeting) authorizing the president and secretary of the company to effect a purchase in the shape of an option, the company paying down $15,000 the balance of the price being $260,000, with the right, if it did not wish to make further payments, to abandon the purchase and forfeit the $15,000 paid. On July 18th a deed of sale pure and simple of the property was executed between R. and the company and by a deed of defeasance (contre lettre) it was provided that the latter should be entitled to abandon the sale before the 30th of November following forfeiting the $15,000 and re-conveying the property to R. At a subsequent meeting of the directors the minutes (procès verbal) of the meeting of 17th July were confirmed, and at another meeting on December 4th a resolution was passed authorizing the president and secretary to re-convey to R. the said property purchased on July 18th and on the same day a protest was served on R. tendering the deed of re-conveyance:—Held, that the company, under the above mentioned charter had power to acquire the property in question. That the company could not set up against R. the want of a quorum at the meeting of July 17th which it had represented to be a regular meeting of its directors. That the resolution of July 17th sufficiently authorized the purchase of said property with a right to re-convey it before 30th Nov. That the resolution and protest of Dec. 4th constituted a sufficient ratification of the purchase on July 18th, assuming that the same was not authorized by the resolution on July 17th, and such ratification was not subject to the conditions of Art. 1214 C.C.

Montreal & St. Lawrence Light & Power Co. v. Robert, Q.R. 25 S.C. 473 (Ct. Rev.), affirmed by King's Bench 19 Jan., 1905, and leave to appeal to Privy Council granted.

—Transfer—Signification—Commercial firm becoming an incorporated company.]—Held (affirming the judgment of the Superior Court, Langelier, J.):—Where goods are sold by an incorporated commercial firm, representing the succession of a trader deceased, and this firm, before delivery of the goods, becomes an incorporated company which carries out the contract of sale making delivery of the goods, signification of the transfer from the firm to the company is not necessary to entitle the company to bring suit against the purchaser for the amount of the debt.

Cowan v. Vezina, 26 Que. S.C. 7 (C.R.).

— Company contracts — "Diamond leases"—Prohibition of.]—On an appeal from a conviction by a police magistrate for an offence under R.S.O. 1897, c. 205, s. 117, as amended by 63 Viet. c. 27, s. 12 (O.), and 4 Edw. VII. c. 17, s. 4:—Held, that the contract referred to in clause (b) of 4 Edw. VII. c. 17, s. 4 is not restricted to such contracts as are mentioned in sub-s. 5 of s. 2 of R.S.O. 1897, c. 205, and held, also, that as the effect of clause (b) is to prohibit the making of such contracts as are dealt with by that clause under the penalty therein mentioned, the enactment is intra vires the Provincial Legislature.

Rex v. Pierce, 9 O.L.R. 374 (D.C.).

—Creditor—Validity of claim—Right to rank on assets.]—W. was president of the A. Loan Company, and also a member of a firm of stock brokers interested in a block of the common stock of a coal company, which it was desired to place in the hands of permanent investors. Another loan company, the E. company, had a large savings bank account with the A. Company, and, as the E. Company contended, to enable the former company, which was empowered to invest in stocks, which the E. Company was not, to purchase a number of these shares, it was arranged, through W., that the E. Company should lend the A. Company $55,000, the amount required for such purchase, on the security of a debenture for the amount to be issued by the A. Company; the E. Company also to hold

the stock purchased as collateral security, and to be paid five per cent. interest, or, at their option, to have the dividends on the stock, and to receive one-half of any profit that might be realized on the stock when sold:—Held, on the evidence fully set out in the case, that the transaction was a bona fide one, and not merely a device to enable the E. Company to invest in the stock, and that the E. Company was therefore entitled, in winding up proceedings against the A. Company, to rank as creditors on the assets of that company.

Re Atlas Loan Co.; Elgin Loan Co.'s Claim, 9 O.L.R. 250.

—Officer of company acting fraudulently in execution of powers—Fraudulent warehouse receipt—Shareholder.]—By by-law of a cold storage company, the president, vice-president and secretary-treasurer had power to sign all negotiable instruments. One of the officers of the company thus expressly authorized, signed and issued fraudulently a number of warehouse receipts previously signed by the other officer of the company who had to be a party to them. There were no goods in storage to represent these receipts:—Held, 1. That a shareholder of a company, from the day on which it is put in liquidation, must be considered a creditor, on a contestation of a claim made against the company, and he is entitled to demand, by direct action, what he might have demanded on a contestation of a claim against the company. 2. Litis pendence cannot be pleaded, to such direct action, on the ground that a contestation of the claim had been filed in the hands of the liquidator, where the contestation was filed subsequent to the institution of the direct action. 3. Whenever the very act of the agent is authorized by the terms of the power, that is to say, whenever, by comparing the act done by the agent with the terms of the power entrusted to him, the act is in itself warranted by the terms used, such act is binding on the principal as to all persons dealing in good faith with the agent. The apparent authority is the real one. Consequently, warehouse receipts of a cold storage company, signed fraudulently by one and negligently by another of the company's officers expressly authorized to sign such receipts, are valid as between the company and third persons acting in good faith. 4. The liability of the company being that resulting from an offence, the fact that other persons may be responsible does not diminish the liability of the company, which is jointly and severally liable with the others responsible for such offence.

Ward v. The Montreal Cold Storage and Freezing Co., 26 Que. S.C. 310 (C.R.).

—Syndicate for promotion of company—Trust agreement.]—

See PARTNERSHIP.

—Debenture mortgage.]—

See MORTGAGE.

—Powers of company—Purchase—Effect of resolution by an insufficient quorum.]—Held, that under Quebec Act, 1 Edw. VII. c. 67, the appellant company was empowered to acquire and hold for the purpose of its business real or immovable estate not exceeding a specified sum in yearly value in any part of the Province except the judicial district of Quebec; and that, acting bona fide, it was the sole judge of what was required for that purpose. Where a purchase intra vires of the above Act had been effected by the company under a resolution of the directors at a meeting on July 17, 1901, which authorized the completion thereof, subject to an option of re-conveying within a specified time:—Held, that after the lapse of the specified time the purchase was absolute and that the company which had furnished the vendor with a copy of the said resolution as one which had been duly and regularly passed, could not avoid it by showing that it had been passed by an insufficient quorum.

Montreal and St. Lawrence Light and Power Company v. Robert, [1906] A.C. 196.

—Loan company—Sale of assets to another company—Ratification by shareholders—Rights of holder of terminating shares—Substitution of permanent shares.]—The E. Loan Company, incorporated under the Loan Corporation Act, R.S.O. 1897, c. 205, were by s. 10 thereof empowered to raise a fund or stock by means of "terminating shares." A number of such shares were in 1901 and 1902 issued by the company to the plaintiff or had been assigned to him, called "prepaid terminating shares," on each of which he paid $50, and on which he was to receive a semi-annual dividend not exceeding six per cent. out of the profits available therefor, and the balance of the profits after payment of expenses was to be applied on the stock until the maturity value thereof was reached as stated in the report, the owners of such stock having the right of withdrawal after three years by giving thirty days' notice in writing to the company on the conditions mentioned in the report. The plaintiff was also the holder of dividend-bearing terminating stock certificates fully paid, issued under the by-laws of the E. Company, which were by the certificates repayable at a date subsequent to the date of the agreement of the sale of the assets of the E. Company. In 1903, the E. Company entered into an agreement with an-

other company, the S. Company, incorporated under the same Act, for the sale to the latter company of all its assets, subject to ratification by the shareholders of the respective companies, which was subsequently procured, the agreement, as required by the Act, being filed with the corporation's registrar, and assented to by the Lieutenant-Governor-in-Council, and the certificate of the Attorney-General issued certifying the same, but no schedule of the names of the shareholders of the E. Company was attached to the agreement as required by the statute. Permanent stock was then issued by the S. Company in lieu of the stock held by the shareholders of the E. Company. The plaintiff, on being notified of the meeting of the shareholders of the E. Company, wrote protesting against the sale, stating that he would withdraw his money from the company before the merging took place, and consequently he again wrote that he positively refused to allow his certificates to be delivered up in exchange for the substituted stock. Two dividend cheques on the new stock were sent and received by the plaintiff, one of which he cashed. The plaintiff claimed that the transaction between him and the E. Company was, in fact, a loan; and he brought an action to have it declared that he was a creditor of the E. Company and entitled to be repaid the amount so paid by him; and before commencing the action, he tendered back to the company the amount of the cashed dividend cheque, together with the unused one:—Held, that under the circumstances, the sale was valid and binding, and was not affected by the fact that the schedule was not attached to the agreement, and that the plaintiff was a shareholder in the E. Company and not a creditor in respect of either class of shares, and was bound by the terms of the agreement of sale.

Lennon v. Empire Loan and Savings Company, 12 O.L.R. 560 (C.A.).

—Mortgage to secure bonds—Liberty to carry on business—Pledge of material and debts to secure advances—Approval of shareholders.]—Plaintiffs, being trustees for the bondholders of the defendant company under a mortgage of all its estate and assets, containing a trust in the words "upon trust that the trustee shall permit the company to continue and carry on the undertaking and business of the company . . . as the directors may deem expedient (and the company may pledge or mortgage the stock-in-trade, finished or unfinished, and the raw material therefor, but may not pledge the real property, fixtures, machinery or plant, or any part thereof)," brought action to recover certain material manufactured and unmanufactured, pledged, and certain debts due the company, transferred, to a bank for advances made:—Held, in the circumstances of this case, that the directors of the company, notwithstanding the mortgage, had the right to pledge the material to the bank, and that without a two-thirds vote of the shareholders of the company, required by the Ontario Joint Stock Companies Act, s. 49, and that the transfer of the debts to the bank was a necessary power in the directors in order to carry on the business under s. 46, and that both securities were valid in the hands of the bank. The Merchants Bank of Canada v. Hancock (1883), 6 O.R. 285; Macdougall v. Gardiner (1875), 1 Ch. D. 13, and Burland v. Earle (1901), 18 Times L.R. 41, followed.

Trusts and Guarantee Company v. Abbott Mitchell Iron and Steel Company, 11 O.L.R. 403 (Street, J.).

—Special powers—Objects of incorporation—Minutes of resolution—Authority to purchase land—Conditions.]—The minutes of a meeting of the directors of an industrial company, as follows: "The president stated that negotiations had been entered into with the view of acquiring a property at the Cascades Rapids, with the object of developing a water power. The purchase was to be in the shape of an option up to the 30th November, 1901, for the sum of $275,000, of which $15,000 is to be paid in cash, on the passing of the deed to the company; an agreement to be signed that, should this company be unwilling to make further payments, they could relinquish the property on the forfeiture of the said $15,000. It was resolved that the president and secretary be authorized to complete the transaction and sign the necessary documents," is authority to the president and secretary to sign, for the company, a deed of sale in its favour of the immovable property in question, and a deed declaring the price and conditions of sale. (2) A company incorporated under a statute permitting it to establish an industry "along the rapids of the Richelieu River, at Chambly," and giving it, moreover, the power to acquire lands and construct works for the utilization of water powers on all rivers within a defined area, has a lawful right to acquire real estate, in that area, upon the River St. Lawrence, even when it cannot be or become of utility or accessory to the establishment on the Richelieu River, at Chambly.

The Montreal and St. Lawrence Light and Power Company v. Robert, Q.R. 14 K.B. 108.

—Sale of mining area—Promotion of company—Failure to deliver securities.]—The plaintiffs transferred certain mining areas to the defendant in order that they might be sold together with other areas to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendants agreeing to give

them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some of the areas it became necessary to borrow money and the lender exacted a bonus in stock and bonds which the defendant gave him out of those he received for conveyance of the properties to the company. After deducting a ratable contribution towards this bonus, the defendant delivered to the plaintiffs the remainder of their proportion of stock and bonds, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of the shares and bonds until some time afterwards when they brought the action to recover the securities or their value:—Held, affirming the judgment appealed from, that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to indemnify himself for expenses necessarily incurred in the preservation of the properties, and that, under the circumstances, their failure to demand delivery of the remainder of the securities before action did not deprive the plaintiffs of their right to recover. If the defendant is to be considered a trustee wrongfully withholding securities which he was bound to deliver, he is liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he is to be regarded as a contractor who has failed to deliver the securities according to the terms of his agreement, he is liable for damages based on the selling price of the securities at the time when his obligation to deliver them arose.

McNeil v. Fultz, 38 Can. S.C.R. 198.

—Sale of assets—Dissenting shareholder.] —The holders of the majority of the shares in the capital stock of a company authorized the selling of its property in order to pay its debts:—Held, that the sale should not be enjoined at the instance of a dissentient shareholder.

Patrick v. Empire Coal and Tramway Company, 3 N.B. Eq. 571.

—Resolution—Promissory notes—Authority of officer.]—The secretary of a joint stock company, having been authorized by resolution to sign promissory notes in settlement of undisputed accounts due, can validly sign a note for a debt in respect of which he has been, by special resolution, directed "to make arrangements" with the creditor, and the company cannot, in an action on the note, deny his authority to do so.

Paquet v. Metabetchouam Pulp Co., Q.R 29 S.C. 535.

—Right to guarantee debt of another company—Ultra vires.]—It is ultra vires of a tug company, incorporated for the purpose of carrying on a general carrying, towing, wrecking, and salvage business in all its branches, to guarantee payment by the owner of a tug employed by the company of a boiler purchased by him to operate the tug.

A. R. Williams Machinery Co. v. Crawford Tug Co., 16 O.L.R. 245.

—Costs of procuring Act of incorporation —Liability.]—(1) A company incorporated by a special Act is not liable for the expenses of procuring its incorporation in the absence of a provision in the Act that it shall be so liable, unless after incorporation it agrees to pay such expenses; and solicitors have no equitable claim against a company for the costs of procuring such an Act on the ground that the company has taken the benefit of their services. In re English and Colonial Produce Co. [1906] 2 Ch. 435, followed. (2) Where, however, the company has made a payment on account to its solicitors, they may be permitted to appropriate such payment to their claim for pre-incorporation costs, as was done in the above cited case. The company, which was in process of winding up, was a mutual hail insurance company and the Act permitted the directors to make assessments annually to cover only losses by hail during the crop season and the expenses for the year, and no assessment could be made to pay any part of the solicitors' bill, part of which was for work done for the company after incorporation. There was, however, a reserve fund accumulated under the Act which might "be applied by the directors to pay off such liabilities of the company as may not be provided for out of the ordinary receipts for the same or any succeeding year":—Held, that those creditors for the payment of whose claims an assessment could be made should be compelled, in the first place, to have recourse to that method of payment so as to leave the reserve fund available as far as possible to pay such portion of the solicitors' bill as the company was liable for, that the assessment already made should stand, the proceeds to be applied first in payment of the claims against the company other than the costs in question, and that any remaining debts, including the amount found due on taxation to the solicitors for services subsequent to the incorporation, should rank pro rata on the reserve fund, after payment of the receiver's costs.

Re Crown Mutual Hail Ins. Co., 18 Man. R. 51.

—Provincial companies' powers—Operations beyond Province.]—Held, per Idington, Maclennan and Duff, JJ., that a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its Province of origin into a valid contract of insurance relating to property also outside of those limits. Per Fitzpatrick, C.J., and Davies, J.:—Sub-s. 11 of s. 92, B.N.A. Act, 1867, empowering a legislature to incorporate "companies for provincial objects," not only creates a limitation as to the objects of a company so incorporated, but confines its operations within the geographical area of the Province creating it. And the possession by the company of a license from the Dominion Government under 51 Vict. c. 28 (R.S. 1906, c. 34, s. 4) authorizing it to do business throughout Canada is of no avail for the purpose. Girouard, J., expressed no opinion on this question. An insurance company incorporated under the laws of Ontario insured a railway company, a part of whose line ran through the State of Maine, "against loss or damage caused by locomotives to property located in the State of Maine not including that of the assured." By a statute in that state the railway company is made liable for injury so caused and is given an insurable interest in property along its line for which it is so responsible:—Held, affirming the judgment of the Court of Appeal, 11 Ont. L.R. 465, which maintained the verdict at the trial, 9 Ont. L.R. 493, that the policy did not cover standing timber along the line of railway which the charter of the insurance company did not permit it to insure. Held, also, Fitzpatrick, C.J., and Davies, J., dissenting, that the policy was not on that account of no effect as there was other property covered by it in which the railway company had an insurable interest; therefore the latter was not entitled to recover back the premiums it had paid.

Canadian Pacific Railway Company v. Ottawa Fire Insurance Company, 39 Can. S.C.R. 405.

—What is an agreement under the seal of the company—Informal sealing.]—It is not necessary to the validity of a contract by an incorporated company that it should be under seal when the contract is for goods of a character likely to be required in the business the company is authorized to carry on. In the absence of evidence that a company has adopted a special seal, if seals are placed after the signatures of the president and secretary, accompanied by a testimonium clause indicating that the parties have set their hands and seals to the document, the agreement is to be deemed as being under the company's seal. An incorporated company, against whom judgment has been entered in an action founded upon an agreement for the sale of goods is estopped by the judgment from setting up the alleged invalidity of the contract, and such estoppel will also extend to the liquidators of the company in case of winding-up proceedings. A chattel sold under the condition that the title shall remain in the seller until payment of the price, does not lose its character as a chattel by being annexed to the soil as otherwise to be a fixture, except as against a bona fide purchaser for value without notice. It is not essential to the validity of a conditional sale as between the parties that it should be registered. The recovery of judgment in an action by the seller against the buyer does not extinguish the condition that the title shall remain in the buyer:—Semble, that a company, having accepted goods purporting to be sold by an agreement made in the name of the company prior to its incorporation, and having paid promissory notes for a portion of the price, is estopped as against the seller of the goods from denying that the agreement is as valid and binding on the company as if formally executed under the seal of the company subsequent to incorporation.

Re Red Deer Milling and Elevator Co., 1 Alta. R. 237.

—Power to issue bonds—Purposes for which bonds may be issued—Guarantee or suretyship of bonds of one company by another.]—(1) A company whose charter provides that it "may acquire, own, lease and sell real estate," and "build, sell, lease and otherwise deal with elevators, etc.," and further "may issue bonds bearing interest to an amount not exceeding the cost of any elevator built by it," has the power to issue such bonds for the price of an elevator bought by it. (2) A guarantee of bonds issued by an elevator company for the price of an elevator, given by a railway company to which the elevator is leased and amounting in effect to an undertaking to pay the rent to a trustee for the bondholders, is valid and binding and may be enforced against such railway company.

Royal Trust Company v. Great Northern Elevator Company, 30 Que. S.C. 499.

—Conditional bonus from municipalities—Power to give hypothec as security, for fulfilment of conditions.]—(1) The directors of a joint stock company incorporated under c. 119 R.S.C. (1st ed.), have the power under the "general powers" clause (s. 35) of the Act, without referring the matter to the shareholders and obtaining their approval, to accept a conditional bonus granted the company in a municipal by-law, and to consent a hypothec on the immovable property of the company, in favour of the municipality, for a specified

sum, as security of the fulfilment of the conditions. Even if the authorization of the shareholders were required, failure to get it would not defeat the right of the municipality to the security, on the ground of the nullity of the hypothec, but would make it the duty of the company to cure the irregularity by giving a valid hypothec instead. (2) The reservation by the assignee, in a deed of assignment of the hypothecated property, of his right to contest the validity of the hypothec, or his repudiation of the claim of the municipality, can in no wise affect the legality of either the claim or the hypothec.

Commercial Rubber Co. v. St. Jerome (1908), 17 Que. K.B. 274 (P.C.).

— **Extra remuneration—Ultra vires act of directors — Ratification — Recovery of moneys illegally paid—Mistake of law.**]—By a resolution of the directors, the secretary of the company had been authorized to sell the company's bonds, for which he was to be paid a commission at the rate of 5 per cent. on the amounts received. Subsequently, at a time when they had no authority to do so, the directors converted the preferred stock held by certain shareholders into bonds, and paid the secretary for his services in making the conversion at the rate of 5 per cent. on the amount of bonds thus disposed of. In an action to recover back from the secretary the moneys so received by him as commission:—Held, that, although the secretary had received the commissions under mistake of law, yet, as he must be assumed to have had knowledge of the illegality of the transaction, the moneys could be recovered back by the company. Subsequently the scheme of conversion was approved of by a resolution of the shareholders, but it did not appear that they had been fully informed as to the arrangement for the payment of a commission to the secretary in that respect, in addition his regular salary. Held, that the resolution of the shareholders had not the effect of ratifying the payment of the commissions.

Rountree v. Sydney Land and Loan Co., 39 Can. S.C.R. 614.

—**Company—Receiver—Leave to bring action—Bondholders — Priorities.**] — Leave given to bring an action against receivers of a company incorporated under the Ontario Companies' Act, to restrain them from carrying out a certain scheme for a fresh bond issue, notwithstanding that the legality of the scheme had been upheld on motion before a Judge of the High Court of Justice in England.

Diehl v. Carrett, 15 O.L.R. 202 (Riddell, J.).

—**Promoters — Contract — Ratification.**]—A contract projected between a private person and a company to be formed is of no effect, as respects the latter, after its constitution by the issue of letters patent. Having had no legal existence it cannot be ratified. To make it effective it is necessary for the company after incorporation, through its board of directors to subscribe to it or become formally bound in the manner provided by law. Therefore, when the promoters of the company draw up in writing a project for launching it, in which it is declared that a certain person will be managing-director with a specific salary and other perquisites, when the shareholders on signing their applications are made aware of this document, and when, after the issue of letters patent and the adoption of by-laws by the provisional directors, a resolution is passed at a general meeting of the shareholders declaring the scheme for constitution definitive and ordering it to be transcribed in the company's books and the original deposited with a notary, these proceedings do not establish a contract between the individual designated and the company so as to give the former a right of action against the company for arrears of salary.

Duquenne v. La Compagnie Générale des Boissons Canadiennes, Q.R. 31 S.C. 409 (Ct. Rev.).

—**Debentures—Receivers and managers under order of Court—Proceeding against, without leave of Court.**]—A paper manufacturing company having become financially embarrassed, J.C. and G.E. were appointed by the Court joint receivers and managers to carry on the business of the company on behalf of debenture holders to whom its property and assets had been mortgaged. Previously to this appointment the company had entered into contracts with the defendants to supply them with paper at certain prices for certain periods of time, and after their appointment it was alleged that J.C. and G.E. had continued to deal with the defendants under these contracts, and other contracts into which J.C. had entered at a time when he was acting as sole receiver and manager. J.C. and G.E. at various times assigned the indebtedness of the defendants under these contracts to the plaintiffs, who brought this action to enforce payment. The defendants thereupon set up a counterclaim, adding J.C. and G.E. as defendants thereto, and alleging that J.C. and G.E. had wrongfully terminated these contracts at a time when they were in full force, on which account the original defendants were obliged to enter into contracts with other manufacturers of paper at a greatly increased price, whereby they suffered and would suffer damages, greatly in excess of the amount claimed by the plaintiffs, which damages they claimed to set off against the claim of the plaintiffs to the extent of that

claim, and they counterclaimed for the balance of their damages against J.C. and G.E.:—Held, that the counterclaim should be struck out as against J.C. and G.E., but that the original defendants should be at liberty to amend their pleadings so as to make the counterclaim a defence to the action. Semble, that an appeal did not lie to the Court of Appeal against the order of the Divisional Court, the matter being one of procedure only, not affecting the ultimate rights of the parties.

Sovereign Bank of Canada v. Parsons, 18 O.L.R. 665 (C.A.).

—Redemption of bonds—Mortgage trust deed.]—

See TRUSTS.

—Action by shareholder to prevent illegal business by company—Bookmaking at races.]—The plaintiff, a director and shareholder in defendant company, brought an action for an injunction restraining the defendants from carrying out an arrangement entered into with a bookmaker named Jackson. The material points of the arrangement were that Jackson should be allowed to carry on his business as a bookmaker at a race meeting to be held on the defendants' race-track at Victoria, provided that he carried on his betting operations at no fixed spot on the race-track, but kept moving about. He was, however, to be allowed to pay off his bets at a booth on the track:—Held, following Rex v. Moylett (1907), 15 O.L.R. 348, that the proposed method of betting was legal, and an injunction was refused.

Fraser v. Victoria Country Club, 14 B. C. R. 365.

—Sale of railway — Vendor's lien—Waiver.]—The acceptance by the vendor of a railway of the bonds of the company purchasing the road is a waiver by implication of his lien, if any, for a balance of the price remaining unpaid:—Semble, that a vendor's lien for unpaid purchase money does not obtain in the case of the sale of a railway under the operation of the Railway Act, R.S. 1906, c. 37. The rights of the vendor in such a case are limited to the remedies prescribed by the statute.

Minister of Railways and Canals v. Quebec Southern Railway Company; Bank Claim, 12 Can. Exch. R. 61.

—Bonds held as security by creditor—Transfer—Purchase of railway by trustee—Breach of trust—Judgment by original bondholder against railway.]—H. had a claim guaranteed by bonds against a railway. It was agreed between H., together with certain other creditors, and D., that the latter would purchase the railway at sheriff's sale in trust for such creditors, and that after the purchase D. would execute a mortgage in favour of these creditors, H. to benefit by such mortgage to the amount of his claim guaranteed by the bonds. To facilitate such arrangement H. transferred the bonds to D. The railway was purchased by D. but thereafter he refused to execute the mortgage as agreed. H., on the 4th July, 1901, obtained a judgment against the railway directing D. to execute in his favour a valid hypothec upon the railway, and in default thereof that the judgment should stand in lieu of such hypothec. D. not complying with the direction, H. registered this judgment. D. having allowed a bank, for whom he professed to act in purchasing the railway, to assume the right to dispose of the same, the bank sold the road to a company incorporated for the purpose of acquiring it, and D. conveyed the road to the company on the 7th August, 1900:—Held, that although H., upon the facts, was not entitled to assert his claim as a hypothec against the railway in the hands of the company, inasmuch as the bank had guaranteed the purchaser a clear title the claim was allowed to be collocated upon the moneys coming to the bank from such sale.

Minister of Railways and Canals v. Quebec Southern Railway Company; Hanson's Claim, 12 Can. Exch. 93.

—Sale of railway—Organization of company to operate road—Enhanced price paid by purchasers—Right to profit on transaction.]—Where purchasers of a railway, having acquired the same on their own behalf and with their own money, organize a company to operate it, in compliance with the requirements of the Railway Act (now found in s. 299, R.S. 1906, c. 37), and turn over the railway to such company at an enhanced price, they are entitled in law to their profit on the transaction.

Minister of Railways and Canals v. Quebec Southern Railway Company; Standard Trust Company Claim, 12 Can. Exch. R. 123.

—Railway—Bonds—Irregularity in issue—Trustee — Transfer of bonds — Bona fide holders.]—A railway company issued bonds under the usual deed of trust. The N.T.C., a body incorporate, was the original trustee, but after having executed the deed, resigned. Another trustee was appointed who signed and issued a number of the bonds a few days before the company passed into hands of receiver. The bonds on their face recited that they should not be "obligatory until certified by the N.T.C., trustee." D., the new trustee, signed the bonds in the name of the original trustee, adding thereto "succeeded by D." The bonds were also signed by the president and secretary of the company:—Held, that the apparent irregularity in the signature of the bonds by the trustee was not sufficient to put a bona fide purchaser for value

upon enquiry, and that the bonds were valid in his hands. (2) A certain number of the bonds were handed to H., the president of the company, by the trustee D., after he had signed them. H. borrowed money for his own use from R., and gave some of the bonds as collateral security, also depositing sixteen of them with R. for safe keeping. R. used all the bonds as collateral for a loan subsequently obtained by him for his own use. The holders of these bonds for value and without notice made claim, and they were allowed to recover against the company on the ground that the company had by their negligence in allowing H. to have the bonds under his control made it possible for the bonds to find their way into the hands of bona fide purchasers.

Minister of Railways and Canals v. Quebec Southern Railway Company; Pilling's Claim, 12 Can. Exch. R. 152.

—Debentures—Validity—Powers of provisional directors—By-law—Ratification by shareholders—Preferential lien on personalty.]—At a meeting of the provisional directors of a joint stock company incorporated under the Ontario Companies Act, a by-law was passed, under the power conferred by s. 49 of the Act., authorizing the directors from time to time to borrow money upon the credit of the company, to issue bonds or debentures of the company for the amounts borrowed, and to pledge the real or personal property, rights and powers, of the company, to secure such bonds or debentures. On the same day a meeting of the shareholders of the company was held, at which all the shareholders were present, when this by-law was confirmed, and all the provisional directors duly elected the directors of the company. This by-law purported to be enacted by the directors (not the provisional directors), and had the seal of the company affixed to it:—Held, that, whether or not the provisional directors had power to pass the by-law (as to which there was a difference of opinion in the Court), it was a valid by-law and sufficient authority for the subsequent issue of debentures by the directors. Held, also, Garrow, J.A., dissenting, that the debentures issued, though purporting to create a lien or change upon the property of the company, were not mortgages or conveyances intended to operate as mortgages of goods and chattels of an incorporated company, within the meaning of the Bills of Sale and Chattel Mortgage Act, and were not, therefore, void as against the defendant, the assignee of the company for the benefit of creditors, because not registered under the provisions of that Act.

Johnston v. Wade, 17 O.L.R. 372.

— Corporation sole — Appointment of bishops.]—Where, in an action by a corporation, the defendant denies that the plaintiff has a corporate existence the latter must prove status, but this rule does not apply when the action is brought to enforce a contract between the parties in which such status is expressly admitted. The rule applies to Roman Catholic bishops created corporations sole by special Acts inasmuch as they cannot claim the status of public functionaries. The existence of such corporation does not depend on these acts as they provide that on the death of the incumbent the corporation continues in the person of the administrators of the diocese. In the absence of a statutory requirement to that effect, the ratification by the Crown of the nomination of a bishop is not a condition of the existence of the corporation.

Roman Catholic Episcopal Corporation of Ste. Hyacinthe v. Macadam Co. of Ste. Hyacinthe, Q.R. 34 S.C. 362.

— Merger — Conditional Sale — Mortgage bonds and preferred stock as price of sale — Non-fulfilment of condition.] — When a projected company is in course of formation to buy up the stocks and take over the business of several existing companies, a sale to the promoters of shares in the stock of one of them, to be paid for by bonds and preferred stock of the new company, such shares to remain in the hands of a third party in trust, until all the shares of the company shall have been so purchased and its real estate conveyed to the new company, when a mortgage deed shall be executed to secure the bonds thereon, is a conditional sale and, failing the fulfilment of the condition, the seller has the right to demand the rescission of the sale. Difficulties in the acquisition of the whole stock and of the real estate of the old company, and the offer of bonds not secured as mentioned in the sale, afford no grounds of defence to the action.

Dominion Textile Co. v. Angers, 18 Que. K.B. 63, affirming 30 Que. S.C. 56.

Affirmed by S.C. of Canada, 41 Can. S.C.R. 185.

II. SHAREHOLDERS AND DIRECTORS.

—Organization—Conditional subscription to stock—Ratification.]—The project of the establishment of a company for the purpose of carrying on building operations, involved the acquisition of the works of an existing company, and the extension of the business by providing additional capital, buildings and machinery, the holders of stock in the existing company to surrender the same and accept stock in the new concern, the capital stock of which was fixed at $100,000, and the paid up capital at $50,000. A subscription list was opened, and was signed by a number of persons for an amount something less than the paid up

capital. A committee of subscribers to the new stock was appointed to act with the directors of the company with a view to the immediate commencement of operations, and a call of 25 per cent. on the stock was made and was paid by 27 out of 49 subscribers. After certain liabilities had been incurred for machinery, materials, etc., the project was abandoned, and a petition was filed to have the persons who paid the call made upon the stock made contributories in winding-up proceedings:—Held, refusing the application with costs, (1) that the stock subscriptions being conditional upon an arrangement for the union of the two bodies going through as a whole, and the project having fallen through, there was a failure of consideration, and there was nothing to prevent the subscribers who paid the call from recovering back the amounts paid by them. (2) The payment of the call, under the circumstances, did not waive the condition.

In re Victor Wood Works, 43 N.S.R. 368.

—Variance between prospectus and memorandum of association—Subscriber — Estoppel.]—Defendant with others signed a memorandum in writing addressed to the provisional directors of a proposed company requesting the allotment to him of two shares in the company when formed. Attached to the memorandum was a prospectus in which the objects of the company were generally set out. The company was incorporated April, 1907, and defendant's name was entered upon the register as a shareholder, and calls were made from time to time to December, 1907, of which defendant had notice. There was no repudiation of liability on the part of defendant, until after action brought in December, 1909, when the objection was made that the powers taken in the memorandum of association were wider than those set out in the prospectus:—Held, affirming the judgment of the trial Judge, that defendant having failed to raise the objection promptly, could not now be heard on the point.

The Silliker Car Co. v. Donohue, 44 N.S.R. 315.

Dominion Companies' Act — By-law to change number of directors — Formalities —Election of directors under such by-law.]—(1) The formalities prescribed in the Companies' Act, c. 79, R.S.C. 1906, s. 76, for the adoption of a by-law to change the number of directors of a company, must be complied with under pain of nullity. Hence, a by-law to reduce the number from seven to five, passed at a general annual meeting, without special notice and not published in the Canada Gazette, is null and void. (2) An election held under such a pretended by-law is also void and confers no right on those elected to act or hold office as directors. (3) An action in the nature of quo warranto proceedings under Art. 987 et seq. C.P., lies to oust those who assume, under colour of such an election, to act as directors of a private company and may be brought by a shareholder present at the meeting when it took place, and not objecting. No acquiescence can cover the nullity above mentioned.

Sherker v. Rudner, 39 Que. S.C. 44.

— Shareholders — Rectification of register —Fraud—"Sufficient cause."] — By s. 116 of the Ontario Companies Act power is given to the Court to make an order for the rectification of the register of shareholders of a corporation "if the name of any person is without sufficient cause entered in or omitted from" the register. H. applied for an order rectifying the register by removing his name therefrom as the holder of shares, alleging that he had been defrauded by those connected with the organization of the company. Whatever complaint he had was based on what took place before the issue of the charter. By the charter he was declared to be a shareholder:—Held, that that was "sufficient cause" for his name appearing on the register, and it could not be removed on account of antecedent fraud.

Re J. A. French & Co., Limited, 1 O.W.N. 864 (Middleton, J.).

— Services of president — Salary — Sanction of shareholders — General meeting.]—S. 88 of the Ontario Companies Act, 7 Edw. VII. c. 34, should be given a broad and wholesome interpretation, and should be construed as wide enough to prevent a president and board of directors from voting to themselves or any one or more of themselves, any remuneration for any services rendered to the company, without the authority of the general meeting of the shareholders. Birney v. Toronto Milk Co., 5 O. L.R. 1, 6, applied and followed. There must, in the first place, be a directors' by-law, and this must be followed by "confirmation" at a general meeting, which implies some resolution or by-law passed at such meeting. It is not enough to show that every shareholder of the company was at the time content to pay the salary—the statute must be lived up to. Apart from statutory authority, a director cannot receive remuneration for his services out of the shareholders' money except with the sanction of a shareholders' meeting — and therefore remuneration for services rendered based upon a quantum meruit could not be allowed. Mackenzie v. Maple Mountain Mining Co., 20 O.L.R. 615, distinguished. Finding of a referee, upon a reference for the winding-up of a company, that E. had become liable or accountable for money of the company paid to him for salary as president, affirmed.

Re Queen City Plate Glass Co., Eastmure's Case, 1 O.W.N. 863 (Middleton, J.).

— Failure of consideration — Purchase of shares — Absence of allotment — Receipt

of dividends — Estoppel.] — The plaintiffs sued the defendant upon a promissory note, the only consideration for which was an alleged purchase and allotment of shares of the capital stock of the plaintiffs:—Held, upon the evidence, that the defendant had received no shares, and the plaintiffs had not done what was necessary to make him the owner and holder of ten shares for which he had agreed to pay. Although the onus of showing want of consideration was on the defendant, and though he did receive and use certain dividend warrants, the receipt of these did not estop him from showing the true facts. The plaintiffs' position was not altered to their detriment or to a degree that the return of the dividends would not fully restore. The defendant stood in the position of one who never received any consideration for the note sued upon. Order of a Divisional Court, affirming the judgment of Magee, J., reversed.

Sovereign Bank v. McIntyre, 1 O.W.N. 254 (C.A.).

— Sale of bank stock—Allotment to shareholders — Shares refused or relinquished — Sale to public.] — M. was sued by a bank on a promissory note alleged to have been given in payment for a portion of an issue of increased stock. He pleaded want of consideration and non-receipt of the stock. On the trial evidence was given of a resolution by the bank directors authorizing the allotment of the new issue to the then shareholders of whom M. was not one, and counsel for the bank admitted that there as no resolution allotting it to anybody else. A verdict in favour of the bank was set aside by the Court of Appeal:—Held, Idington and Duff, JJ., dissenting, that the onus was on M. to prove that the stock was issued to the public without authority and such onus was not satisfied. Held, per Idington and Duff, JJ., that such onus was originally on M. but the evidence produced, and the said admission of counsel had shifted it to the bank, which did not furnish the requisite proof. Judgment of the Ontario Court of Appeal reversed.

Sovereign Bank v. McIntyre, 44 Can. S.C. R. 157.

— Seizure of shares by sheriff under execution against the company—Payment by shareholder to execution creditor of company.] — Shares in a joint stock company are not "securities for money" that can be seized by the sheriff under execution issued against the company. A shareholder has no right to pay the amount unpaid on his shares to an execution creditor of the company until after the execution has been returned nulla bona. The provisions of the Ordinance for enforcing a judgment against a company must be strictly followed.

Clarke v. Preston, 3 Terr. L.R. 329.

—Moneys paid to executors of deceased president — Secret trust.]—

Jenns v. Oppenheimer, 7 W.L.R. 774 (B. C.).

—Agreement to take shares—Rescission — Misrepresentation—Laches.]—

Gourley v. Chandler, 1 E.L.R. 433 (N.S.).

—Shareholder—Agreement to take shares in exchange for profit on lands acquired by company.]—

Bogle v. Kootenay Valley Co., 5 W.L.R. 139 (Man.).

—Powers of shareholders—Implied renunciation to charter rights—Risk of forfeiture of franchise.]—(1) The rule that in the management of the affairs of a joint-stock company, the will of the majority of the shareholders, legally ascertained and expressed, should prevail, applies only in matters that are within the scope and powers of its incorporation. Acts that are ultra vires adopted by the majority of shareholders, at regularly convened meetings, are null and void and therefore not binding on the minority. (2) An act of a joint-stock company that amounts to an implied renunciation to its charter rights, or involves the risk of forfeiture of its franchise, is ultra vires. Such an act is the demise by a manufacturing company, by a twenty-one years' lease, for a fixed rental, of all its property, "mills, plant and accessories," practically a surrender of its whole business.

Amyot v. Dominion Cotton Mills Co, 38 Que. S.C. 457.

—Agreement by shareholders not to sell shares.]—A joint stock company, defendant in proceedings by mandamus to compel it to register a transfer of shares acquired by the plaintiff represents its shareholders who may, for the purposes of said demand, have an interest distinct from its own. Therefore, a judgment ordering the issue of a peremptory writ of mandamus is chose jugee against them as well as the company itself. An agreement among all the shareholders of a joint stock company only to sell or transfer their shares on certain conditions is not equivalent to a by-law of the company for such purpose and has no effect as against third parties. The pretenom has the status of an agent as to his principal only. As against third parties he is himself the principal in interest and may exercise the remedies arising from contracts made in his name. Barnard v. Duplessis Independent Shoe Machinery Co., Q.R. 31 S.C. 362.

Barnard v. Desautels, Q.R. 19 K.B. 114.

—Resolution—Bonus to directors—Action to annul—Acquiescence.]—A shareholder in a joint stock company cannot maintain proceedings to annul a resolution unanimously adopted at a general meeting of the shareholders (at which he was present and de-

clared, on being asked, that he did not object) providing for a bonus to the directors, on the ground that the charter of the company settled the manner in which the profits were to be used and no provision was made for such gratuities.

Gignac v. Gignac, Q.R. 37 S.C. 174 (Sup. Ct.).

—Transfer of paid-up shares—Refusal of directors to allow.]—A company incorporated under the Dominion Companies Act, R.S.C. 1906, c. 79, purporting to act under the authority of s. 80, passed a by-law providing that shareholders might, with the consent of the board of directors, but not otherwise, transfer their shares, and that no person should be allowed to hold or own stock in the company without the consent of the board, and that all transfers of stock must be approved by the majority of the directors before being entered:—Held, that it was beyond the powers of the company, as defined by the Act, to prohibit the transfer of paid-up shares. Order of Teetzel, J., requiring the company to allow a transfer of paid-up shares to which the directors had refused to consent, affirmed by a Divisional Court. Leave granted to the company to appeal to the Court of Appeal.

Re Good and Jacob Y. Shantz, Son & Co., 21 O.L.R. 153.

—Sale of property to company by director —Agreement with co-directors—Secret profits.]—A trustee cannot make a profit for himself without the full knowledge of all his cestuis que trust, and so the directors of a company when it is intended to sell stock, stand in a fiduciary relation not only to those who are members at the time but to all who may come in afterwards. The five promoters of a company, who were the only shareholders, as shareholders and directors, assented to the purchase of property from one of them for the company for $5,000, and each of the other four received from the vendor a cheque for $1,000, which was applied in payment of the liability of the four to the company for stock subscribed. The exact nature of the agreement did not appear from the evidence, but it was clear that each of the four received $1,000 from the vendor, and that that fact was not disclosed to the shareholders who had been or were thereafter invited to take stock in the company:—Held, in an action against the five original shareholders and the company, brought by two persons who afterwards became shareholders, that the four had received a secret profit for which they must account to the company. As the conduct of the four was fraudulent, a class action was maintainable; and the right to compel the defendants to account for the advantage so received could not be lost by any delay short of the appropriate statutory limitation. Held, also, that the judgment should direct that the money be paid into Court, and that the plaintiffs should have a lien upon it for their costs, as between solicitor and client, properly incurred, on the principal of salvage, in creating the fund for the company.

Bennett v. Havelock Electric Light and Power Co., 21 O.L.R. 120.

—Assignment of amount due by subscriber for shares—Action by assignee.]—The plaintiff, claiming under an assignment from an incorporated company, sued to recover moneys alleged to be due by the defendant in respect of shares of the capital stock of the company, for which the defendant was a subscriber. The assignment was made to the plaintiff as security only for money lent. An order was made, under the Winding-up Act of Canada, for the winding-up of the company, before any steps were taken by the defendant to repudiate the shares, on the ground of misrepresentations alleged to have been made in order to induce him to subscribe for them, or on any other ground:—Held, that, even if the defendant had made out a case which would, before the commencement of the winding-up, have entitled him to rescission, it would have been no answer to an application by the liquidator to place him on the list of contributories; and he was precluded in the same way from setting it up as an answer to the plaintiff's claim. In the winding-up the liquidator sought to have the defendant placed on the list of contributories in respect of the shares in question, and the defendant succeeded in having his name removed from the list, on the ground that the unpaid calls had been assigned to the plaintiff. Held, that the defendant, having escaped from the liability as a contributory by establishing the assignment under which the plaintiff claimed, could not now attack the validity of the assignment, either on the ground of misrepresentations or on the ground that the directors had no authority to borrow; he could not approbate and reprobate.

Stephens v. Riddell, 21 O.L.R. 484.

—Issue of new shares—Purchase of inventions—Transfer of common shares—Bonus to purchasers of preferred shares—Colourable transaction.]—The defendant company was incorporated in 1901, under the Ontario Companies Act, with a capital stock of $700,000. On the 22nd July, 1907, the directors adopted a by-law to increase the stock to $1,500,000, by the issue of 50,000 shares of new common stock of the par value of $10 each, "which may be issued as a bonus, share for share," and by the issue of 30,000 shares of new preferred stock of the par value of $10 each, "which will be sold for cash," and "that the new shares, both common and preferred, be issued and allotted in such manner and proportions as the directors of the com-

pany may deem proper for the benefit of the company." This by-law was approved by the shareholders at a general meeting. Supplementary letters patent were granted authorizing the increase of the stock to $1,500,000 by the issue of $800,000 shares of $10 each, all of common stock. The directors each year appointed an executive committee, as authorized by the by-laws of the company, to do all things that the directors of the company could do, with the limitation that the committee should report to the board of directors. After the increase in the capital stock, the committee on the 18th June, 1908, resolved that 50,000 shares of the common stock be allotted to McB. in accordance with his application of the 16th June, 1908. By an agreement, bearing that date, between McB. and the company, it was recited that McB. was in possession of certain new and valuable discoveries (described), and had agreed to transfer his interest therein to the company, in consideration of the transfer to him of 50,000 shares of common stock, on the terms and conditions set forth, among which were: that he was immediately to apply for 50,000 shares of common stock; he was to be called upon to pay over at once only $10, being the par value of one share; to transfer to the company all his rights for Canada and one-half interest in his rights for other countries; he was to transfer 40,000 shares to a person to be mutually agreed upon between himself and the president of the company, so that the 40,000 shares, or part thereof, in the sole discretion of such person, might be given as a bonus to purchasers of preferred stock, to promote the sale of the remainder of the company's stock; the remaining 10,000 shares to be transferred to the person agreed upon, not to be delivered until a Canadian patent should issue; this person to have the sole right to vote on the stock; and on the fulfilment of the agreement by McB. he to be released from liability on his application for shares:—Held, that it must be taken that the application of McB. for the shares was in pursuance of this agreement, and that McB. was not to pay for the shares in cash or otherwise except as mentioned in the agreement. The executive committee passed a resolution that the company purchase from McB. the patents described in the agreement, on the terms set forth therein, and that the performance on his part thereof be accepted in satisfaction of the balance due for shares allotted to him; and on the 30th June, 1908, he signed a receipt for a certificate for 50,000 shares. This action was bought by certain shareholders of the company, who, by amendment made at the trial, sued on behalf of themselves and all other shareholders, for a declaration that the transfer of the shares to McB. was null and void, and that the shares should be retransferred to the company; a declaration that the issue of the $800,000 additional stock was fraudulent and illegal and for cancellation thereof; and for other relief. The defendants were the company, McB., and C., the managing director and president. The defendants disputed the right of the plaintiffs to maintain the action. Held, that, if the acts complained of were ultra vires the corporation, the action could not succeed; but the agreement provided an indirect method of selling the company's preferred stock with a bonus from the company of common stock; it was a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; and was ultra vires of the company; and therefore the plaintiffs were entitled to maintain the action. The whole contract was not void, however; the real price for the inventions was the block of 10,000 shares of the 50,000, and to that block McB. was entitled; the contract was double, and the two portions were separable; the part relating to the 40,000 shares should be declared void; and the other should stand, there being no evidence of value or other evidence of fraud on which it could be impeached, even if the action were properly constituted. Ooregum Gold Mining Co. v. Roper, [1892], A.C. 125, and Mosely v. Koffyfontein Mines, Limited, [1904], 2 Ch. 108, followed. Re Lake Ontario Navigation Co. (1909), 20 O.L.R. 191, distinguished. Where the effect of a judgment upon the appeal of one defendant is to establish the validity of a transaction between two defendants, the transaction may be declared valid in respect of the other, who has not appealed. Judgment of Clute, J., varied in favour of the defendant B., who did not appeal, as well as of the other defendants.

Lindsay v. Imperial Steel and Wire Co., 21 O.L.R. 375.

—Unsatisfied judgment—Action against shareholder — Unpaid shares — Counterclaim.]—The plaintiff recovered judgment against a company, incorporated under the Ontario Companies Act, for $674.08 damages and $22.54 costs. He at once placed a writ of fi. fa. in the sheriff's hands, and requested a return of nulla bona, as he wished to commence proceedings against the shareholders of the company. Thereupon the sheriff, without inquiry as to available assets, indorsed on the writ a certificate that there were no goods and chattels in his bailiwick upon which he could levy as commanded by the writ. The writ was not returned, but remained in the sheriff's possession. The plaintiff then began this action, to recover from the defendant, as one of the shareholders, the amount of the judgment. The defence was a simple denial. By counterclaim against the company the defendant set up that he sold the company certain property for $2,468, and agreed to accept 2,468 shares of paid-up

stock therefor; that he subscribed for 500 shares as part of the 2,468; that the company did not deliver the shares; that the shares had no market value; that, therefore, the company owed him $2,468 as the purchase price of the property; that the plaintiff and his father had not paid for their shares; that the plaintiff and the company were acting in collusion in the matter of the fi. fa. and direction to the sheriff; and he claimed from the company (made defendants by counterclaim) the sum of $2,468:—Held, that the claim attempted to be set up in the counterclaim was not "relating to or connected with the original subject of the cause or matter," so as to come within the Ontario Judicature Act, s. 57 (7); it was a claim sounding in damages against the company only; and the counterclaim was struck out. S. 69 of the Ontario Companies Act, 1907, allows a set-off to be pleaded, but against the claim made in the action only, and not against any one other than the plaintiff. Held, as to the plaintiff's claim in the action, that he had not proved himself within s. 68 of the Companies Act, which provides that a shareholder shall not be liable to such an action "before an execution against the company has been returned unsatisfied in whole or in part." Semble, that, if this initial difficulty could have been got over, the plaintiff would have been entitled to recover; for the facts alleged in the counterclaim did not constitute a defence to the action; since the change in the Con. Rules made in 1888, under statutory authority (Con. Rule 373 of 1888, Con. Rule 251 of 1897), a defendant has not the right to set up as a defence by way of set-off a claim sounding in damages—he must set it up by way of counterclaim; and, the Companies Act, 1907, having been passed with the law in this condition, the shareholder, had the action been brought by the company, could not have pleaded by way of defence a set-off sounding in damages; but he might "set up" such a claim against the company if the company sued; and the Act says that he may plead by way of defence any set-off which he could set up against the company; there was no reason, therefore, why he could not plead this set-off by way of defence in the present action, although he would need to take another proceeding to set it up if the company had been plaintiff; but on the facts the defendant could not succeed. Semble, also, that the dismissal of the action would not prevent another action being brought.

Grills v. Farah, 21 O.L.R. 457.

—British Columbia Companies' Acts, 1890, 1892—Forfeiture of shares—Alleged irregularities in call and forfeiture.]—In an action by the appellants, being husband and wife, for a declaration that 240 shares in the respondent company standing in the name of the wife, but of which she has executed a transfer to the husband (on the back of the certificate), had not been validly forfeited by the company, and that the husband was owner thereof and entitled to be registered as such, it appeared that the husband was a director of the company, a party to the resolution of the board making calls on the said shares and to the subsequent resolution declaring them to be delinquent and forfeited, and that notice dated May 22, 1895, of the call of that date and of the liability to forfeiture if unpaid was mailed by the secretary to the wife's address in Vancouver, being the address given by her husband in all proceedings connected with the company from 1891 onwards (no address being registered or given on the certificate):—Held, that the plaintiffs had, by their conduct, disentitled themselves to the relief prayed for; that the notice fulfilled all the requirements of the Canadian Companies' Act, 1890, s. 35, and the 9th and 10th by-laws of November 5th, 1891; and that any objections to the absence of due formalities in the service on the husband of acts to which he was a party, and to the illegality of the allotment, calls and forfeiture of the shares due to technical irregularities in the original appointment of the husband and others as directors, must be disallowed.

Jones v. North Vancouver Land and Improvement Co., [1910] A.C. 317.

—Managing director—Appointment by directors of one of themselves to salaried position.]—Plaintiff, a director in defendant company, was appointed at a meeting of his co-directors to the position of managing director:—Held, on appeal, that the directors had no power to appoint one of their number a managing director and fix his rate of remuneration. Minutes of a directors' meeting were taken down in shorthand by the solicitor for the company and afterwards transcribed and handed to the secretary and re-transcribed into the minute book. They were not confirmed at any subsequent meeting. The solicitor died before the action came to trial. Held, per Morrison, J., at the trial, that such minutes or re-transcribed notes, were not admissible to prove what transpired at the meeting in question.

Claudet v. The Golden Giant Mines, 15 B.C.R. 13, 13 W.L.R. 348.

—Wages of labourers—Equitable assignment—Action by assignee against directors.]—The plaintiff, by an oral agreement between himself, an incorporated company, and the company's wage-earners, supplied goods to the wage-earners, to be paid for out of the wages. The plaintiff at the end of each month was to hand and did hand in to the company particulars of his account against the men, and the company was to keep out of the men's wages the

amount of the account, and hold the amount for the plaintiff. The company was allowed by the plaintiff $10 a month in part for its trouble in collecting. The plaintiff did not discharge the liability of the men for the goods bought by them until the money had been actually paid over by the company:—Held, that there was a good equitable assignment of the wages; and, the company having debited the wage-earners' accounts with the amounts of the plaintiff's accounts for two months, and not having paid either the plaintiff or the wage-earners, the plaintiff was in a position to sue the company for the amount of his claim. He did so, joining "in one action with certain wage-earners, and, the company not appearing and not objecting, the plaintiffs in that action obtained a judgment against the company for the amounts of their several claims respectively. Execution against the company having been returned unsatisfied, the plaintiff, under s. 94 of the Ontario Companies' Act, 7 Edw. VII. c. 34, sued the directors of the company for the amount for which judgment had been recovered by him alone. Held, that the judgment, though irregular, could not be attacked by the defendants, in the absence of fraud, which was not alleged; and the plaintiff, as an assignee of wages, came within s. 94, and was entitled to recover against the directors. Herman v. Wilson (1900), 32 O.R 60, distinguished.

Lee v. Friedman, 20 O.L.R. 49 (D.C.).

—Issue of new stock allotted to shareholders.]—New stock issued and allotted in shares to the actual shareholders by a joint stock company that has the power to increase its capital, when the issue does not amount to a conversion of profits into capital, accrues to the principal, or original stock, by right of accession. Hence, in the case of shares held subject to usufruct, the proprietor, and not the usufructuary, is entitled to the benefits of such new issue of stock.

Lamb v. Lamb, 19 Que. K.B. 49.

— Contributory — Shares — Conditional application—Allotment—Conduct approbating contract.]—D. made an application in writing to the company for 130 shares of stock, of the par value of $13,000, agreeing to pay therefor the sum of $1,300, "on the condition that no further call be made thereon." At a directors' meeting the application was accepted by resolution, and the shares allotted to D., in consideration of $1,300 to be paid on demand. In the minutes of the proceedings at the meeting there was a memorandum, following the resolution, that the shares "were allotted and issued on the condition that no further call would be made thereon." The meaning was that the shares were to be considered as fully paid up. No written notice was given to D., but H., the president, informed him of the action of the directors, and D. gave the company his cheque for the $1,300, and gave a proxy in favour of another shareholder to vote at a meeting of shareholders. The proxy was used for voting for directors at the meeting, but objection was raised as to the right of D. to vote on these shares. H. informed D. of the objection raised, and D. at once stopped payment of his cheque, and informed H. that he would have nothing more to do with the shares. Three months later a winding-up order was made. It appeared that D.'s name was on the register as the holder of 130 shares, and there was among the company's papers a certificate, signed by the president and secretary, stating that D. was the owner of 130 shares, but not stating whether they were fully paid up or not. There was no evidence that D. was aware either of the entry or the certificate:—Held, that D. was not liable as a contributory. Per Maclaren, J.A., that it was not necessary, in the circumstances, for D. to bring an action to have his name removed from the register; his repudiation was sufficient. Held, also, that, D. not being liable, H. could not be liable for misfeasance for acquiescing in the stopping of payment of D.'s cheque, and thereby causing a loss to the company of $1,300. Decision of Teetzel, J., 18 O.L.R. 354, reversed.

Re Lake Ontario Navigation Co., 20 O.L.R. 191 (C.A.).

—Action for deceit—Agreement for sale of shares in company—False representations—Compromise—Notice.] — P., living in Montreal, owned stock in a Cobalt mining company, and D., of Ottawa, looked after his interests therein. Being informed by D. that the mine was badly managed and the property of little value, and that other holders were selling their stock, P. signed an agreement to sell his at par. D. assigned this agreement to a third party. Later P., learning that the stock was selling at a premium and believing that he had made an improvident bargain, entered into negotiations with the holder of his agreement, and a compromise was effected by a portion of P.'s holdings being sold to the assignee at par and the remainder returned to him. It transpired afterwards that D. and the assignor were in collusion to get possession of the stock, and P. brought action against D. for damages:—Held, that the compromise having been effected when P. was in ignorance of the real state of affairs, it did not bind him as against D. from whom he could recover as damages, the difference between the par value of his remaining shares and their market value at the date of such compromise. Judgment of the Court of Appeal (12 Ont. W.R. 824) reversed and that of the trial Judge (9 Ont. W.R. 380) affirmed by a Divisional Court (11 Ont. W.R. 127) restored.

Pitt v. Dickson, 42 Can. S.C.R. 478.

—Salary of president — Remuneration — Resolution fixing amount.]—The purpose or object of s. 88 of the Ontario Companies Act, 7 Edw. VII. c 34, providing that no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting, is that those who govern the company shall not have it in their power to pay themselves for their services without the shareholders' sanction; and:—Held, reversing the decisions of Clute, J., and a Divisional Court, 20 O.L.R. 170, that there had been, on the facts there set out, a substantial, if not a literal, compliance with the enactment; and the plaintiff was entitled to recover the salary voted to him as president. A seal is not necessary to the validity of a by-law, unless it is required by the constitution or by-laws of the company.

Mackenzie v. Maple Mountain Mining Co., 20 O.L.R. 615 (C.A.).

—Action for account— Onus—Particulars.] —In an action en reddition de compte by a company against its president it is for the defendant who alleges that the board of directors of the plaintiff is not complete to prove it. The plaintiff company demanding that in default of rendering an account the defendant be condemned to pay a certain amount which it had been informed he has received under certain contracts, is not bound to state at what date and from what persons such sum was received.

Temiscouata Railway Co. v. Macdonald, 3 Que. P.R. 462 (S.C.).

—Subscription for stock—Necessity for allotment—Calls.]—On September 1st, 1899, the defendant subscribed for shares in the plaintiff company by agreement covenanting with the company and directors to accept the same when allotted, and pay as calls might be made. The company was incorporated under the British Columbia Companies Act, 1897, which so far as affected this case is identical with the English Companies Act, 1862. On December 14th, 1899, the directors resolved that all shares should be called up, and between that date and November 22nd, 1900, many interviews took place between the president and the secretary-treasurer and the defendant, at which the latter's liability was discussed and demand for payment made, which also was demanded in several letters written by them to the defendant, but to which the defendant made no reply. On November 15th, 1900, the defendant wrote formally withdrawing his "offer" to take shares. In reply, the treasurer on November 22nd, 1900, again notified him for immediate payment, and on November 29th, 1900, the directors passed by-laws for the issue and allotment of shares to the defendant to the number subscribed for, and also that the whole should be at once called up:—Held, that the defendant was not liable on his shares, having withdrawn his subscription before allotment.

Nelson Coke and Gas Co. v. Pellatt, 2 O.L.R. 390 (Lount, J.).

—Undertaking to subscribe for shares in a company to be formed—Action to declare a subscriber.]—The defendant wrote a letter to A., who was desirous of organizing a driving park company, undertaking to subscribe for $1,000 of stock in a company to be formed, subject to the conditions that before the formation of the company an amount of $7,000 be guaranteed, and that this subscription be obtained within three months from date. Subsequently the defendant cancelled this letter, and refused to sign the stock book. In an action for a first call, instituted by all the underwriters on the stock book, before the incorporation of the company:—Held, that an action for a first call could not be maintained on the defendant's letter, until the company had been organized. In the absence of a special contract on the part of and between the co-adventurers, no legal call can be made prior to the organization of the corporation, because until then there is no board of directors capable of making a call.

Cazelais v. Picotte, 18 Que. S.C. 538 (Davidson, J.).

—Mandamus—Protection of stock register.]—Plaintiff, a foreign shareholder in a foreign corporation doing business in the Province of Nova Scotia, obtained a mandamus ordering the defendant company to produce for the inspection of plaintiff the register of stockholders, showing the names and places of residence of persons holding shares and stock in the company, and the number of shares held by each person. Also to produce and file in the office of the Provincial Secretary an abstract of receipts and expenditures, profits and losses of the company within the province for each year during which the company did business within the province. Also to file at the office of the Commissioner of Mines for the province a copy of the charter or act of incorporation of the company and of the by-laws and regulations of the company, together with a list of officers, etc.:—Held, setting aside the order and allowing defendants' appeal, that it was not just and convenient to grant the order as the effect of it would be to decide the whole case upon affidavit, leaving nothing to be disposed of at the hearing. And that while such an order may be useful in some cases in order to preserve the rights of parties or the subject matter until there could be a deliberate disposition made of it at the hearing, or where the matter could not wait until a hearing, it should not otherwise be disposed of in a summary way. Semble, that under the rules enabling a case to be set down for hearing at any time, a strong case

must be made out for pursuing a different course. Held, that as the merits of the case must be disposed of later the costs of both parties to the appeal ought to abide the event.

Merritt v. Copper Crown Mining Co., 37 C.L.J. 405 (S.C.N.S.).

— Building societies — Subscription for stock—Mortgage as collateral security—Repayment in monthly instalments.] — Where a mortgage of real estate by a member of a loan association incorporated under R.S.O. 1887, c. 169, executed to secure collaterally an advance to him of the amount of the maturity value of certain of his shares in the association contained a covenant by the mortgagor that the monthly payments would be made according to the by-laws of the association until the shares should have matured, and also that he would make the several payments provided by the by-laws for the time being with respect to shares and the payments thereof:—Held, that the association had power by by-law passed subsequent to the execution of the mortgage to change the mode of payment which, according to the mortgage, was by fixed monthly instalments, to a provision by which when the shares matured the mortgage should be released.

Williams v. Dominion Permanent Loan Company, 1 O.L.R. 532.

—Calls—By-law—Time for payment of—Forfeiture of stock.]—The plaintiff sued as an assignee for creditors under an assignment which excepted shares in companies not fully paid up, and in which his assignor was declared a trustee for plaintiff, to transfer the shares in such a way as he should direct. In this action plaintiff sought to have it declared that he was the owner of certain shares, standing in the name of his assignor, in a company incorporated under R.S.O. 1897, c. 191, and that he was entitled to pay the balance of calls made thereon:—Held, that he was not entitled to call on the company to account to him for the shares or any dealings therewith. Under s. 35 of the above statute, stock may be forfeited by the company where the amount payable on a call is not paid within the time limited by the special Act incorporating the company, or by letters patent, or by a by-law of the company. Where, therefore, no time was limited in the statute, or letters patent, or in the by-law making the call, such call was held to be illegal and an attempted forfeiture of the stock ineffectual.

Armstrong v. Merchants' Mantle Manufacturing Company, 32 Ont. R. 387.

—Shares—Certificate and transfer—Parties out of jurisdiction.]—A transfer of certain shares in a company was executed by the holder of the shares in favour of her brother-in-law on the 29th September, 1900, and application to the company was at once made by the transferee for a certificate, but he did not receive one, and on the 25th October he was informed by the company that his transferor had set up a claim that the transfer was procured by fraud. On the 19th November the transferor brought an action against the company and the transferee to restrain the company from transferring the shares, for a declaration that the shares belonged to the plaintiff, and to set aside the transfer executed by her. On the 23rd November the transferee began an action against the company to compel the delivery of a certificate or for damages equal to the value of the shares, and of a mandatory injunction. On the 28th November the company applied for an interpleader order. Pending the application the transferee discontinued his action, and asserted his claim against the transferor and the company as a counterclaim in the action brought by the former:—Held, that the company were entitled to relief by way of interpleader, notwithstanding the claim against them for damages made by one of the claimants. Held, also, that although both claimants were out of the province, and the company's head office was also outside of the province, there was jurisdiction to make an interpleader order, the claimants themselves having brought the company into the jurisdiction, and the documents being within the jurisdiction. Held, also, that the laches of the company had not been so great as to disentitle them to the relief claimed, and the charge of collusion between the company and the transferor was not sustained. Held, also, that the transferee was entitled to have preserved to him any claim he might have for damages against the company.

Re Underfeed Stoker Company of America, 1 O.L.R. 42.

—Shares purporting to be fully paid—Whether purchaser liable for calls.] — A portion of the shares in a joint stock company, purporting on the face of their certificates to be of a certain par value, and paid up were allotted to three promoters. One of them sold part of his allotment at a discount and had them transferred by the company direct to the purchasers, who were not aware that the shares were not really paid up:—Held, in an action by the company, that the purchaser were not liable for the discount on such shares, inasmuch as the company was bound by its statement in the certificates that the shares were "fully paid and non-assessable."

Kettle River Mines, Ltd. v. Bleasdel, 7 B.C.R. 507.

—Judgment creditor — Action against shareholder — Transfer of shares — Evidence.]—Judgment creditors of an incorporated company, being unable to realize

anything on their judgment, brought action against H. as a shareholder, in which they failed from inability to prove that he was owner of any shares. They then brought action against G. in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H., but were not registered in the company's books. On this evidence the court below gave judgment in favour of G.:—Held, affirming such judgment, 33 N.S.R. 77, 1900, C.A. Dig. 58, that the shares were duly transferred to H. though not registered, as it appeared that H. had acted for some time as president of, and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G. Held, also, that although there appeared to be a failure of justice from the result of the two actions, the inability of plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit. The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed intituled "An Act to consolidate and amend" the former company, but authorizing additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the latter Act came into force. The judgment against the company was recovered in 1895. Held, that G. was never a shareholder of the company against whom such judgment was obtained.

Hamilton v. Grant, 30 Can. S.C.R. 566, on appeal from the Supreme Court of Nova Scotia.

—Payment for shares—Equivalent for cash —Written contract.]—M. and C. each agreed to take shares in a joint stock company, paying a portion of the price in cash and receiving receipts for the full amount, the balance to be paid for in future services. The company afterwards failed:—Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396, 1900), that as there was no agreement in writing for the payment of the difference by money's worth instead of cash under s. 27 of the Companies Act, R.S.C. 1886, c. 119, M. and C. were liable to pay the balance of the price of the shares to the liquidator of the company.

Morris v. Union Bank of Canada, 31 Can. S.C.R. 594.

—Action for calls — Insolvency — Reprise d'instance—Defence.]—A shareholder sued for payment of calls by a company placed in liquidation pending the action cannot set up, against the application of the liquidator to be allowed to take up the instance in the name of the company, an allegation that his liability to contribute to the stock of the company can only be enforced against him by virtue of a fresh call by the liquidator which should be based upon the amount required to pay the debts of the company and the costs of winding-up and which would make the former calls of no effect, but the shareholder will be permitted to plead these grounds as a defence to the action continued by the liquidator.

Victoria Montreal Fire Ins. Co. v. Derome, 21 Que. S.C. 319 (Sup. Ct.).

—Action for calls—Defence.]—In an action by an incorporated company to enforce payment of calls on shares subscribed for, the defendants cannot plead that the conditions of the Act of incorporation have not been complied with, and that the company has for more than a year carried on the business of insurance in violation of the conditions of the statute incorporating it.

Victoria-Montreal Fire Ins. Co. v. O'Neil, 5 Que. P.R. 4, 451.

—Subscription for shares — Contract by deed — Delivery — "Issue" and "allotment" of shares—Calls—Resolutions and letters — "Offer" — Preference shares.] — Held, reversing the judgment of Lount, J., 2 O.L.R. 390, 1901 C.A. Dig. 75, that the defendants undertaking to take shares in the plaintiff company, when issued and allotted, being by deed, for valuable consideration, and being delivered to an agent of the company, was not revocable as a mere offer would be, and that the resolutions of the company and the letters to the defendant were a sufficient "issue" and "allotment" of the shares. Xenos v. Wickham (1886), L.R. 2, H.L. 296, followed. Nasmith v. Manning (1880-1), 5 A.R. 126, 5 S.C.R. 417, distinguished. Held, also, that provision therefor having been made in the memorandum and articles of association, the preference shares of the company were lawfully created.

Nelson Coke and Gas Co., et al. v. Pellatt, 4 O.L.R. 481 (C.A.).

— Subscription for shares — Contemporary condition—Allotment — Notice — Liability as contributory.]—Held, per Street, J., under the circumstances of this case, where an applicant had agreed to take shares in a company conditional on his receiving certain moneys to pay for them, that he had the right to withdraw his application, as he did, not having received any formal notice of allotment, by informing the company of his inability owing to non-receipt of the moneys to pay for the shares, and that he was not liable as a contributory.

In Re Publisher's Syndicate, Mallory's Case, 3 O.L.R. 552.

—Prospectus — Unreasonable delay—Subscription for shares—Departure from prospectus—Res judicata.]—On January 23th, 1899, defendant and others subscribed for shares in a projected hotel company. The prospectus stated that a charter would be applied for forthwith and building commenced as soon as $40,000 had been subscribed, at an estimated cost of $45,000, to be ready by the summer season of 1899. After March 29th, 1899, by which time only $28,700 had been subscribed, no further subscriptions to stock were taken till October 24th, 1899, nor was the company incorporated, nor anything done towards having the hotel ready by the time mentioned. After October 24th, 1899, however, additional subscriptions were obtained, which shortly brought the total subscribed to $40,150. On November 24th, 1899, the company was incorporated, and about July 1st, 1900, the hotel was completed. at a cost however, of about $15,000 over the estimated figure. There was no evidence that the defendant had at any time after October 1st, 1899, agreed to be bound by his subscription or approved of proceeding with the erection of the hotel, or of the cost subsequently incurred in its erection: —Held, under the above circumstances, as the undertaking had not been proceeded with within a reasonable time from its inception, defendant could not now be held bound by his subscription to take shares. Semble, that the fact that in an undefended action brought by defendant against the company judgment had been recovered by the defendant, which contained a declaration of the Court that he was not a shareholder, did not in itself afford any defence in this action brought against him to compel him to pay for the shares he had subscribed for. The change in the law contained in the present Ontario Company's Act, R.S.O. 1897, c. 191, s. 9, as to who become shareholders in a company incorporated by letters patent, specially referred to.

Patterson v. Turner, 3 O.L.R. 373.

—Division of profits—Reserve fund.]—A company formed by letters patent under 27 and 28 Viet. (Can.) c. 23, is not bound to divide all its profits on each occasion amongst its shareholders. It can legally reserve any portion thereof at its own discretion and a court has no jurisdiction to regulate it. Whether the undivided portion is retained to credit of profit and loss or carried to credit of a reserve, it may lawfully, in the absence of any express power, be invested on such securities as the directors may select, subject to the control of a general meeting, but not restricted to such investments as trustees are authorized to make.

Burland v. Earle, [1902] A.C. 83.

—Indemnity respecting shares—Infant—Bond — Ratification.] — The bond, with a penalty, of an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant is void and not merely voidable, and cannot be adopted and ratified by the obligor after he has attained his majority. Judgment of Ferguson, J., 3 O.L.R. 345, reversed.

Beam v. Beatty (No. 2), 4 O.L.R. 554 (C A.).

—Shares in building society—Mortgage of shares held "in trust"—Notice—Purchaser of land subject to mortgage collateral to loan on shares without notice that shares pledged for prior loan—Consolidation—Purchaser of trust shares.]—The defendant mortgagor being the holder of six shares of class "A" permanent stock in her own name, and six shares of class "C" instalment stock "in trust," and other shares of class "B" stock in a building society, obtained a loan of $700 from the plaintiff's company and transferred to their treasurer as security, "all my stock in the said company, consisting of shares of classes A. B. and C. stock, held by me in the said company," and "all other stock or shares held by me in the said company." Subsequently she obtained a further loan of $600, and transferred to the treasurer, as security, six shares of class C instalment stock, the intention being to transfer the six shares held "in trust" and already assigned, as the plaintiffs contended to secure the prior loan of $700, giving also a mortgage on land, reciting that she was the owner of six shares of the capital stock of the plaintiff's company, and that the plaintiffs had agreed to advance $600 upon the said shares, with such mortgage as further security. The mortgagor afterwards conveyed the lands to a purchaser, subject to the $600 mortgage, who assumed the mortgage, and also purchased from the mortgagor her equity on the six shares of instalment stock so held "in trust," subject also to the $600 mortgage. In an action by the plaintiffs claiming consolidation of the loans and payment of both mortgages or foreclosure:—Held, that the use of the words "in trust" put the plaintiffs upon inquiry, and they were affected by the notice that the mortgagor was not the owner of the shares and had no power to mortgage. Held, also, that s. 53 of c. 205 R.S.O. 1897, which relieves a company from seeing to the execution of any trust to which shares are subject, did not empower the plaintiffs to disregard the trusts. The purchaser brought into Court the arrears due on the collateral mortgage, and the plaintiffs accepted the amount in satisfaction of such arrears. Held, that the plaintiffs could not consolidate the two mortgages as against the purchaser, as she was a purchaser for value without it being shown that she was aware, at the time she bought the equity of redemption in the

nds, that any prior mortgage existed against the six shares in the hands of the plaintiffs. Judgment of MacMahon, J., reversed.

Birkbeck Loan Co. v. Johnston, 3 O.L.R. 497.

—Building Society—Maturity of shares.]— See MORTGAGE.

Lee v. Canadian Mutual, 3 O.L.R. 191.

—Shares and shareholders—Appropriation by president — Damages.] — A company which, with its president, appropriates shares in its capital stock to the prejudice of a shareholder, is bound to indemnify such shareholder for the damages he may suffer in consequence.

Acer v. Percy, 5 Que. P.R. 401.

—Increase of capital—Statutory restrictions—Payments to directors—Dividends—Reserve fund—Investment in business—Plant and building fund.]—By 50 Vict. c. 85 (O.), "An Act to further extend the powers of the Consumers' Gas Company of Toronto," the defendants were given authority to increase their capital stock to $2,000,000. By s. 4 it was provided that the new stock should be sold, and that all surplus realized over the par value of the shares should be added to the reserve fund until it should be equal to one-half of the paid up capital stock, the true intent and meaning being that the defendants might at all times have a reserve fund equal to but not exceeding one-half of the then paid up capital, which fund might be invested in specified securities. By s. 6 it was enacted that there should be created and maintained by the defendants a plant and buildings renewal fund, to which should be placed each year five per cent. on the value at which the plant and buildings in use by the defendants stood in their books at the end of their then fiscal year, and that all usual and ordinary repairs and renewals should be charged against this fund. By s. 7, any surplus of net profit remaining at the close of any fiscal year, after payment of (1) fees to the directors not exceeding $9,000 per annum, (2) a dividend at ten per cent. on the paid up capital, (3) the establishment and maintenance of the reserve fund, and (4) providing for the plant and buildings renewal fund, was to be carried to a special surplus account, and whenever the amount of such surplus should be equal to five cents per 1,000 cubic feet on the quantity of gas sold during the preceding year, the price of gas should be reduced for the current year at least five cents per 1,000 cubic feet. By s. 8, if in any year the net profits should not be sufficient to meet the requirements of the defendants for the payment of fees, dividends, and provision for the plant and buildings fund (as in s. 7), the directors were empowered, in their discretion, to draw upon the reserve fund to the extent of such deficiency, and to restore from earnings any amount so drawn, but it was provided that the reserve fund should not otherwise be drawn upon. By s. 9 the plaintiffs were authorized to be parties to the annual audit of the defendants' affairs:—Held, that the defendants were not bound to keep the reserve fund, as an actual separate sum of money, apart from their own property, and invested in the securities mentioned in s. 4, but were at liberty to use it in their business, as they did from year to year, without objection by the plaintiffs' auditors; and were not bound to carry to the credit of the fund its share of the increase in the value of defendants' property which it had helped to acquire while invested in the business. (2) That charges for decrease in the value of gas mains, for iron gas lamps which became useless, and for gas meters destroyed, were not charges for renewal or repair, but for depreciation and loss, and did not come within s. 6 so as to be chargeable to the plant and buildings renewal fund. (3) That under s. 6 the defendants were entitled to continue to contribute to the plant and buildings renewal fund the five per cent. authorized, even although it should not appear necessary to do so for the purposes for which the fund was to be used. These sections were construed in Johnston v. Consumers' Gas Co. (1895), 27 O.R. 9, upon a special case, but the decision was reversed (23 A.R. 566, [1898] A.C. 447), although not on the question of construction. Held, that the Court was not bound by the views expressed in that case.

City of Toronto v. Consumers Gas Co. of Toronto, 5 O.L.R. 494 (Street, J.).

—Transfer of stock—Power of attorney—Scope of—Payment to directors—Validity of.]—The directors of a company under the belief, which was erroneous, that there was no unallotted stock, procured through an agent, powers of attorney from several persons, which were pasted by the secretary in the transfer book. The powers authorized the agent "to receive from the vendors a transfer" of a specified number of "shares in the company, purchased by me from him," and "to sign in the books of the company my name to the acceptance and transfer" thereof. One of the appointors, whose power called for three shares, subsequently signed an application therefor, and, on his payment for the stock, received a stock certificate. Another appointor, whose power of attorney called for five shares, forthwith paid the company for two and received a stock certificate therefor, and, on his subsequently paying for the remainder, received stock certificates therefor. The other appointors also paid for the amount of shares specified in their powers and received stock certificates, no transfer then being made of the stock by

any vendor nor any acceptance thereof, what took place amounting to an allotment of stock by the company. Several months afterwards P., an original shareholder, and provisional director and subsequently a director and superintendent of the company, becoming aware of the existence of these powers of attorney, and of no transfers having been made thereunder, filled in opposite the names of the various appointors transfers of stock from him to them, to the numbers specified in their powers, procuring the agent, as their attorney, to accept the transfers, for which the agent was paid by the company at P.'s instance $60 for alleged commission. On the winding up of the company:—Held, by the Court of Appeal that neither the transfers of stock made by P. nor the $60 payment could be supported, and that P. must be placed upon the list of contributories. The judgment of Meredith, C.J., limiting the liability of P. to certain of the shares referred to, and as to his non-liability for the $60, reversed. Shortly after the incorporation of the company, a meeting of the provisional directors, who were then the only shareholders, was held, when a resolution was passed under which P. was paid $300 out of capital, for alleged services, it not appearing that any service had then been rendered by him. The minutes of this meeting were confirmed at a subsequent shareholders' meeting. At the time no profit had been made by the company, and, so far as the books showed, nothing had been paid on account of the stock. No by-law was passed authorizing these payments. Held, that the payment of $300 could not be supported.

Re Publishers' Syndicate; Paton's Case, 5 O.L.R. 392, 2 C.L.R. 133 (C.A.).

—Memorandum of association—Conditions imposed by statute—Public policy—Preference stock—Election of directors.]—In the memorandum of association of a joint stock company formed under the provisions of the British Columbia "Companies Act, 1890," and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect three of the five directors or trustees for the management of the business of the company, notwithstanding anything contained in the Act:—Held, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that the agreement was ultra vires of the powers conferred by the statute, and null and void, being repugnant to the conditions as to elections of trustees and directors imposed by the Act as matters of public policy. Judgment appealed from (9 B.C. Rep. 275) reversed. Colonist Printing and Publishing Co. v. Dunsmuir, 32 Can. S.C.R. 679.

—Shares in building society—Mortgage "in trust"—Notice.]—

See TRUSTS AND TRUSTEES.

Birkbeck v. Johnston, 6 O.L.R. 258 (C.A.).

— Shares — Deposit of certificate — Bailment.]—The plaintiff loan company became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, and deposited the certificates for the shares with the defendant trust company for safe keeping. The defendant trust company executed and delivered to the plaintiff loan company a document under seal by which they acknowledged the receipt of the certificates, and agreed to hold in their safe deposit vaults to the order of the loan company any dividends received in respect thereof, and guaranteed to the loan company that the certificates would be kept safely in deposit vaults and delivered upon demand under proper authority. The document also provided for the remuneration of the trust company. The certificates were put in the name of the trust company. It appeared that 375 of the shares had been acquired by the plaintiff loan company under an agreement with the Atlas Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in possession of the defendant trust company both loan companies were ordered to be wound up under the Dominion Act, and the defendant trust company were appointed liquidators of the Atlas Loan Company, and the plaintiff trust company liquidators of the plaintiff loan company. After the commencement of the liquidations the plaintiff trust company, as liquidators, demanded the certificates from the defendant trust company, but the latter refused to deliver them up, and this action was brought for damages for the detention:—Held, that the defendant trust company were merely bailees and not trustees; but, if they were to be regarded as trustees, the failure to hand over the certificates was not a breach of trust for which they ought fairly to be excused under 62 Vict. (2) c. 15, s. 1 (O.); owing to their dual character as trustees and also liquidators, they did not act with singleness of purpose, and therefore not as required by the Act; and the direction of the Master in Ordinary, to whom was referred the winding-up of the Atlas Loan Company, that the whole 575 shares should be retained by the defendant company as liquidators, was made without jurisdiction, and did not protect them as trustees. 2. The plaintiffs were entitled to damages for the detention (delivery having been

made pending the action) based on estimates of what had been lost by the detention; and the measure of damages was the highest price of the shares represented by the certificates between the demand and the delivery.

Elgin Loan and Savings Co. et al. v. National Trust Co., 7 O.L.R. 1 (Boyd, C.).

—Subscription for shares—Principal and agent—Authority of agent—Conditional agreement.]—S. signed a subscription for shares in a company to be formed and a promissory note for the first payment, both of which documents he delivered to the promoter of the company to which they were transferred after incorporation. In an action for payment of calls S. swore that the stock was to be given to him in part payment for the good will of his business which the company was to take over. The promoter testified that the shares subscribed for were to be an addition to those to be received for the good will:—Held, that, though S. could, before incorporation, constitute the promoter his agent to procure the allotment of shares for him and give his note in payment, yet the possession by the promoter did not relieve the company from the duty of inquiring into the extent of his authority and, whichever of the two statements at the trial was true, the promoter could not bind S. by an unconditional application. Judgment for defendant affirmed.

Ottawa Dairy Company v. Sorley, 34 Can. S.C.R. 508.

—Payment for shares—Transfer of business assets—Debt due partnership—Set-off counterclaim—Accord and satisfaction—Liability on subscription.]—On the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid up shares, at their par value, in satisfaction of his interest in the partnership assets:—Held, reversing the judgment appealed from (9 B.C.R. 301 and 354), Davies, J., dubitante, that the transaction did not amount to payment in cash for shares subscribed by the partners within the meaning of ss. 50 and 51 of the Companies Act, R.S.B.C. c. 44, and that the debt owing to the shareholders as the price of the partnership business could not be set off nor counterclaimed by them against their individual liability upon their shares. Fothergill's Case, 8 Ch. App. 270, followed.

Turner v. Cowan, 34 Can. S.C.R. 160.

—Promoter—Fiduciary capacity—Profit—Action to recover.]—The owner of a patent, in April, 1898, induced the defendants to agree to take an interest in it, with a view to introducing the patented article into public use. They subsequently decided to form a company. An actual assignment to the defendants was executed in June, 1898, pending incorporation, the expense of which the defendants undertook to bear, and by agreement of even date they agreed to sell the patent to the company, when incorporated, in consideration, inter alia, of $5,000. In August, 1898, after incorporation of the company, an instrument was accordingly executed by the defendants and the company, adopting and confirming the agreement above mentioned, and the patent was assigned to the company, and the $5,000 paid:—Held, that the defendants were entitled to retain the $5,000, as against the company, as they did not become promoters until after they were entitled by agreement to the interests in the patent, which were afterwards and before incorporation actually transferred to them. Semble, that even if the defendants had acquired their interests without consideration, that would have made no difference unless acquired for the company.

Highway Advertising Company v. Ellis, 7 O.L.R. 504 (C.A.).

—Share — Transfer — Certificate — Notice of lien.]—A provision in a certificate of ownership of paid-up shares issued by a company incorporated by special Act, that "the articles of this company are part and parcel of this contract" is not sufficient to make applicable to a purchaser in good faith of the shares a by-law of the company purporting to give to the company a lien on all shares held by any shareholder for "any and all amounts that may be owing by the shareholder or his assigns to the company," and the purchaser is, upon compliance with the necessary formalities, entitled to be registered as transferee. Judgment of Ferguson, J., affirmed by Divisional Court.

Re McKain and Canadian Birkbeck Investment and Savings Company, 7 O.L.R. 241.

—Action for calls—Counterclaim for rescission.]—

Re Pakenham Pork Packing Co. (1903), C.A.D. 59, since reported 6 O.L.R. 582.

—Sale of shares by broker.]—

See BROKER.

—Directors' meeting—Regularity—Calls.]—The company is properly and necessarily a party to an action by shareholders to have declared void a call made by the directors, or to restrain the forfeiture of shares for non-payment of calls. Directors who are charged with fraudulent conduct in connection with such calls are also proper parties. A directors' meeting cannot be regularly adjourned by preparing minutes declaring it adjourned and obtaining the signatures thereto of the number of directors required to form a quorum. The directors must meet together and act con-

jointly as a board of directors, but this defect may be cured by a resolution of the shareholders, at a subsequent shareholders' meeting regularly called, ratifying the action of the directors at the adjourned directors' meeting. When a shareholders' meeting is held on Saturday, resolutions passed after midnight, and therefore on Sunday, are a valid expression of the wish of the shareholders.

Paul v. Kobold (N.W.T.), 2 W.L.R. 90 (Harvey, J.).

—Contributory—Allotment—R.S.O. 1897, c. 191, s. 26.]—A subscriber for a share in a company was debited in the company's stock ledger with one share, was placed on the "shareholders' list," and was drawn upon for the first payment of ten per cent. and paid the draft. There was no formal allotment to him:—Held, that what had been done must be taken to have been done by authority of the directors and to be a mode of allotment "ordained" by them within the meaning of the Companies Act R.S.O. 1897, c. 191, s. 26.

Hill's Case, 10 O.L.R. 501 (MacMahon, J.).

—Subscription for shares—Condition not fulfilled—Representations of agent—Contemporaneous oral contract.]—In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiff's agent that two other named persons had each subscribed $10,000 of shares upon the condition that subscriptions for $50,000 were obtained by a certain date; that the defendant's subscription was required to make up the $50,000; and that his subscription would not be binding unless the $50,000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for $10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscription, and that $50,000 was not subscribed on or before the date named. The defendant's testimony was not contradicted, the plaintiff's agent having died some years before the commencement of the action; and the trial Judge credited the testimony:—Held, that it was sufficient without direct corroboration, and, in the absence of facts or circumstances of countervailing weight, should be accepted. Held, also, that the plaintiffs were bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares, whether those representations were made in good faith and with a belief in their fulfilment or not. Held, lastly, that where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement. Wallace v. Littell (1861), 11 C.B.N.S. 369, applied and followed.

Ontario Ladies' College v. Kendry, 10 O.L.R. 324 (C.A.).

—Director's personal liability—Wages—"Labourer."]—Held, (affirming the judgment of the Superior Court, Davidson, J.): —A person engaged to perform manual work, at a daily wage, and who is actually occupied in doing such work, is a "labourer," within the meaning of s. 71 of 2 Edw. VII. (Can.) c. 15, although, being a workman of superior capacity, he is also entrusted with the supervision of other workmen, and to that extent, fills the position of a "boss," or foreman.

Fee v. Turner, 13 Que. K.B 435.

—Transfer of shares—Fully paid up shares—Refusal to transfer.]—S. 47 of the Ontario Companies Act, R.S.O. 1897, c. 191, empowers directors to make by-laws to regulate the transfer of stock, that is to declare how and in what manner and with what formalities it is to be transferred, but the Act nowhere authorizes a company to refuse to transfer on their books fully paid up shares.

Re Imperial Starch Company, 10 O.L.R. 22.

—Shares—Deposit of certificates—Bailment.]—The E. Company became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, depositing the certificates thereof,—which were put in the name of the defendants, a trust company—with them for safe keeping, receiving from the trust company a document under seal whereby they acknowledged the receipt of the certificates, and agreed to hold same in their safe deposit vaults to the order of the loan company, with any dividends received in respect thereof, guaranteeing they would be kept safely therein, and delivered up on demand to the E. Company, the remuneration of the trust company also being provided for, 375 of the shares had been acquired by the E. Company under an agreement with another company, the A. Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in the defendant's possession both loan companies were ordered to be wound up under the Dominion Act, the defendants being appointed liquidators of the A. Company, and the L. & W. Trust Company liquidators of the E. Company. After the commencement of the liquidation proceedings the L. & W. Company, as such liquidators, demanded the certificates from the defendants, and, on the latter refusing to

deliver them up, this action was brought for damages for the detention:—Held, that the defendants were merely bailees, and not trustees, but, even if regarded as trustees, the failure to hand over the certificates was not a breach of trust, for which they were fairly excusable under 62 Vict. (2) c. 15, s. 1 (O.); for owing to their dual character as trustee of the E. Company and liquidators of the A. Company, they did not act with singleness of purpose; and that a direction made by the Master in Ordinary, to whom was referred the winding-up of the A. Loan Company, that the whole 575 shares should be retained by the defendants as such liquidators, was made without jurisdiction and so afforded no protection, and that damages for the detention (delivery having been made pending the action) should be based on an estimate of what had been lost by the detention, the measure thereof being the highest price which could have been procured for the shares between the demand and the delivery. Judgment of Boyd, C., 7 O.L.R. 1, affirmed.

Elgin Loan & Savings Co. v. National Trust Co., 10 O.L.R. 41.

—Stock issued as "fully paid-up"—Part payment—Liability — Contributory — Set-off by shareholder.]—A certificate of 238 shares of stock was issued to one McN. described as fully paid-up, pursuant to an understanding between him and the directors. He paid for 171 shares, and accepted the certificate knowing that 67 shares were not paid for, but believing that there was no further liability on him in respect to them. There was no evidence of any application for them by him or any allotment to him. He transferred one share, surrendered his certificate, and got a new one for 237 shares, and acted as a director of the company. His name was in the stock ledger and stock register as a holder of 237 shares:—Held, that he was a shareholder with all the rights and liabilities of a shareholder, and that he was properly put upon the list of contributories for the amount actually unpaid in respect of the shares. McN. had paid $1,500 on a guarantee given for the company, and claimed to set-off that amount against his liability on the shares. Held, that s. 37 of R.S.O. 1897, c. 191, has reference only to an action against a shareholder in the nature of a sci. fa. by a creditor of the company, and that its provisions do not extend the right of set-off to proceedings against shareholders under that Act, and that such right did not exist on the broad ground of absence of mutuality between the claim of the liquidator against McN. and the latter's claim as a creditor against the company. The Maritime Bank v. Troop (1889), 16 S.C.R. 456, followed, and the judgment of King, J., in the Court below referred to with approval.

Re Wiarton Beet Sugar Manufacturing Co. (McNeill's Case), 10 O.L.R. 219 (Teetzel, J.).

— Contributories — Consideration for shares.]—H. and others, interested as creditors and otherwise in a struggling firm, agreed to purchase the latter's assets and form a company to carry on its business and they severally subscribed for stock in the proposed company to an amount representing the value of the business after receiving financial aid which they undertook to furnish. A power of attorney was given to one of the parties to purchase said assets, which was done, payment being made by the discount of a note for $2,000 made by H. and indorsed by another of the parties. The company having been formed the said assets were transferred and the said note was retired by a note of the company for $4,000 indorsed by H., which he afterwards had to pay. H. also, or the company in Buffalo of which he was manager, advanced money to a considerable amount for the company which eventually went into liquidation. After the company was formed, in pursuance of the original agreement between the parties, stock was issued to each of them as fully paid-up according to the amounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the total amount of said stock. The ruling of the Local Master in this respect was affirmed by a Judge of the High Court and by the Court of Appeal:—Held, reversing the judgment of the Court of Appeal, Davies and Nesbitt, JJ., dissenting, that as all the proceedings were in good faith and there was no misrepresentation of material facts, and as H. and S. had paid full value for their shares, the agreement by which they received them as fully paid-up was valid and the order making them contributories should be rescinded. Held, per Davies and Nesbitt, JJ., that as they did not pay cash or its equivalent for any portion of the shares as such the order should stand. Held, also, that it is the duty of the Supreme Court, if satisfied that the judgment in appeal is erroneous, to reverse it even when it represents the concurring view of three, or any number of, successive Courts before which the case has been heard.

Hood v. Eden, 36 Can. S.C.R. 476.

—Transfer of shares—Right to have recorded—Resolution closing books—Invalidity of.]—A transferee of fully paid-up shares in a company incorporated under the Ontario Companies Act, R.S.O. 1897, c. 191, is entitled, on the presentation to the company of a transfer of shares, to have same recorded in the books of the company, the company having no discretion whatever in the matter. Where, therefore,

under a resolution of the directors, the books were closed for a brief period for the alleged purpose of avoiding confusion or inconvenience in ascertaining the shareholders entitled to vote at the meeting, and during such period the company refused to record a transfer of shares, a mandamus was granted compelling such transfer to be recorded.

Re Panton and Cramp Steel Company, 9 O.L.R. 3 (Osler, J.A.).

—Loan company — Shareholders contributing to reserve fund—Rights of creditors.] —Shareholders in a loan company, in answer to a proposal from the company, paid to the company towards the reserve funds dividends paid to them by the company and various other sums of money, with a view to increase the reserve fund to the same amount as the paid-up stock. In winding-up proceedings:—Held, that such shareholders were not entitled to rank as creditors upon the assets of the company with the other creditors, depositors and debenture holders, and that any claim they had against the company and its reserve fund was subject to the payment of the debts of the company. Judgment of Briton, J., 7 O.L.R. 706, affirmed.

Re Atlas Loan Co. (Claims on Reserve Fund), 9 O.L.R. 468 (C.A.).

—Inspection of books by shareholder.]—Where it is not shown that there exists some urgent necessity for interference, without which irreparable injury may result, an order for injunction will be refused. An application for the issue of an injunction is not the proper proceeding to compel an industrial corporation to allow a shareholder to inspect its books.

Plamondon v. Blouin, Q.R. 28 S.C. 149 (Sup. Ct.).

—Directors—Filling vacancies in board—Quorum—Special meeting of shareholders.] —The by-laws of a company, incorporated under the Ontario Companies Act, provided that there should be seven directors, four of whom should be a quorum. Four of the directors ceased to be qualified, having sold and transferred their stock:—Held, that the remaining directors had not the power, under s. 43 of the Act, to fill the vacancies, notwithstanding that by s. 40 the board might consist of only three members. Held, also, that the vacancies could only be properly filled by a meeting of the shareholders duly called for that purpose.

Sovereen Mitt, Glove and Robe Co. v. Whitside, 12 O.L.R. 638 (D.C.).

—Sale of shares—Terms of payment—Absence of covenant to pay—Default in payment.]—By an agreement of 11th August, 1903, between the plaintiff and defendant, after reciting that the plaintiff was the owner of 302 fully paid-up shares of the common stock in a named company, of the par value of $100 each, and his agreement to sell the same to the defendant for the consideration therein made, and subject to the terms thereinafter expressed, it was witnessed that the plaintiff had agreed to sell the shares to defendant for $18,120, with interest at six per cent. until same were fully paid—viz., on his paying $500 on account, he was to have the right of paying the balance in the manner set out in the agreement. The plaintiff was to deposit in a bank the stock certificates, endorsed in blank, to be delivered to defendant on payment of the purchase money in full; but he was at liberty to pay into the bank the sums of money thereinbefore referred to, to be held to his credit, and which should fully discharge him in respect of the payment of the purchase price and interest, and entitle him to the delivery of the shares; the defendant was to pay the plaintiff the $500 on account upon the deposit of the certificates so indorsed; and in consideration of the premises and of the payment of $500 the plaintiff covenanted and agreed with the defendant that he would not for five years from the date of the agreement, directly or indirectly, erect or cause to be erected in Canada a mill for the manufacture of book and writing papers, or of coated papers, or associate himself or accept employment from any mill erected during the said period for manufacturing such papers:—Held, that the terms and whole effect of the agreement completely negatived the existence of any covenant on defendant's part to pay for the shares.

Finlay v. Ritchie, 12 O.L.R. 368 (C.A.).

—Manufacturing company—Managing director — Authority of — Ratification of acts.]—The plaintiff in equity, though successful as to part of its claim, was deprived of the general costs of the suit on the ground that unfounded charges of fraud were made as to the other part, and it was ordered to pay the costs of the sections charging fraud. The managing director of a company, without the authority, but with the knowledge of all of his company's directors except one, erected, at a cost of $17,000, a fuel house for the storage of mill wood and a conveyor for the purpose of moving the mill wood from his mill to the company's pulp mill to be used for fuel and pulp. The fuel house and conveyor became of no use to the company by reason of the discontinuance of the use of mill wood:—Held, that there was no such gross negligence on the part of the managing director as made him liable for the expense of erecting the fuel house and conveyor.

Cushing Sulphite Fibre Company v. Cushing, 37 N.B.R. 313.

—Control of company—Purchase of mineral claim by directors for illegal object—Fraudulent scheme—Knowledge of by vendor—Duty of directors.]—As fiduciary donees of their powers, the directors of a company are bound to exercise them bona fide for the purposes for which they were conferred; and generally the corporate body to which they owe this duty is entitled, in the case of a breach of it, to invoke the remedial action of the Court. A director acting in a certain way, with the primary object of deriving an improper personal advantage, financial or otherwise, cannot save himself by showing that his action was also of benefit to the company. If the circumstances are such that his actions are equivocal, and open to two constructions, he must, seeing that he is in a fiduciary capacity, be prepared to show beyond all reasonable doubt the single-mindedness of his intentions.

Madden v. Dimond, 12 B.C.R. 80.

—Liability of purchaser of shares to indemnify original subscriber against future calls on stock—King's Bench Act, Rules 759, 761—Objection not raised at trial.]—(1) The purchaser of the assets of a company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, who agrees to assume the liabilities of the company, is bound to indemnify the company against its liability for payment of future calls on shares of stock held by it in a fire insurance company which were only partly paid up at the time of the sale, although no mention of such liability was made at the time but the purchaser was aware thereof; and such liability is attachable at the suit of the fire insurance company under Rules 759 and 761 of the King's Bench Act for the purpose of realizing on a judgment obtained for the amount of unpaid arrears of subsequent calls on the shares. (2) Per Dubuc, C.J.:—An objection based on s. 68 of the Joint Stock Companies Act, that no company incorporated under that Act can use any of its funds in the purchase of stock in any other corporation unless expressly authorized by a by-law confirmed at a general meeting, and that there was no evidence of any such by-law having been passed, cannot be given effect to on the hearing of an appeal when it was not raised at the trial. Proctor v. Parker (1898), 12 M.R. 528, and Hughes v. Chambers (1902), 14 M.R. 163, followed. (3) Per Dubuc, C.J.:—The statute does not prohibit a joint stock company from holding stock in another corporation, it provides only that its funds shall not be used for such purpose unless expressly authorized by by-law confirmed at a general meeting; and, if it were shown that such shares had been acquired otherwise than by using any of the funds of the company, the holding would be legal.

Victoria-Montreal Fire Insurance Co. v. Strome & White Co., 15 Man. R. 645.

—Action to recover money paid for shares—Statements contained in prospectus—Responsibility of directors.]—Plaintiff sought to recover payments made to the defendant company and damages on account of statements alleged to be false and fraudulent contained in a prospectus issued by the directors of the company on the faith of which plaintiff was induced to subscribe and pay for a number of a new issue of preference shares. One of the principal matters complained of was a statement to the effect that undrawn profits or assets of the company to a large amount had been appropriated to a "reserve fund," whereas, as plaintiff alleged, the company never had an reserve or sinking fund. The evidence showed that profits which were supposed to have been earned, instead of being distributed in dividends, were transferred to an account referred to and known as the "reserve account:"—Held, affirming the judgment of the trial Judge, that the words "reserve fund," as used in the prospectus, did not necessarily mean a reserve fund which was invested, but the important thing was the reserving of the amount out of property available for distribution in dividends, and appropriating it in the books of the company to meet contingencies, which was shown in this case to have been done. And that even if plaintiff understood the fund to be invested, this, in the case of a manufacturing company, would not be a material representation which would influence the conduct of plaintiff in taking shares. Held, also, it appearing that the directors employed competent managers, upon whom they were dependent for information, and that their auditor used due care in the performance of his duties, that the directors were not responsible for a representation in regard to the cost of materials, affecting the profits, which was not discovered to be mistaken until some time after the prospectus had been issued. Held, also, as to a representation in the prospectus, as to the appropriation of profits earned in payment of dividends on common and preferred stock, that the expression "appropriated" did not mean "paid," but that the sum mentioned was appropriated or devoted to a particular purpose and might be payable later. The prospectus contained a representation that the proceeds of the issue of stock would be applied, among other things, to replacing "working capital" already expended in the erection of a mill, known as "Cowie's mill." Held, that the words "working capital" were not a technical expression or likely to mislead plaintiff, it being usual to speak of money used in the business of a company, whether borrowed on debentures or raised by the sale of shares, as "capital." Held, also, as to the application of

moneys to other purposes than those mentioned in the prospectus, that the burden was on plaintiff to show that the directors, at the time the prospectus was framed, intended that the proceeds of the new shares should be so applied, or that, on proper inquiry, they would have learned that the money could not be applied in the way stated and were reckless.

Kennedy v. Acadia Pulp and Paper Mills Co., Ltd., 38 N.C.R. 291.

—Company—Act of directors—Unauthorized expenditure—Liability of innocent directors.]—The directors of a limited company, without authority from the shareholders, passed a resolution providing that, in consideration of a firm of which two directors were members carrying on business of a similar character continuing the same until the company could take it over, the company indemnified it from all loss occasioned thereby. K. and F., two members of the firm, refused their assent to the terms of this resolution and declared their intention, of which the majority of the directors were made aware, to retire from the firm. F. subsequently wrote to the president and another director reiterating her intention to retire, and declared that she would not be responsible for any further liability. The company afterwards took over the business of the firm, paying therefor $30,000 and receiving assets worth $12,000, and having eventually gone into liquidation, the liquidator brought an action to recover from the members of the firm the difference. The Court of Appeal held that K. and F. were not liable, though their partners were:—Held, that K. and F., having received the benefit of the money paid by the company, were also liable to repay the loss.

Wade v. Kendrick, 37 Can. S.C.R. 32.

—Shares—Calls.]—The directors of a company and not the shareholders are the proper persons to make a call and give notice of a forfeiture of shares; and the irregular action of the directors in so doing cannot be ratified by a resolution passed at a subsequent meeting of shareholders.

Paul v. Kobold (N.W.T.), 3 W.L.R. 407.

—Illegal consideration for shares—Fraud—Breach of trust.]—With a view to concealing the financial difficulties of a mining company and securing control of its property, the manager entered into a secret arrangement with the respondent whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution and purchase it for a new company to be organized, in which the respondent was to have a large interest. The manager, who was a creditor of the company, was to have his debt secured and to receive an allotment of shares in the new company proportionate to those held by him in the old company, and he agreed that he would not reveal this understanding to the other shareholders:—Held, affirming the judgment appealed from (11 B.C. Rep. 466), Sedgewick, J., dissenting, that the agreement could not be enforced as the consideration was illegal and a breach of trust by which the other shareholders were defrauded.

Lasell v. Hannah, 37 Can. S.C.R. 324.

—False statement of earnings to directors—Payment of dividends—Damages.]—In an action by an incorporated company to recover from the executors of the deceased president of the company damages alleged to have been suffered by the company by reason of false and fraudulent representations made by the deceased:—Held, upon the evidence, that the statement of approximate earnings laid before the directors of the company by the deceased on the 15th December, 1902, and the annual statement presented by him to the directors on the 27th January, 1903, and afterwards to the shareholders, were untrue to his knowledge, and that the earnings for 1902 were wilfully misrepresented by him in order that the directors might be induced to declare dividends which they would not have declared had they been made aware of the true earnings, and that the directors acted upon the misrepresentations made to them in declaring five per cent. half-yearly dividends in January and July, 1903. Held, also, that the plaintiffs, the company, had suffered damages by reason of the payment of the dividends, notwithstanding that the payment was not made out of the actual fixed capital and was not ultra vires of the company, and notwithstanding that it was made to the persons who were then the shareholders of the company; the company having parted with sums of money which, but for the misrepresentations, would still have been at the company's credit. Damages were assessed against the estate of the deceased in the sum of $34,500, made up by taking the amount of the misrepresentation at the end of December, 1902, to have been roundly $30,000, and adding three years' interest at five per cent. It was urged by the defendants against the credibility of the principal witness for the plaintiffs, that having, at the instance of the plaintiffs, though before this action was brought or contemplated, and while the president was still alive, made a statutory declaration as to the truth of the facts which he afterwards deposed to at the trial, he was in vinculis, and was not free to vary from it except at the risk of a prosecution for perjury:—Held, that the taking of unnecessary statutory declarations is a practice which should be avoided, and in this case a simple signed statement would have been as effectual; but the witness was en-

titled to credit, against this objection, his testimony being given with fairness and candour, and no motive for falsehood being apparent.

Northern Navigation Co. v. Long, 11 O. L.R. 230 (Street, J.).

—Fraud by manager—Facilitating creditor to sell company's assets—Secret profit.]—

See CONTRACT.

—Executory contract—Corporate seal—Authority of general manager.]—By letter, signed by their managing-director, the defendants, a joint stock company, agreed to furnish the plaintiffs malleable iron coupler parts of their manufacture as might be ordered, the letter being subscribed "accepted" by the plaintiffs. No by-law had been passed defining the general powers of the Board of Directors or of the managing-director of the defendant company except as to borrowing for the purpose of the business. The managing-director did not consult the Board before signing the letter and there was no formal subsequent approval or disapproval by the Board of what had been done. The managing-director knew that to carry out the contract a substantial extension of the defendants' plant and premises would be necessary, and the plaintiffs also knew this. But there was no evidence that they knew anything about the defendants' capital or commercial circumstances, or their ability to furnish the additional plant:—Held, that in the absence of bad faith or notice the plaintiffs were entitled to assume that the managing-director was authorized to enter into the agreement, which when orders were actually given by the plaintiffs, became a binding contract and one to which the Board of Directors would have had power to bind the company. Held, also, that the circumstance that the contract required an increased plant for its full performance was not in itself sufficient to render it ultra vires; though it would have been otherwise if such increased plant had been required to carry on a new or different business from that then being carried on by the company. As it was, the supplying such additional plant would fall under the head of "Management" and would therefore be within the general scope of the directors' authority. Held, also, that there was no need of the corporate seal although the contract was an executory contract. Held, therefore, that the plaintiffs were entitled to recover so far as they had given orders for the couplers under the contract.

National Malleable Castings Co. v. Smith's Falls Malleable Casting Co., 14 O.L.R. 22 (C.A.).

—Directors — Action by judgment creditor against — Payment of dividend when company insolvent.]—

Snow v. Benson, 2 W.L.R. 359 (Terr.).

—Sale of shares — Profit of agent of company — Assistance of director in making sales — Right to share of profits — Disability of director — Duty to company — Account of profits.]—

Black v. Anderson, 10 W.L.R. 111 (B.C.).

— Shares — Allotment — Ratification by paying first instalment.]—

Re Victor Wood Works, Limited, 7 E.L. R. 55 (N.S.).

—Forfeiture for non-payment of calls — Irregularities in procedure — Notice to shareholder — Laches.]—

Johns v. North Vancouver Land & Improvement Co., 11 W.L.R. 220 (B.C.).

—Shares — Purchase induced by misrepresentation — Right to rescind — Counterclaim for damages—Measure of damages.]—

Gould v. Gillies, 1 E.L.R. 440 (N.S.).

—Directors—Meetings of—Invalidity — Protest — Withdrawal of director — Assent to mortgage — Seal.]—

Harris v. English Canadian Co., 3 W.L. R. 5 (B.C.).

—Directors—Illegal action — Illegal exercise of a legal power — Meetings of directors — Quorum — Notice of meetings.]—

Rudolph v. Macey, 3 W.L.R. 52 (B.C.).

— Judgment against — Unsatisfied execution — Action against directors — "Labourer" — Miner — Wages.]—

Crew v. Dallas, 9 W.L.R. 598 (Alta.).

— Shares — Subscription — Allotment.]—

Eastern Townships Bank v. Robert, 2 E. L.R. 525 (Que.).

—Directors—Transfer of shares before first payment made to insolvent persons —Breach of duty.]—On the issue of letters patent under the Ontario Companies Act, R.S.O. 1897, c. 191, incorporating a company, the directors subscribed for stock, making no provision, however, for the payment nor making any calls thereon—while applications for stock by others were only accepted on their paying 25 per cent. on subscription and 25 per cent. on allotment. Subsequently, and some time before the company was declared insolvent, the directors, knowing of its insolvent condition, and desiring to get rid of their stock, on which nothing had been paid, employed the promoter of the company to procure persons willing to take the stock. He accordingly procured five persons, whom he knew were of little or no substance, and as to whom he had carefully abstained from any inquiry, to take all of the directors' stock, except one share each on which they could qualify and make the transfers, informing the transferees that they would become directors, and, as to four of them, that

they would incur no liability on the stock, as he would arrange for its disposal. The purchasers gave their promissory notes for the first 25 per cent., payable in six months without interest, before the transfers were made, payable to the company itself instead of to the directors, the object being that they should be treated as payment of the 25 per cent. for which the directors were liable:—Held, that the transfers were invalid, as being made contrary to s. 30 of the Act before all calls had been paid, the liability of the directors for the 25 per cent. being substantially the same as a call; and also in that the directors were guilty of a breach of trust in not exercising their powers in the best interests of the company by taking special care and caution in procuring responsible transferees. The directors were therefore directed to be placed on the list of contributories for this stock.

Re Peterborough Cold Storage Co., 14 O.L.R. 475 (Boyd, C.).

—Directors—Reduction of numbers of—Preferred shares—Issue of—By-law—Resolution.]—The Ontario Companies Act, R.S.O. 1897, c. 191, s. 45, provides that a company may by by-law increase or decrease the number of its directors, but no such by-law shall be valid or acted upon unless sanctioned by vote of not less than two-thirds in value of the shareholders at a meeting of the company duly called for considering the subject, nor until a copy certified under the company's seal has been transmitted to the Provincial Secretary and published in the Gazette. By section 22 it is enacted that the directors may make a by-law for creating and issuing any part of the capital stock as preference stock, but no such by-law shall have any force or effect whatever until after it has been unanimously sanctioned by a vote of the shareholders present or represented at a general meeting duly called for considering the same, or unanimously sanctioned in writing by the shareholders, or approved by the Lieutenant-Governor as therein provided. The plaintiff company, at its first general meeting of shareholders, at which all of the existing shareholders, being the five persons named as provisional directors in the letters patent of incorporation, were present, unanimously adopted a resolution that the number of the directors of the company should be four, and thereupon four of the provisional directors were elected directors. Another motion was then carried authorizing the directors to arrange for terms and conditions of sale of stock, preferred and common, and to allot or dispose of the same on such terms as they deemed best. Thereupon the four directors immediately held a meeting, elected officers and adopted a form of application for preferred stock. It was then moved and carried "that we offer for sale not more than 1,500 shares of the company to be sold as preferred stock of the company at par value at $10 per share, etc." Immediately after this directors' meeting the shareholders' meeting was resumed, all shareholders being present, and the full minutes, resolutions, etc., of the Board of Directors were presented and confirmed unanimously. Some two months afterwards the first annual general meeting of the company was held, when a motion was carried that the shareholders "approve and confirm the sale by the directors of $3,900 of the preferred capital stock of the company, and hereby authorize the directors to make any further sales of the said preferred capital stock that they may deem necessary in the interests of the company:"—Held, that the preferred shares had not been properly and validly issued, for s. 45 above mentioned, with regard to decreasing the number of directors, had not been complied with; and although if the motion for issue of preferred shares carried at the directors' meeting amounted to a by-law, although in form only a resolution—which was very doubtful—s. 22 required that such a by-law should be passed by the directors first and then confirmed by the shareholders, thus prescribing consideration twice, and by two different bodies, acting in different capacities; and, moreover, the resolution did not create any specified number of shares as preferred shares, as it should have done, but left uncertain not only the amount of preferred stock, but also the amount of common stock. Held, therefore, in this action, in which the plaintiff sued the defendant upon a note given for the amount due in respect of certain preferred shares alleged to have been alloted to him, that as there were in fact under the above circumstances no such shares to allot, there had been a total failure of consideration for the note, and the action must be dismissed. Semble, that where an application for shares contains an absolute covenant to pay, notification of withdrawal before allotment is invalid.

Manes Tailoring Co., Limited, v. Willson, 14 O.L.R. 89.

— Subscription by minor — Contract of minor annullable for lesion.]—A subscription by a minor to the capital of a joint stock company, however flourishing, is annullable for lesion, if the payments that may be required under it exceed the means of the subscriber.

Bernard v. Hurteau, 30 Que. S.C. 184 (C.R.).

— Provisional directors — Delegation of powers by provisional directors.]—By the Act incorporating the plaintiff company, certain persons were declared provisional directors, who, it was enacted, "may forth-

with open stock books, procure subscriptions of stock, make calls on the stock subscribed and receive payments thereon, and shall deposit in a chartered bank in Canada all moneys received on account of stock subscribed or otherwise received by them on account of the company, and shall withdraw the same for the purposes only of the company, and may do generally what is necessary to organize the company:"—Held, that, the provisional directors had no right to enter into an agreement by which, to induce a person to subscribe for shares, they were to advance out of the funds of the company moneys to enable the intending subscriber to make payments on the shares. Semble, also (Meredith, J.A., dissenting) that, in the absence of express provision, the provisional directors had no power to delegate their powers to committees, but, per Meredith, J.A., there was no evidence that they had done so.

Monarch Life Assurance Company v. Brophy, 14 O.L.R. 1 (C.A.).

—Application for shares—Withdrawal before notice of allotment.] (1) An agreement to take shares in a company, although accompanied by the giving of a promissory note in part payment, is nothing more than an application for the shares and is not binding on the applicant until acceptance by the company and notice thereof given to him; and if the applicant gives notice of withdrawal of his application before notice of acceptance reaches him, he will be released from any obligation under his agreement or under the promissory note in the hands of the company or in the hands of any person having no better right to it than the company would have had. (2) Notice of such withdrawal, if given to the general agent of the company who procured the subscriptions, will be sufficient notice to the company.

Kruger v. Harwood, 16 Man. R. 433.

—Shares — Payment — Disbursements of secretary-treasurer — Credit in company's books—Set-off.]—The appellant was secretary-treasurer of the company and the holder of shares upon which 50 per cent. of the value had been paid. On the 6th October, 1905, the balance due upon the shares, $275, was called up by the directors, and was payable on the 10th October. The appellant on the 31st December, 1905, entered to his credit in the company's cash-book, for "services rendered," $275, thereby showing his shares as having been paid up in full. In fact, the company at that date owed the appellant $271.06, moneys properly disbursed for the company. The appellant acted in good faith. A winding-up order was made on the 31st March, 1906, and it was sought to make the appellant liable as a contributory in respect of the whole balance of $275:—Held, that the disbursements made by the appellant constituted a good payment in fact upon his shares, and that the effect was the same as if he had credited the sums from time to time as they were disbursed. It was not necessary to consider the effect of the winding-up order upon the general right of set-off.

Re Ottawa Cement Block Co., Macoun's Case, 14 O.L.R. 389.

—Prospectus — Misrepresentation — Agent —Liability of directors—Rescission of contract to purchase shares—Delay.]—Where a broker employed by a company to sell shares in its capital stock, issues, though without the knowledge or authority of the company, a prospectus containing untrue material statements, on the strength of which shares are purchased, the purchase money being paid to the company, the purchaser may rescind the contract as against the company, the broker's statements being binding on his principal as made within the scope and course of his employment. A broker employed by a company to sell shares in its capital stock, issued a prospectus stating, among other things, that while in the past the company's earnings had been applied to the improvement of its property, "henceforth it is the intention to declare regular half-yearly dividends as the net earnings of the business will warrant. In view of past results, and the very favourable prospects for increased earnings, shareholders can with confidence look forward to receiving satisfactory returns on their investments in the shape of dividends." No mention was made of the debts or assets of the company. It owed a large sum to its bankers, but its assets considerably exceeded its liabilities:—Held, that the statement amounting to no more than an announcement of policy, and which the directors were at liberty to pursue, a company having power, though in debt, to pay dividends out of profits, the failure to disclose the indebtedness to the bankers did not render the statement misleading, there also being no duty to disclose in the prospectus the assets and liabilities of the company. Directors adopting a resolution to sell shares in the capital stock of the company and to employ a broker for the purpose held not responsible in damages for misrepresentation in a prospectus issued by a broker employed by them under the resolution, at the instance of a purchaser of shares who had purchased in reliance upon the prospectus the prospectus having been issued without their knowledge or authority, and the broker being the agent of the company. The plaintiff learned on January 24, 1904, that material representations, upon which he had been induced to purchase shares in the defendant company on June 24, 1903, were untrue. On February 16, and on March 8, he demanded at meetings of the company a return of the purchase money. Neither de-

mand was assented to, and on April 13. the company communicated to him a formal refusal. A suit for rescission was commenced by him on December 27, following. Held, that the suit was barred by delay.

Farrell v. Portland Rolling Mills Company, 3 N.B. Eq. 508.

—Liability of directors for wages.]—(1) Persons who accept transfers of shares in a company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30; and are elected and act as directors of the company, cannot escape the liability for wages of employees imposed upon directors by s. 33 of the Act by showing that they do not hold the shares absolutely in their own right, but only as security or in trust, notwithstanding that, under s. 27 of the Act, such persons are not legally qualified to be directors. (2) The provisions of s. 33 are remedial and not penal in their nature, being only the withholding from directors, in respect of wages, of the freedom which the statute would otherwise give them from personal liability for all debts of the company.

Macdonald v. Drake, 16 Man. R. 220.

—Pledge of shares in joint stock company —Sale by auction of shares pledged—Notice of sale to shareholders only.]—The pledgee who is authorized by the contract to dispose of the thing pledged in default of payment of the debt and to apply the proceeds thereto, can only do so by a public sale duly advertised. Where a number of shares in a joint stock company were pledged with the above covenant, a sale of them by auction, at which the pledgee bought them for less than their value, of which notice was given by private circular to the other shareholders of the company only, was not such a "disposing" of them as was intended by the contract.

Campbell v. Beyer, 30 Que. S.C. 86 (C. R.).

—Election of directors—Proxies — By-law regulating—By-law proper for directors—General power of shareholders.]—Action by certain shareholders of a company, on behalf of themselves and all other shareholders, except the individual defendants, to have the election of the latter as directors set aside for irregularity:—Held, that the action must be dismissed unless the plaintiffs obtained the consent of the company to sue in the company's name; as, however, the company was a party defendant and all necessary parties before the Court it was proper to dispose of the case on the merits, conditionally on such consent being obtained and the record amended. Under s. 47 of the Ontario Companies Act, R.S.O. 1897, c. 191 (7 Edw. VII. c. 34, s. 87), by-laws regulating the requirements as to proxies are to be made by directors, and shall have force only until the next annual meeting of the company, and, unless confirmed thereat, shall cease to have force. The shareholders, themselves, therefore have no power to initiate and pass such a by-law at general meeting; and, in the absence of any valid by-law regulating the matter, nothing more is necessary to a proxy than valid execution by the shareholder.

Kelly v. Electrical Construction Co., 16 O.L.R. 232.

—Shares—Forfeiture for non-payment of call—Promissory note—Non-presentment.]—The plaintiff, in subscribing for 10 shares of the capital stock of the defendants, an incorporated company, covenanted under seal to pay $12.50 per share and "all other calls, if any, as the same may from time to time be made." He paid the $12.50 and an additional call of 2½ per cent., and received a stock certificate. The defendants subsequently made a call of 5 per cent., and, in writing to the plaintiff requesting him to pay $50 therefor, they offered to take a promissory note for that amount, and enclosed a blank note for the purpose, stating in the letter that the giving of a note simply meant an extension of time for payment, and that in the event of non-payment the shares would be liable to be forfeited. The plaintiff filled up and signed the note, but made some alterations therein—one being the addition of the words "at the Molsons Bank, market branch." This was accepted by the defendants, but was not presented for payment at the branch indicated, where the plaintiff at all times had a sufficient balance to pay it, and it was not paid. The board of directors thereupon purported to forfeit the plaintiff's shares, and notified the plaintiff of the forfeiture:—Held, that, giving effect to the notice in accordance with which the note was sent, and consequently to the terms of which the plaintiff must be considered to have agreed, the sole effect of the note was to give time to pay the debt; and, the debt admittedly not having been paid at the due date of the note, the defendants were within their legal rights in forfeiting the shares. But, if there were no such condition, the most that could be said was that the note was given for and on account of the debt, and the only effect of non-presentment upon such a note is upon the question of costs (Bills of Exchange Act, s. 183); the note is, quoad the debtor, a promise to pay generally; and the debt, as the note became overdue and was unpaid and unproductive in the hands of the creditor, revived. Dictum of Armour, C.J., in Merchants Bank of Canada v. Henderson (1897), 28 O.R. 360, followed. Held, also, that, a call having been regularly made, an action could have been brought upon the plaintiff's covenant, and payment enforced not-

withstanding the parol arrangement. Held, also, that the plaintiff would not, in any view, be entitled to damages for the forfeiture of his stock, but at the most to a declaration that the forfeiture was a nullity, which relief had been offered to him and refused.

Freeman v. Canadian Guardian Life Ins. Co., 17 O.L.R. 296.

—Liability of shareholders for calls on stock — Allotment — Validity of acts of board of directors when some of their number disqualified—Election of directors without balloting.]—(1) Subscribers for shares in the stock of a company who have already paid one call cannot be heard to deny the allotment of their shares. (2) The production of a certificate of indebtedness for unpaid calls on stock in a company incorporated by letters patent under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, made in accordance with s. 53 of the Act, is prima facie evidence of notice of the call as well as of the other matters referred to in that section. (3) The presence on the board of directors of such a company of three who were not qualified, by reason of being in arrears in respect of unpaid calls at the time of their election, is not sufficient to invalidate the acts of the board if done by a legal quorum of properly qualified directors. (4) Although the Act requires that the election of directors shall be by ballot, an election by unanimous vote without balloting will be valid if no more than the necessary number are nominated.

Morden Woollen Mills Co. v. Heckels, 17 Man. R. 557.

— Fraudulent prospectus — Purchase of shares—Rescission of contract — Delay.]—The plaintiff learned on January 24, 1904, that material representations, upon which he had been induced to purchase shares in the defendant company on June 24, 1903, were untrue. On February 16, and on March 8, 1904, he demanded at meetings of the company a return of the purchase money. Neither demand was assented to, and on April 13, the company communicated to him a formal refusal. A suit for rescission was commenced by him on December 27, following:—Held, affirming the judgment of the Court below, that the suit was barred by delay; that directors who adopted a resolution to sell shares of the company and to employ a broker for the purpose are not responsible in damages for misrepresentations in a prospectus issued by the broker, to a holder of shares who had purchased relying upon the prospectus, it having been issued by the broker without their authority as the agent of the company.

Farrell v. Portland Rolling Mills Co., 38 N.B.R. 364.

—Lien on shares for debt due to company —Power to make by-law providing for lien —Estoppel—Waiver.]—A company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, has, by virtue of s. 41 of the Act, power to make a by-law providing that a lien shall exist upon the shares of any stockholder for any debt or liability to the company; and, if such by-law has been passed, the company may maintain such lien as against an execution creditor of a stockholder whose shares have been seized by the sheriff under execution. The shares in question, which were not fully paid up, stood in the name of defendant's wife, but the plaintiff on the first day of May, 1907, recovered a judgment against the defendant, his wife and the company declaring that the said shares were the absolute property of the defendant Mitchell and available under execution in satisfaction of the plaintiff's judgment. At that time a note given to the company for the balance due on the shares was held by the bank in which it had been discounted; but, before the time of the seizure of the shares by the sheriff, that note had fallen due and had been taken up by the company:—Held, that, at the time of the recovery of the last mentioned judgment, there was no debt due from Mitchell or his wife to the company for which the company could then have set up a lien, and it was not estopped by the judgment from setting up the lien as soon as it had taken up the note. Held, also, that the right to the lien had not been waived or lost by the taking and discounting of a promissory note for the debt for which the lien was claimed.

Montgomery v. Mitchell, 18 Man. R. 37.

—Directors—Increase of capital stock—Allotment of new shares by directors to themselves at par.]—The directors of an electric railway company passed a by-law increasing the capital stock by 2,000 shares, and this was sanctioned by a majority of two-thirds in value of the body of shareholders at a meeting. The first batch of 350 shares the directors ex parte allotted at par to five of themselves, and also allotted the remaining 1,650 to the same five, but after issuing a circular to the body of shareholders, whereby the latter were invited to state whether they desired to increase their holdings, and wherein it was set forth that such shares might be allotted as seemed to the directors desirable and necessary. The plaintiff and other shareholders acting with him made no response except by way of protest. By the company's Act of Incorporation, 56 Viet. c. 95, ss. 13 and 46 (O.), the capital stock could be increased, and certain traffic and other arrangements with other companies could be permitted, only upon approval by two-thirds in value of the shareholders. The directors did not wish or intend to allot the new stock

among the shareholders pro rata, but so to deal with the last 1,650 shares as to appropriate for themselves enough shares to give them more than a two-thirds majority in value of shareholders:—Held, that the minority shareholders were not required to submit to the form of application proposed by the circular; there was not recognition of any right on the part of existing shareholders to claim a pro rata division of the proposed new issue, and at this time, by the appropriation of the 350 shares, the minority had become less than one-third in value of the shareholders; and, therefore, the plaintiff was not precluded from seeking relief in respect of the total issue and allotment of the new stock. The only statutory direction affecting this company as to the allotment of stock is in the general Railway Act of Ontario, R.S.O. 1897, c. 207 (incorporated with the special Act), s. 34 (16) of which enacts that the directors shall make by-laws for the management and disposition of stock, not inconsistent with the laws of the Province; but no by-laws appeared to have been made with relation to the allotment or disposal of new shares. Held, that the disposal made by the directors of the new shares was not within the general powers and functions of the directors of such companies; it was a one-sided allotment of stock, which ignored the just claims of many shareholders, and in effect amounted to a prejudicial encroachment on the voting power of the minority; it was not within the power conferred upon the directors by s.6 of the Act of incorporation, to exclude any one from subscribing for stock who, in their judgment, would hinder, delay, or prevent the company from proceeding with and completing their undertaking under the provisions of the Act; and, therefore, the allotment should be declared invalid, and the defendants be restrained from voting upon the increased capital shares. The plaintiff was allowed his general costs, although he had alleged fraud, and had not established it; any costs arising from the charge of fraud were excluded.

Martin v. Gibson, 15 O.L.R. 623 (Boyd, C.).

—Directors—Action to recover amount improperly paid by officer of company—Wrongful dismissal—Damages.]—The directors of plaintiff company paid defendant, the manager and secretary of the company, a commission for services rendered in connection with the conversion of preferred stock of the company into bonds. Defendant would have been bound under the terms of his employment to render the services in question without compensation beyond the amount of his salary and expenses. In the absence of evidence of ratification by the shareholders:—Held, that the company was entitled to recover back the amount paid. Defendant counterclaimed damages for wrongful dismissal and judgment was given in his favour for his salary for the unexpired portion of his year. The dismissal took place on the 1st May, 1905, and the current year of service expired Nov. 2nd of the same year. Defendant appealed against the order for judgment in which the amount fixed covered only five months' salary instead of six months as claimed. Held, that the appeal must be allowed with costs, and the amount increased as claimed. Held, also, that the burden was upon plaintiff of showing that defendant might have obtained other employment and so reducing the damages.

Sydney Land & Loan Co., Ltd., v. Rountree, 42 N.S.R. 49.

—Shares—Transfer on company's books—Mandamus to enforce transfer.]—The owner of two shares of stock in the defendants' railway, assigned them to the plaintiff, endorsing the assignment on the certificate. The plaintiff called at the head office and demanded that the necessary transfer should be made on the company's books, and also saw the president; and after some correspondence, the transfer not having been made, he procured a duplicate assignment of the stock, and placed the matter in the hands of his solicitor, who thereupon wrote the company demanding a transfer, and enclosed one of the duplicate assignments, and stated that he would attend on a named hour, ready to surrender the certificate, and have the transfer completed, and, on receiving a reply that it could not be attended to, this action was brought, in which an order for a mandamus was claimed. An interlocutory order made by a Judge in Chambers directing a mandamus to issue, was, on appeal to the Divisional Court, set aside, and the matter left for decision at the trial.

Nelles v. Windsor, Essex and Lake Shore Rapid R.W. Co., 16 O.L.R. 359; 7 Can. Ry. Cas. 367.

—Representations by agent of promoters—Company not liable for where not expressly adopted.]—Plaintiffs were induced to sign an agreement to take stock in a proposed company upon the representation of P., acting for the promoters in securing subscriptions, that one of the plaintiffs G. would be appointed agent and representative of the company for the Province of Prince Edward Island. After the incorporation of the company, notices were sent out to subscribers requiring payment of a first call upon the stock subscribed for by them. Plaintiffs paid the amount of the call, but subsequently, the company having refused to appoint G. as their agent, as agreed by P. at the time the agreement to take shares was signed, claimed a rescission of the contract and a return of the money paid by them:—Held, that plaintiffs could not recover. Per Longley, J.:—(1) That the com-

pany was not responsible for representations made prior to the incorporation unless such representations were expressly adopted by the company after incorporation. (2) That plaintiffs could not escape liability as shareholders on the ground of the misrepresentations alleged, their remedy in such case being against P. personally.

Gourlie v. Chandler, 41 N.S.R. 341.

—Paid-up shares—Sale by broker—Prospectus—Misrepresentations—Rescission.]—F. in June, 1903, purchased paid-up shares in the capital stock of an industrial company on the faith of statements in a prospectus prepared by a broker employed to sell them. In January, 1904, he attended a meeting of shareholders and from something he heard there suspected that some of said statements were untrue. After investigation he demanded back his money from the broker and wrote to the president and secretary of the company repudiating his purchase. At subsequent meetings of shareholders he repeated such repudiation and demand for repayment and in December, 1904, brought suit for rescission:—Held, that his delay, from January to December, 1904, in bringing suit was not a bar and he was entitled to recover against the company. Held, also, that he could not recover against the directors who had instructed the broker to sell the shares as they were not responsible for the misrepresentations in the prospectus. Judgment of the Supreme Court of New Brunswick, 38 N.B. Rep. 364, affirming the decision at the hearing, 3 N.B. Eq. 508, reversed.

Farrell v. Manchester, 40 Can. S.C.R. 339.

—Sale of shares—Misrepresentation—Fraud—Action for deceit.]—G. a director in an industrial company transferred 290 shares of the capital stock to the president to be sold for him. The president instructed an agent to sell said shares along with some of his own and some belonging to the company. The agent sold 25 shares of G.'s stock to J. G. representing and believing, that it was treasury stock and getting a note for the price in favour of the company. The note was indorsed over to G. Later J. G. discovered that the stock he had bought was not treasury stock and had some correspondence with the secretary of the company in which he complained of having been deceived by the agent. Eventually he gave a four months' note in renewal of that given for the price of the stock but when it fell due refused to pay it the company having in the meantime become insolvent. In an action on the renewal note he filed a counterclaim for damage based on the misrepresentation and deceit. Judgment was given against him on the note and for him on the counterclaim:—Held, that G. was responsible for the fraud practised on the purchaser of his shares by the misrepresentations of the agent who sold them. Held, also, that the settlement of the claim for the price of the shares by giving the renewal note and thus obtaining further time for payment was not a release of the purchaser's right of action for deceit.

Goold v. Gillies, 40 Can. S.C.R. 437, affirming 42 N.S.R. 28.

—Remuneration of officers—Retrospective remuneration.]—The Act of incorporation of a charitable society provided that the corporation might assign to any of its officers such remuneration as they might deem requisite:—Held, that a grant by the shareholders at an annual meeting to the treasurer of a sum of money as remuneration of his services during the past 30 years was intra vires under the above section.

Bartram v. Birtwhistle, 15 O.L.R. 634 (D.C.).

—Transfer of shares—Agreement not to transfer.]—In the absence of a prohibition in the charter or by-laws of a joint stock company incorporated under the Companies Act of Canada the holder of shares in the stock of the company can sell or transfer them and the transferee may demand registration, as provided by law, of the sale or transfer so made to him. An agreement among all the shareholders of a company that shares shall only be sold or transferred under certain conditions cannot stand in the place of a by-law forbidding a sale and is of no effect as against third parties who may acquire shares. One who acts as prête-nom of another has only the status of mandataire as respects his principal. As to third parties he remains the main person interested and may exercise against them the remedies arising out of contracts made in his name. Therefore, if he acquires shares in a joint stock company he is entitled to a mandamus to compel the company to register the sale or transfer made to him.

Barnard v. Duplessis Independent Shoe Machinery Co., Q.R. 31 S.C. 362 (Sup. Ct.).

—Subscription for shares—Acceptance and allotment—Allotment to third party.]—The subscription for shares in the capital stock of a joint stock company becomes a contract when the company accepts and allots the shares. Such acceptance and allotment may be by implication as well as express. Hence, the transfer to a third party of the amount paid for shares applied for, followed by notice to the subscriber, is an acceptance of the subscription and an implied allotment of the stock.

Robert v. Eastern Townships Bank, Q.R. 17 K.B. 157.

—Subscription for share in company—Fraud—Note of subscriber transferred to bank—Holders in due course—Hypotheca-

tion of securities—Powers of company—By-law.]—The defendant was induced to subscribe for one share of the stock of an incorporated manufacturing company and to give a promissory note for the amount of the par value thereof, by a false and fraudulent representation made by an agent of the company. The note showed on its face that it was given for a share in the company, and it was indorsed to the order of the plaintiffs, a chartered bank, by an indorsement in the name of the company, with the name of the secretary thereof signed thereto. A by-law was passed by the directors of the company, and confirmed by the shareholders at an annual meeting, authorizing the borrowing of money, following the words of s. 49 of R.S.O. 1897, c. 191. It was also resolved by the directors, and confirmed by the shareholders, that an account be opened with the plaintiffs; that all moneys, orders, and other securities belonging to the company and usually deposited in the ordinary course of banking be deposited in said bank account; that the same might be withdrawn therefrom by cheque, bill, or acceptance in the name of the company, over the names of any two of four specified officers (one being the secretary); and that for all purposes connected with the making of deposits in the bank account, the signature of any one of the four should be sufficient. By a memorandum over the seal of the company and the hands of three of the officers, it was agreed that the plaintiffs should hold all the company's securities at any time in the plaintiffs' possession as collateral security for present and future indebtedness; and it appeared that the note above referred to, upon which this action was brought, with a large number of others, was delivered to the plaintiffs as a collateral security, accordingly. The secretary was also a director of the company, and indorsed notes, as he indorsed that in question, almost daily, with the knowledge of his co-directors, for a year and a half:—Held, that the by-law was sufficient to authorize the hypothecation of the company's securities to secure the present and future indebtedness of the company to the plaintiffs; that the indorsement over the signature of the secretary was sufficient to pass the property in the note to the plaintiffs; that the plaintiffs were entitled to assume that a share had been properly allotted to the defendant, and that the note represented the debt due by him to the company for such share, and that the company had the right to negotiate it; and (upon the evidence) that the plaintiffs were holders in due course, for value, without notice of the fraud, and were entitled to recover.

Standard Bank of Canada v. Stephens, 16 O.L.R. 115 (D.C.).

—Shares—Sale—Transfer — Registration.]—The plaintiff purchased from the defendants 1,000 shares of mining stock, and received from them a certificate for that number of shares, made out in favour of one C., and by him indorsed with a transfer in blank:—Held, that this completed the duty of the defendants as sellers, and it was not incumbent upon them to see that the plaintiff should become registered as owner of the shares upon the books of the company; but they were under obligation to do nothing to prevent the plaintiff from having the shares registered in his name. The plaintiff, having contracted to sell the shares at a profit, endeavored to have himself registered as the owner of 1,000 shares and to obtain two certificates for 500 shares each, which were required by the plaintiff's vendee as a term of his purchase, but was refused registration because of an injunction, obtained by the defendants, restraining the transfer agents of the mining company from registering any transfers of shares standing in the name of C. Held, that the plaintiff was entitled to recover from the defendants as damages the difference between the price at which he had contracted to sell the shares and the price which he afterwards obtained when the injunction was dissolved and he was registered as owner of the shares.

Boultbee v. Wills, 15 O.L.R. 227 (D.C.).

—Sale of shares—Resolution of company empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow pending payment of the note.]—Defendant purchased 50 shares in plaintiff company, giving his note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between defendant and the president of the company that defendant was to be employed as a foreman by the company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the company, beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note:—Held, that upon the signing of the application and the delivery of the note, the defendant became the owner of the 50 shares, with power to forthwith validly assign them to anyone else, or to have bound himself to do so on the issue of the certificates if the company's articles of association required indorsement of the certificates; and that there was no notice of allotment necessary.

Anglo-American Lumber Co. v. McLellan, 13 B.C.R. 318.

—**Application for charter—Subscription for stock.**]—One who joins with others in an application for incorporation of a joint stock company and permits his name to be mentioned in the letters patent as subscribers for a specific number of shares is a shareholder and cannot, in case the company is wound up, repudiate his liability as a contributor on the ground that the company was never formally organized and could not, therefore, incur the obligations which brought it into liquidation.

Lafleur v. Saint-Amour, Q.R. 18 K.B. 400.

—**Broker—Purchase of shares for customer on margin—Hypothecation—Conversion.**]—The defendants, who were brokers, purchased for the plaintiff certain shares of the stock of incorporated companies; she paid them a small portion of the purchase money therefor, and owed them the balance, the defendants being entitled to hold the shares until the plaintiff paid them the amount owing in respect thereof. The defendants borrowed, on the security of these shares and of others, a sum of money in excess of the amount owing by the plaintiff. After the lapse of some months the plaintiff applied to the defendants for the shares, and, upon her paying the amount claimed by the defendants as due in respect thereof, they were at once transferred to her. At no time was delivery wrongfully withheld from her, and she sustained no actual damage because of the hypothecation of the shares. It was contended by the plaintiff, however, that upon hypothecation of the shares by the defendants, there was a conversion, and that all moneys paid by her on account of the purchase money were recoverable as damages in an action of deceit—that the defendants had so dealt with the plaintiff's property that the could not in an action of trover, be allowed to deliver the shares in mitigation of damages:—Held, that the plaintiff was not damaged by the hypothecation of the shares, and there was, therefore, no misrepresentation which gave her a cause for action. The delivery of the shares to her annulled the effect of their previous technical conversion, and restored both parties to their former positions, thus leaving the plaintiff in debt to the defendants for the unpaid purchase money. An agreement to pay the interest charged was implied from her conduct and same could not be recovered by plaintiff.

Clark v. Baillie, 19 O.L.R. 545.

—"**Prospectus**"—**Advertisement — Director—Penalty.**]—A mining company incorporated on the 17th November, 1908, pursuant to the provisions of the Ontario Companies Act, 7 Edw. VII. c. 34, filed a prospectus with the Provincial Secretary on the 27th November, 1908, and subsequently inserted in certain newspapers an advertisement, for which the defendant, one of the directors, was responsible, giving particulars about the organization of the company, the mining lands owned by the company, and the operations of the company, and stating that shares were for sale at a named price, but not complying in all respects with the requirements of the Act as regards a prospectus, and not filed with the Provincial Secretary:—Held, that the advertisement was a "prospectus" within the meaning of s. 99 of the Act, being an advertisement designed to accomplish the purpose mentioned in s. 95 (1), and that the defendant was liable to the penalty imposed by s. 100. Semble, that an advertisement merely stating that a company are offering shares for sale, and that a prospectus can be obtained upon application, would be a "prospectus" within the meaning of the Act.

Re Rex v. Garvin, 18 O.L.R. 49, 14 Can. Cr. Cas. 283.

—**Directors allotting themselves shares as fully paid up—Malfeasance.**]—An original subscriber and provisional director of a company who had only paid $25 on account joined with the other provisional directors in passing a resolution, at the organization meeting of the company in 1902, that the shares of capital stock subscribed for by them should be allotted to them as fully paid up, which was done. In 1904 he transferred his shares, receiving therefor the sum of $125 more than he had paid. In 1906 the shares were forfeited, by resolution of the directors, for non-payment of a call of 100 per cent. made upon them:—Held, in winding-up proceedings (Meredith, J.A., dissenting as to the measure of damages), that the original subscriber for the shares was liable as for breach of trust under s. 123 of the Winding-up Act, R.S.C. 1906, c. 144, in assuming to accept the shares as fully paid up; but the measure of damages was the market value of the shares at the date of the allotment, and the sum of $125 was all that he was liable for in this proceeding. Per Meredith, J.A.:—The measure of damages was the par value of the shares.

Re The Manes Tailoring Company; Crawford's Case, 18 O.L.R. 572.

—**Action of shareholders—Control of Court.**]—Outside of the case specially provided for by the charter of a joint stock company the will of the majority of shareholders, lawfully expressed, respecting the affairs of the company should generally prevail. Nevertheless, if what they propose implies the abandonment of the enterprise or cessation of its independent working or a deviation from the charter as to its business purposes such as the assignment, sale or even lease for several years of the franchises, factories, etc., it must

be to the manifest interest of all the shareholders before the minority can be bound by it. The Superior Court, with its powers of control and reformation (Art. 50 C.P.Q.) may at any time, on application of a shareholder, inquire into the circumstances and annul the proceedings if not clearly to the equal advantage of all, perfectly honest and in the company's interest and especially if there appears to be a fraudulent combination for purposes of speculation profitable to a part only of the shareholders even if it is the majority.

Amyot v. Dominion Cotton Mills, Q.R. 36 S.C. 35.

—Forfeiture of shares—Abandonment by acquiescence in forfeiture.]—The plaintiff, H. A. Jones, one of the original shareholders of the defendant company, organized in 1891, transferred 240 shares to his wife, the co-plaintiff, Clara B. Jones, on September 26th, 1893, and on the same day took an assignment of the same shares from her to himself. The assignment was never registered. The par value of the shares was $100, on which 80 per cent. had been paid and notice was given to her requiring her to pay a call of 2½ per cent., payable on June 14th following, with the usual penalty of forfeiture in case of default. Default was made, and the shares were declared delinquent, were offered for sale, but there being no bid, were withdrawn. In March, 1896 (new by-laws having been adopted in the meantime), a call of 6 per cent. was made on all shares, including those of the plaintiff, Clara B. Jones. Default was made and in due course the shares were declared delinquent. In April, 1897, a further call of 9 per cent. was made. On the 21st of May, 1898, a resolution was passed by the directors that Mrs. Jones be served with a notice requiring her to pay the call of 2½ per cent. by the 24th of June, and that in the event of default the shares would be forfeited. At a meeting of the directors on the 25th of June, a resolution of forfeiture, reciting the facts, was put, when Mrs. Jones' husband and co-plaintiff, who was present and a director, offered to pay $100 on account if the shares were not forfeited for six months. This offer was refused and the resolution was passed. In May, 1907, Mrs. Jones' solicitors inquired of the company whether the shares had been forfeited, and offering to pay up the arrears, but were informed that the shares had been forfeited. She then brought action:—Held, on appeal, that the plaintiff Clara B. Jones had elected to abandon the undertaking by acquiescing in the forfeiture at a time when the company's prospects were doubtful, and such abandonment could not be recalled when it was found that the company was prosperous.

Jones v. North Vancouver Land and Improvement Co., 14 B.C.R. 285.
[Affirmed [1910] A.C. 317.]

—Ownership of shares—Assignment of revenue—New issue.]—A. held a number of shares in the capital stock of the Canadian Pacific Railway Co. of which B. was entitled to the revenue. The company made a new issue and each present holder was entitled to subscribe for one share for every five of his holding. A. subscribed for and was allotted shares in the new issue:—Held, that the latter shares were not revenue from the original holding but an augmentation of the capital. They were, therefore, the property of A. not of B.

Lamb v. Lamb, Q.R. 34 S.C. 355.

—Directors—Discretion of as to purchaser and price of shares.]—At a meeting of the directors of an incorporated company they allotted all the unissued shares, being 40 per cent. of the capital stock, to the secretary of the company at par, he having subscribed for them, and immediately afterwards he disposed of a number of these shares at par to the directors individually. No shares had been sold for three years previously, and in the meantime the company's real estate had greatly increased in value, and the plaintiff had recently purchased a large number of shares, nearly all at a premium, and some at a premium of 150 per cent.:—Held, that this transaction by the directors was not illegal, as the shares were allotted bonâ fide to the secretary with intent to further the company's interests and without intent on the part of the directors to profit personally thereby; that the directors were acting within their powers when they exercised their discretion and sold shares at par which might have brought a premium; and that they were not obliged to offer the unissued shares to all shareholders pro rata or put them up at auction before disposing of them to one shareholder at par.

Harris v. Sumner, 39 N.B.R. 204.

—Sale of shares and bonds—Deposit—Recovery.]—Under a contract for sale of railway stock and also for transfer of bonds to be thereafter executed, a deposit of $250,000 was received by the respondent vendor as security for and to be credited towards the payment of the price, on a date fixed, or to be forfeited on default. In an action by the assignee of the purchaser, without tendering the price, to recover back the deposit as the bonds were not ready for delivery at due date:—Held, that as the evidence showed that the purchaser or his assignee was responsible for the non-production and non-completion thereof, there was default by him in pay-

ment of the price and the action must be dismissed.

Sprague v. Booth, [1909] A.C. 576.

—Contributory—Holder of certificate of shares as security only.]—The appellant, who agreed to take one share in a company, received and accepted a certificate of five shares expressed to be fully paid up, four of which the managing director of the company informed him were intended only as security for certain paper to which he had become a party for the accommodation of the company. No stock was subscribed for by, or allotted to, him, but a dividend on the one share was paid to him:—Held, that he was a contributory in respect to the one share only Bloomenthal v. Ford, [1897] A.C.. 156, followed; Re Perrin Plow Co. (1908), 12 O.W.R. 387, distinguished.

In re Charles H. Davies, 18 O.L.R. 240.

—Sale of stock—Evidence of title—Duty of vendor—Defective certificate.]—When shares in the stock of a company are sold for cash and a certificate delivered with a form of transfer indorsed purporting to be signed by the holder named therein who is not the seller, the latter must be taken to affirm that a title which will enable the purchaser to become the legal holder is vested in him by virtue of such certificate and transfer. A transfer was signed by the wife of the holder at his direction but not acted upon until after his death:—Held, that the authority of the wife to deal with the certificate was revoked by the holder's death and on a cash sale of the shares the purchaser who received the certificate and transfer so signed being unable, under the company's rules, to be registered as holder had a right of action to recover back the purchase money from the seller. The fact that the purchaser endeavoured to have himself registered as holder of the shares was not an acceptance by him of the contract of sale which deprived him of his right of action to have it rescinded. Nor was his action barred by loss of the defective certificate by no fault of his nor of the seller. Judgment appealed from (13 B.C.R. 351) reversed.

Castleman v. Waghorn, 41 Can. S.C.R. 88.

—Petition for incorporation—Memorandum of agreement—Subscription to previous memorandum—Withdrawal of subscription.]—A company was incorporated under the Ontario Companies Act, R.S.O. 1897, c. 191, on April 4th, 1907. One R. did not sign the memorandum accompanying the petition as prescribed by s. 10, sub-s. 2, of that Act, but he had signed a memorandum in the same form subscribing for $500 of stock in the proposed company, and alleged that this subscription was not meant to bind him unless the company attempted to buy out a certain rival business, and, this not being done, he notified the company before it was organized that he would not take the shares. In 1907 the company drew on him for calls, but he refused to accept the drafts. In January, 1908, for the first time, the company allotted stock to R., and he attended a meeting of the shareholders on April 6th, 1908, but only to protest against his being considered to be one. No stock certificate was issued to him:—Held, that since the memorandum which R. signed was not the memorandum which accompanied the petition for incorporation, he did not become a shareholder by virtue of the statute, and he was not liable as a contributory on the winding-up of the company. Re Provincial Grocers (Caldwood's Case) (1905), 10 O.L.R. 705, distinguished.

In re Nipissing Planing Mills, 18 O.L.R. 80.

—Sale of stock—Discretion of directors.]—At a meeting of the directors of an Exhibition Association, a large number of shares of the original capital stock of the company were allotted to the secretary of the company at par, he having subscribed for them; and immediately afterwards he disposed of a number of these shares at par to the directors themselves individually, in varying amounts. It was established in evidence that the transaction was for the purpose of retaining control of the company, in order that it might be carried on for the purposes for which it was organized. It was also established that the plaintiff had previously purchased a large number of shares, for many of which he had paid a premium:—Held, that this allotment of shares by the directors was not illegal, as the transaction was bona fide, and not ultra vires of the corporation itself; that the directors were acting within their powers when they exercised their discretion, and in the interest of the whole body of shareholders sold shares at par which might have brought a premium. Held, that as no fraud had been shown, and relief was sought only for the company, the bill should have been filed in the name of the company itself.

Harris v. Sumner, 4 N.B. Eq. 58.

—Sale of shares—Resolution of company empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow.]—Defendant purchased 50 shares in plaintiff company, giving his note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between the defendant and the president of the company that defendant was to be employed as foreman by the company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the company, beyond a resolution empow-

ering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note: —Held, affirming the judgment of Hunter, C.J., that upon the signing of the application and the delivery of the note the defendant became the owner of the shares.

Anglo-American Lumber Co. v. McLellan, 14 B.C.R. 93.

—Sale of shares—Resolutive condition—Hypothecary security.]—By the judgment appealed from (Q.R. 18 K.B. 63), affirming the judgment of the Superior Court (Q.R. 30 S.C. 56), it was held that the acceptance of a proposal to purchase shares in a joint stock company for a price payable half in bonds and half in the stock of a new company to be formed to take over the business of the first mentioned company, on condition that the shares so sold should be deposited in trust as security for the payment of the bonds and that, so soon as all the shares of that company were so deposited and its real estate transferred to the new company, a mortgage on the real estate should be executed to secure payment of the bonds, was a sale subject to a resolutive condition to become complete and effective only in the event of the new company acquiring the property of the first company and executing the mortgage, and that, on breach of the condition respecting the security to be given for payment of the bonds, the sale became ineffective and should be rescinded. On an appeal to the Supreme Court of Canada, the judgment appealed from was affirmed.

Dominion Textile Co. v. Angers, 41 Can. S.C.R. 185.

—Covenant for deposit of shares—Right of either to specific performance by the other.]—When two shareholders in a trading company agree, for their mutual advantage, to deposit their shares in the hands of a third party, neither of them is entitled to specific performance of the covenant by the other, without establishing his interest therein, nor until he has himself executed his part of it.

Kuppenheimer v. MacGowan, 18 Que. K.B. 215.

—Shares—Application—Allotment —Withdrawal of application—By-laws—Number of directors.]—At a general meeting of the shareholders of the plaintiff company, incorporated under the Ontario Companies Act, it was resolved that a board of three directors should be elected to manage the affairs of the company, and three of the five provisional directors were elected as directors. The three directors met and adopted by-laws, one of which provided that the affairs of the company should be managed by a board of five directors, and another provided for the terms upon which stock subscriptions should be received. About ten months later, a document in the form of an agreement to purchase stock was signed by the plaintiff, and the words "accepted by" written at the foot over the signature of one of the three directors, who had been elected president and general manager; and at a meeting of the directors a resolution was passed giving to the president full power to deal with the defendant's "application." On the following day the president wrote to the defendant notifying him that calls had been made upon the shares subscribed for by him, "which have this day been allotted to you by by-law of this company." Nothing further was done in the way of allotting shares to the defendant and the name did not appear in the register of shareholders. About two weeks after the receipt of the president's letter, the defendant wrote to the company withdrawing and cancelling his application:—Held, in an action for the amount of calls alleged to be due, that the directors had no power to delegate to the president their authority as to the allotment of shares or their authority to accept the offer of the defendant; there was, therefore, no valid allotment, and the withdrawal was effectual. Semble, that the fact that the by-laws passed by the directors provided for a board of five directors, while a board of only three assumed to manage the affairs of the company, would be a bar to the plaintiffs' success in the action.

Twin City Oil Co. v. Christie, 18 O.L.R. 324.

—Stock certificate—Transfer—Shares not fully paid for.]—A stock certificate issued by a joint stock company is not a documentary title to fully paid-up shares, and one who becomes holder of it by indorsement is not entitled to be registered as owner of paid-up stock and to a certificate from the company to that effect. The seller of shares in a company does not fulfil his obligation to deliver them by indorsing and forwarding the certificate and stating thereon that he retains one of the shares when he has only paid forty per cent. of their par value. The buyer who is prejudiced thereby can maintain an action in warranty to compel him to pay the remaining sixty per cent.

Beauchemin v. Richelieu Foundry Co., Q.R. 34 S.C. 261.

III. WINDING UP.

—Pending action against company.]—If, since the institution of the action, an insurance company, defendant, has been put into liquidation, a motion by plaintiff to make the liquidator a party to the suit will be granted, but the liquidator must be summoned in the ordinary way.

Comet Motor Co. v. Dominion Mutual Fire Ins. Co., 11 Que. P.R. 314.

—Motion by creditors to set order aside.] —One creditor obtained a winding-up order. Other creditors applied to have the order set aside on the grounds of fraud and prejudice. Middleton, J., refused the application, holding that the order was in effect a judgment of the Court directing the company's assets to be realized and applied pro rata in discharge of its obligations and no other creditor could have any greater or higher right; that the order could not defraud any creditor nor in any way prejudice him; that the application was without precedent and unwarranted by the practice; that the Court had no power on this application to appoint a receiver; that application for leave to intervene should be made to the referee.

Re Standard Cobalt Co., 16 O.W.R. 501, 1 O.W.N. 875.

—Contributory—Shares held by agent or trustee.]—Application to place the name of T. C. Musson on the list of contributories in respect of the amount unpaid on 20 shares of stock standing in his name in trust for the Union Fire Agency, Limited. The referee found that Musson was the nominee of the United Fire Agencies, Limited, holding shares for them in trust. It was urged that Musson was simply the agent for a disclosed principal, and that the principal should be placed on the list of contributories and not the agent. See Winding-up Act, s. 51, and Ont. Ins. Act, R.S.O. 1897, c. 203, and Ont. Companies Act, ss. 66, 71, 72:—Held, that where, as in this case, A. holds shares in trust for B., in the absence of any statutory provision to the contrary, even although B. is named, A. must be put on the list of contributories as the shareholder liable. B. is not the shareholder, A. is. The case is governed by Ont. Ins. Act, R.S.O. 1897, c. 203, s. 21. The sole question is who is the legal owner of the shares, and Musson, in this case, is the owner and the shareholder in respect of these shares, and is therefore liable to contribute the amount unpaid thereon.

Re Standard Mutual Fire Ince. Co.; Musson's Case, 46 C.L.J. 505.

Winding-up — Preferred claims of lien-holders — Mechanics' Lien Act.] — The commencement of a mechanics' lien is coincident with the commencement of the work. Liens claimed by different lien-holders were in respect of work done in building upon the lands of a company prior to the date of the service of a petition for the winding-up of the company, but some of the claims for liens were not registered until after that date, though all within 30 days after the commencement of the liens:—Held, that all the liens existed by force of the Mechanics' Lien Act prior to the service of the petition, and their efficacy and precedence were not disturbed by the subsequent winding-up proceedings; and the lien-holders had a valid claim attaching upon the land and to be paid in priority to ordinary creditors. S. 84 of the Winding-up Act, R.S.C. 1906, c. 144, does not apply to mechanics' liens. The lien-holders had, therefore, preferential claims upon the assets of the company in liquidation.

Re Clinton Thresher Co., 1 O.W.N. 445 (Boyd, C.).

— Railway company — Trust deed — Registration — Trustee's salary — Prescription —Salary of director — Privilege of bond-holder.] — Held (by the registrar, as referee) that the deposit of a trust deed by a railway company with the Secretary of State and notice thereof given in the Canada Gazette, as required by s. 94 of 51 Vict. c. 29, satisfies the requirements of Title XVIII. C.C.P.Q. with respect to registration. 2. The holding of a railway bond by one of several trustees of a railway company as collateral security for the payment of salary to such trustees is an interruption of prescription under Art. 2260 C.C. from the time it was deposited with such trustee. 3. The power of the Parliament of Canada to legislate upon the subject of railways extends to civil rights arising out of, or relating to, such railways. 4. A cestui que trust cannot act as trustee for his own trustee and recover remuneration for his services as such. 5. A director of a company is not entitled to any remuneration for his services, without a resolution of the shareholders authorizing the same. 6. The failure on the part of a bondholder to deposit his bonds within a certain period, in the hands of a named trustee in compliance with the terms of a scheme of arrangement, duly confirmed by the Court under the provisions of the Railway Act, deprives him of any privilege attached to his bonds, and he must be ranked only with the unsecured creditors. 7. Where bonds find their way into the hands of a creditor as a mere pledge for his debt, not being bought in open market, the creditor can only recover the amount of his debt and not the face value of the bonds. 8. Leave to amend under Rule 86 of the practice of the Court becomes null and void if not acted upon within the period fixed for the purpose. 9. Under the law of the province of Quebec a hypothec cannot be acquired by the registration of a judgment upon the immovables of a person notoriously insolvent at the time of such registration, to the prejudice of existing creditors. 10. Under the facts of this case, trustees under a debenture-holder's trust deed were held to be entitled to be indemnified in preference to all other creditors out of the trust property, for all costs, damages and expenses incurred by them in the performance of the trust. In re Accles Limited (1902), 17 T.L.R. 786, re-

ferred to. 11. The word "approved" written by the debtor upon an account against him, and dated, will not suffice to revive the debt already prescribed under the provisions of Art. 2267 C.C.P.Q.

Royal Trust Co. v. Atlantic and Lake Superior Railway Co., 13 Can. Exch. R. 42.

—Railway — Insolvency — Status of creditor as mortgagee of bonds and trustee.]— In this case, certain of the defendants, who were creditors of the railway company defendant, asked leave during the progress of the trial to amend their defence by setting up non-compliance by the railway company with certain statutory requirements as to the issue of bonds:—Held, that the amendment asked would result in raising a new issue between the parties, and the application should be refused as having been made too late. 2. By its statement of claim the plaintiff company asked among other things, that certain mortgage bonds of the defendant company held by them together with a mortgage deed in favour of the plaintiff, as trustee, made by the defendant company to secure certain bonds or debentures, be declared a "first claim and privileged debt" ranking on the property of defendant company's railway. Held, that judgment should be entered declaring that said mortgage bonds and trust deed constituted "a claim and privileged debt," but that their rank, amount and priority should be determined by the registrar of the Court, to whom a general reference was directed to take accounts and ascertain what was due to the several creditors and what the priorities were as between them, and whether there were any prior claims, and, if any, for what amounts respectively.

Royal Trust Co. v. Atlantic and Lake Superior Railway Co., 13 Can. Exch. R. 38.

—Railway — Insolvency — Sale — Prior enquiry into claims of creditors — Pledge of bonds — Trustee for bondholders.] — An enquiry before a referee into the validity and priority of the claims of creditors of an insolvent railway may be ordered before an order for the sale of the railway is made under the provisions of s. 26 of the Exchequer Court Act (R.S. 1906), c. 140. 2. A pledgee of railway bonds has a sufficient interest (in the nature of that of a mortgagee) in such bonds to institute an action for the sale of the railway under the provisions of s. 26 of the Exchequer Court Act. 3. A trustee for the bondholders of an insolvent railway may become a purchaser, as such trustee, at the sale of the railway. 4. Under the terms of s. 26 of the Exchequer Court Act part of a railway may be sold when the railway is in default in paying interest on its bonds. 5. A director, being a creditor of a railway company, present at a meeting where authority is given to pledge the bonds of the company, is estopped from setting up the invalidity of such bonds in an action by the pledgee. 6. The Court in exercising its jurisdiction in respect of railway debts under the said section, will not review the judgment of another Court of competent jurisdiction affecting the railway, but will leave the rights of any person entitled to attack the judgment to the determination of the Court which pronounced the same.

Royal Trust Co. v. The Baie des Chaleurs Railway Co., 13 Can. Exch. R. 1.

—Liquidation—Contestation of claim — Leasehold premises as part of assets—Future rentals.]

Re Markland Paper Co. v. St. Croix Paper Co., 8 E.L.R. 103.

—Contributories — Issue of treasury stock to existing shareholders as paid-up.] —The directors of a company, incorporated under the Ontario Companies Act, R.S.O. 1897, c. 191, in 1906 made a ratable distribution of treasury or company stock, to be treated as paid-up, to the extent of $7,500, among the existing shareholders. For this nothing was given to the company by the shareholders or by any one. In the annual return to the Government made by the company in January, 1907, and in the company's books, the transaction appeared as if $7,500 had been paid on account of stock in 1906. The names of the shareholders were placed on the register in respect of these shares, and they (or some of them) accepted the shares and allowed their names to remain on the register, and they appeared there at the time when an order was made for the winding-up of the company:—Held, that the issue of the unissued stock belonging to the company, to the extent of $7,500, as paid-up stock, was in violation of the statute, and ultra vires; all the shareholders, and not merely the directors, were affected with notice or knowledge of this; and, whatever remedy they might have had before the winding-up order, they had no right, as against the liquidators, representing creditors, to say that the shares were fully paid-up. The names of the shareholders who had accepted the shares were, therefore, placed on the list of contributories.

Re Clinton Thresher Co., 20 O.L.R. 555.

—Contributories—Shares allotted as paid-up.]—Promoters of a manufacturing company agreed with a town corporation to form the company and establish an industry in the town, and the town corporation agreed, upon certain conditions, to give a bonus of $15,000 to the company. The company was formed, a by-law was passed authorizing the issue of debentures to procure the money to pay the bonus, and the money was procured and paid over to the company. Pursuant to a resolution of the shareholders, shares called "bonus shares" were allotted as paid-up shares to the persons who were shareholders at the

date of the resolution, to the amount of $15,000, in proportion to the stock held by them at that date. Certificates of these bonus shares were issued to the respective persons named therein as the holders thereof, and they received the same with full knowledge of the circumstances. With that knowledge, they accepted the certificates, gave receipts for them, assented to their names being on the register in respect of them, and treated and dealt with their respective shares as their property:—Held, that they had accepted the shares and become shareholders in respect thereof; and, on the fair construction of the agreement and by-law, the $15,000 was the property of the company, and not of the promoters, and was part of the assets of the company; the bonus shares could not be regarded as paid-up by the application of the $15,000 in payment thereof; the persons to whom the bonus shares were allotted, although they acted under a mistaken belief, were not entitled to be relieved from the obligation to pay for the shares which they had accepted; and they were properly placed on the list of contributories in respect thereof, in the winding-up of the company.

Re Cornwall Furniture Co., 20 O.L.R. 520.

—Notice of allotment—Application obtained by fraud—Debt due by company to shareholder—Right to set-off.]—On the day after signing an application for shares in a company the applicant decided to withdraw and mailed a notice of such intention to the party who had taken the application, which in the ordinary course of the mail should have reached him the following day. There was no evidence that this letter did reach the party to whom it was addressed on that day or that he was an agent or officer of the company authorized to receive such a notice. In the meantime and without notice of withdrawal the company accepted the application and allotted the shares, but notice of allotment was not given until twelve days later. On an application to settle contributories:—Held, that an application for shares cannot be withdrawn after allotment. 2. That in the absence of a statutory provision or custom of business to the contrary, a notice sent by mail is not operative in the absence of evidence that it was actually received. An applicant for shares resisted the application to place his name on the list of contributories on the ground that he had been induced to take the shares by misrepresentation. Held, that fraud was no answer to the application, as the applicant should have taken proceedings to have the shares cancelled before winding up. A shareholder set up that the company was indebted to him in a large amount, being for amount due under one of the company's policies upon property destroyed by fire, and claimed the right to set off each amount. Held, that in view of the provisions of sub-s. 2 of s. 44 of the Companies Ordinance and par. 2 of s. 14 of the Winding-up Ordinance, the shareholder was entitled to set off such debt.

In re Globe Fire Insurance Co., 2 Sask. R. 234.

—Register of members—Evidence of membership—Condition attached to application not stated in writing—Application in writing unconditional.]—On an application to settle the list of contributories of a company, one Robertson, who had made application for shares and whose application had been accepted, objected that his application was conditional upon his appointment as agent of the company and his acceptance of that agency. He also objected that his membership in the company had not been properly proved, as the register had not been produced:—Held, that the register of the company is not conclusive or the only evidence of membership therein, but membership may be proved without reference to the register. 2. That the application for shares being an unconditional one, and there being no evidence that any notice of a condition attached had ever been given to the company, Robertson's name must be placed on the list of contributories.

Re the Globe Fire Insurance Co.; Robertson's Case, 2 Sask. R. 266.

—Forfeiture of shares—Liability of shareholder whose stock is forfeited.]—The liquidators of a company in course of being wound up under the Dominion Winding-up Act, R.S.C., c. 144, have not, nor have the creditors of the company, any right to take any advantage of any irregularities in the proceedings for the forfeiture of shares; and shareholders whose shares have been forfeited to the company cannot be placed on the list of contributories merely because there have been irregularities in the proceedings prior to forfeiture. Proceedings for the forfeiture of shares cannot be taken for the benefit of a shareholder; the duty of the directors, when a call is made, is to use all reasonable means to compel every shareholder to pay the call, and the directors must bona fide believe that payment cannot be obtained before they are justified in invoking the power of forfeiture. Semble:—Shareholders whose shares have been forfeited, while not liable to be placed on the list of contributories, are still liable (if the articles of association so provide), to be sued for the amount unpaid on calls made. An order made in Chambers cannot be varied or set aside by another Judge than the one granting the order, and by him only in Court, and consent of the Judge whose order is to be varied or set aside will not confer jurisdiction.

Re D. Wade Co., 2 Alta. R. 117.

—Admissions of insolvency by officers—Affidavit verifying petition.]—An application was made to wind up a company on

the grounds of insolvency under the provisions of the Companies Winding-up Act (Dom.). The petition set out that the petitioner was a creditor, and that the company was indebted to other persons in large amounts; that the company, unable to pay these debts, and that certain persons in charge of the company's business had admitted its insolvency. This petition was verified by affidavit, which stated "that such of the statements in the petition as relate to my own acts and deeds are true, and such of the statements as relate to the acts and deeds of others I believe to be true." No other evidence was filed with the petition, nor was notice of any other affidavit served until two days before the application was to be heard, when three further affidavits were served and leave was asked to read them: —Held, that the affidavit did not verify the petition as required by the rules, and was insufficient to support it. 2. That the original affidavit filed being totally insufficient, there was no evidence on file when the petition was presented to support it, and leave should not be given to file further affidavits in an endeavour to make out a case after the return of the motion. 3. That insolvency can only be established in winding-up proceedings in the manner provided by the Act, and admissions of officers of the company of its insolvency are not sufficient to bring the case within the Act.

Re Outlook Hotel Co., 2 Sask. R. 435.

—Winding-up — Petition for — Grounds — "Just and equitable"—Mismanagement.] — A petition by three shareholders to wind up the company under the Ontario Companies Act, 7 Edw. VII. c. 34, s. 199, sub-s. 3, upon the ground that it was "just and equitable" that the corporation should be wound up, was dismissed, no case for a winding-up order being disclosed. Any suspicion that the company is being mismanaged is insufficient. The whole substratum of the company could not be said to be gone, the property acquired under the charter existing and there being a means of working it. A winding-up petition cannot be resorted to merely because there is dissension within the company.

Re Harris Maxwell Larder Lake Gold Mining Co., Limited, 1 O.W.N. 984 (Middleton, J.).

— Sale of land by liquidator — Approval of referee — Application to Court to confirm sale.] — Where an order is made for the winding-up of a company under the Dominion Winding-up Act, R.S.C. 1906, c. 144, the order, in the usual form, directs a Master or referee to take all necessary proceedings for the winding-up of the company, and delegates to him all such powers conferred upon the Court by the Act as may be necessary for the winding-up; and under this order everything may be carried out by the referee without referring to the Court except by way of appeal. Under s. 34 (c), (d), of the Act, the liquidator may, with the approval of the Court, proceed to sell the real and personal estate, etc. When the liquidator makes a sale approved by the referee, there is no need for an application to the Court to confirm the sale.

Re McCann Knox Milling Co., 1 O.W.N. 579 (Boyd, C.).

—Seizure by sheriff—Chamber summons by liquidator for possession.]—A Judge in Chambers has no jurisdiction to order a sheriff to give up to a liquidator under "The Winding-up Act" (Can.), possession of goods and chattels seized under execution prior to the making of the winding-up order.

Merchants Bank v. Roche Percee Coal Co., 3 Terr. L.R. 463.

—Contributory—Issue of shares at half price —Liability of subscriber for balance — Acceptance of certificate and dividend—Estoppel.]—C. subscribed for four shares of the capital stock of a company incorporated under the Ontario Companies Act, the par value of each share being $50. The company issued to him a certificate for eight paid-up shares, upon his paying them $200. He gave a receipt for the certificate and accepted a dividend based upon a holding of eight shares or $400. In the winding-up of the company he contested his liability as a contributory to the extent of the $200 actually unpaid upon the shares, but did not offer to return the dividend:—Held, that, as the company had no power to issue shares at a discount, the shares must be regarded as only half paid, and C. was estopped from denying that he was a member of the company in respect of the eight shares; and he as therefore properly made a contributory.

Re Niagara Falls Heating and Supply Co., 1 O.W.N. 439 (Mulock, C.J.Ex.D.).

— Res judicata — Contributory — Action for calls — Dismissal — Consent judgment.] —The rule of the common law, "that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court," is difficult of application since the Judicature Act, by reason of the uncertainty which may exist as to what was really determined in the former suit; but, in order to ascertain whether the judgment in the former suit is a bar, the Court may look outside the judgment and the pleadings. A judgment by consent is in the same position as a judgment pronounced after the trial of an action. In re South American and Mexi-

can Co., Ex p. Bank of England, [1895] 1 Ch. 37, and The Bellcairn (1885), 10 P.D. 161 followed. An incorporated company brought an action against McK., as the holder of shares of the capital stock, to recover money alleged to be due by him in respect of calls. McK. pleaded several defences — among others, that he was not the holder of the shares, and that the calls were not duly made. The action came on for trial, and, upon consent, a judgment dismissing it was pronounced, signed and entered. Afterwards, the company being in liquidation under a winding-up order, the liquidator sought to make McK. a contributory in respect of the same shares upon which the calls had been made:—Held, that, as it was impossible from the pleadings and judgments to ascertain upon which of the grounds of defence McK. succeeded, the Court might look at the admissions made before the referee in the winding-up proceedings; and those admissions, coupled with the judgment and record, warranted the conclusion that the ground upon which McK. succeeded in the action was that he was not a shareholder in the company; and, therefore, the former recovery was a bar to the claim of the liquidator, which was based upon its being established that McK. was a shareholder at the commencement of the winding-up.

Re Ontario Sugar Co.; McKinnon's Case, 22 O.L.R. 621.

—Application for winding-up order pending appeal from judgment against company — Insolvency — "Demand in writing."]—

Re Dominion Antimony Co., 6 E.L.R. 177 (N.S.).

—Mining — Wages — Lien — Claim of bondholders — Priority — Winding up — Subrogation.]—

Eastern Trust Co. v. Boston Co., 5 E.L.R. 558 (N.S.).

—Contributories—Allotment of promotion stock—Declaration of dividend impairing capital.]—1. An allotment pro rata amongst shareholders' stock in a company, incorporated under the Manitoba Joint Stock Companies Act, R.S.M. (1902), c. 30, as fully paid stock, made after incorporation, will, in a proceeding under the Dominion Winding Up Act, entitle the liquidator to place each subscriber on the list of contributories for the full amount not actually paid in cash, if there is no binding agreement with the company showing other valuable consideration in lieu of cash. 2. The declaration of a dividend when the company is insolvent, contrary to s. 32 of the Act, and the application of such dividend in payment of shares in full cannot be allowed to stand, and, in the winding up, the shareholders are entitled to no credit in respect thereof.

Re Northern Constructions, Limited, 19 Man. R. 528.

—Winding up of a foreign company—Action to restore assets withdrawn.]—The right of action on behalf of the creditors of an insolvent joint stock limited liability company to have one of the shareholders ordered to restore assets withdrawn from the capital of the company to the prejudice of its creditors is not extinguished by the lapse of one year applicable to recocatory actions provided by Art. 1032 and following of the Civil Code. 2. Such right of action can be exercised with the leave of a Judge by the liquidator (appointed in Canada) of a foreign company against which a winding-up order has been made in Canada, in his quality of liquidator.

Hyde v. Thibaudeau, 11 Que. K.B. 419.

—Action against insolvent company—Parties.]—It is not by motion but by the usual writ of summons that the liquidator of an insolvent company is made a party to an action against the company which was put in liquidation after the action was begun.

Standard Mutual Fire Insurance Co. v. Dominion Mutual Fire Insurance Co., 11 Que. P.R. 392 (Ct. Rev.).

—Joint liquidators—Resignation of one.]—A liquidator of an insolvent company who is about to depart from the country can resign his position. If one of joint liquidators resigns the other cannot obtain authority to continue to act alone unless previous notice of his application therefor has been given to the creditors, contributories, shareholders and members of the company.

Woodburn Sons Co. v. Duggan, 11 Que. P.R. 393.

—Liquidation—Mutual Fire Insurance Co.]—All the provisions of the Civil Code and of the Code of Procedure respecting the cession de biens which are not inconsistent with those of the Act 8 Edw. VII. c. 69, apply to the liquidation of mutual fire insurance companies. When a mutual fire insurance company appeals to the Supreme Court from a judgment of the Court of Review placing it in liquidation, its property will be administered by a sequestrator pending such appeal unless security has been furnished for compliance by the company with the judgment of the Supreme Court.

Dostaler v. Canadian Mutual Fire Insurance Co., 11 Que. P.R. 303 (Ct. Rev.).

—Action by liquidators—Sanction of Court—General manager—Transactions on his own behalf.]—In an order for the winding-up of a company, it was provided that the liquidators with the consent and approval of the inspectors appointed to advise in the winding-up, might exercise any of the powers conferred upon them by the Winding-up Act without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers. S. 38 enables the Court to provide by any order subsequent to the wind-

ing-up order that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court. The liquidators having brought an action, proceeding under the above order, Morrison, J., at the trial held that it was necessary to obtain an order subsequent to the winding-up order before s. 38 enured:—Held, on appeal, that the action having the consent and approval of the inspectors, was properly brought. Defendant as general manager of a company engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber which he disclosed to the defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as represenative of the company. Defendant drew a cheque on the funds of the company for the Government dues on this timber, but did not cash the cheque, and the transaction appeared in the books as "Kitimat limits." Held, on appeal, reversing the finding of Morrison, J., (reported (1909), 14 B.C.R. 390), that as the limits were acquired for the company in the first instance, and the company's funds used for that purpose that the defendant was merely a trustee for the company, to which he was bound to account. Held, further, that the transaction was one within the scope of the company's operations.

Kendall v. Webster, 15 B.C.R. 268.

—Mortgage made within three months—Presumption—Pressure—Mortgage to bank to secure existing liability.]—The defendants, a chartered bank, advanced $6,000 to a brewing company in the ordinary course of dealing. Frequent demands for payment having been made, the company agreed to secure the amount by mortgage on their lands, and the directors met and passed a by-law for the purpose of implementing the agreement. The by-law contained a recital that s. 73 of the Ontario Companies Act authorized the directors to borrow money for the purposes of the company. This assertion was unnecessary, and was also inapplicable, as the directors were not about to borrow or give security for a present loan, but to secure by mortgage an existing liability. Aside from this, the by-law contained all that was necessary to authorize the preparation and execution by the president and secretary of a mortgage to secure the liability of $6,000:—Held, in an action by the liquidator of the company for a declaration that the mortgage was void, that, the debt being an outstanding liability of the company, and the intention and agreement being to mortgage the company's real property, s. 78 of the Act gave the directors ample power to do so, and all that was needed was that they should act under the powers vested in them by that section; and the by-law was a sufficient authorization of the mortgage, notwithstanding the recital referring to s. 73 and the failure to refer to s. 78. Held, also, per Moss, C.J.O., that the objection to the by-law was not open to the company, and in this respect the plaintiff, as liquidator under a winding-up order, occupied no higher position. The defendants, having received a mortgage apparently duly executed on behalf of the company, were entitled to assume that everything necessary to its valid execution had been regularly and properly done. Judgment of Sutherland, J., upon this branch of the case, reversed. Held, also, per curiam, that the presumption of intent to defraud the company's creditors, arising from the circumstance that the mortgage was made within three months next preceding the commencement of the winding-up (s. 94 of the Winding-up Act), was rebuttable, and, upon the evidence, was rebutted, pressure being shown. Judgment of Sutherland, J., upon this branch of the case, affirmed.

Hammond v. Bank of Ottawa, 22 O.L.R. 73.

—Voluntary winding-up—When interfered with by Court—Liquidator—Notice of appeal.]—The Court will not interfere with a voluntary winding-up of a company by its shareholders and order a compulsory liquidation unless it is shown that the rights of the petitioner will be prejudiced by the voluntary winding-up. Service on the liquidator of a notice of appeal on behalf of the company from a compulsory winding-up order is not necessary.

In re The Oro Fino Mines, Limited, 7 B.C.R. 388.

—Winding-up—Life insurance—Proof of claim of unmatured policy.]—The amount for which the holder of an unmatured policy payable at the death of the insured is to rank against an insolvent life insurance company in liquidation under the Ontario Insurance Act, R.S.O. 1897, c. 203, is the difference if any, at the date of the commencement of the winding-up, between and in favour of the present value of the reversion in the sum assured at the decease of the life and the present value of a life annuity of an amount equal to the future premiums which would become payable during the estimated duration of the life assured.

Re Merchants Life Association (Vernon Cases), 1 O.L.R. 256.

—Winding-up—Petition for order—Previous demand—Service of writ of summons—Notice of application.]—Service of the specially indorsed writ of summons in an action against the company to recover the amount of a creditor's claim is not a sufficient demand in writing, within the meaning of s. 6 of the Winding-up Act,

R.S.C. 1886, c. 129, to serve as the foundation for a petition by the creditor for a winding-up order:—Semble, that, as s. 8 of the Act requires the petitioner to give four days' notice of his application, effect could not be given to a ground of which the company had not that notice.

Re Abbott-Mitchell Iron and Steel Co., Limited, 2 O.L.R. 143.

—Winding-up—Order for sale of property—Appeal.]—A judgment authorizing the liquidation of a company being wound up under the Winding-up Act, to sell the property of the company under certain conditions is not an order subject to appeal within the terms of the statute.

In re Montreal Cold Storage and Freezing Co., 3 Que. P.R. 371 (S.C.).

—Winding-up—Application for order—Previous voluntary assignment—Creditors—Discretion.]—The Court has a discretion to grant or withhold a winding-up order under s. 9 of R.S.C. 1886, c. 129. Re William Lamb Manufacturing Co., of Ottawa (1900), 32 O.R. 243, dissented from. Where the assets of the company were small, and the creditors had almost unanimously entered upon a voluntary liquidation under the Ontario Assignments Act, a petition for a compulsory winding-up order was refused.

Re Maple Leaf Dairy Co., 2 O.L.R. 590. (Boyd, C.).

—Liquidator—Action against.]—A suit cannot be entered against a liquidator appointed under the Winding-up Act, R.S.C. c. 129, without leave of the Court.

Robillard v. Blanchet, 19 Que. S.C. 383 (Andrews, J.).

—Liquidator—Production of documents—Arts. 286-289 C.P.Q.]—The official liquidator of a company defendant in an action to set aside a deed for fraud may be examined on discovery and compelled, under subpoena, to produce the books of the company in his possession.

Ward v. Montreal Cold Storage and Freezing Co., 4 Que. P.R. 47 (S.C.).

—Practice—Service of petition—Time.]—Under s. 8 of the Winding-up Act, R.S.C. 1886, c. 129, a petition may be presented "after four days' notice" of the application, and where notice of its presentation was given on the 4th for the 8th November it was held sufficient.

Re Arnold Chemical Co., 2 O.L.R. 671 (Boyd, C.).

—Winding-up Act—R.S.C. 1886, c. 129—Claims provable thereunder—Fully secured creditors—Jurisdiction of Master.]—Creditors holding fully secured claims, and content to rely on their security, without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in winding-up proceedings under the Dominion Winding-up Act, R.S.C. 1886, c. 129, and have them adjudicated upon therein; and where such creditors without any intention to submit to such adjudication had filed with the liquidator affidavits stating their claims as fully secured, leave was given them to withdraw the same.

Re Brampton Gas Co., 4 O.L.R. 509.

—General authorization to liquidator.]—The Judge in a winding-up proceeding under the Dominion Act may properly give the liquidator a general authorization to act without applying to the Court in matters involving less than $100.

Re Victoria-Montreal Fire Ins. Co., 4 Que. P.R. 315 (Langelier, J.).

—Final order.]—An order for the winding-up of a company is a final and not an interlocutory order.

Re Florida Mining Co., 8 B.C.R. 388.

—Ontario Winding-up Act—Practice on appeal—Settling appeal case—Final order—R.S.O. 1897, c. 222.]—S. 27 of the Ontario Joint Stock Companies Winding-up Act, R.S.O. 1897, c. 222, contains the whole code of proceedings on an appeal under that Act. There is no provision requiring reasons for or against the appeal, or any delivery or settlement of the case in appeal. Semble, an order of a County Judge rescinding an order previously made by him under s. 41 of the above Act for the dissolution of the company is a final order, and therefore appealable.

In Re Equitable Savings Loan and Building Association, 4 O.L.R. 479.

—Winding-up—"Just and equitable"—Substratum gone—Shareholder's petition—Contributory—B. C. Companies Winding-up Act, 1898.]—An order for compulsory winding-up may be made under s. 5 of the B. C. Companies Winding-up Act, 1898, notwithstanding the winding-up is opposed by the company. In winding-up proceedings it appeared (1) that shares had been unlawfully issued at a discount and at different percentages of their face value. (2) That the substratum was gone, and that the company was unable to carry on business. (3) That there was a question as to the liability of the company to the principal shareholder who had always been in practical control of the company:—Held, by the Full Court, affirming Irving, J., that it was just and equitable that the company should be wound up.

Re Florida Mining Co., Limited, 9 B.C.R. 108, 38 C.L.J. 517.

—Debenture-holders' suit — Receiver — Liquidator—Displacing receiver by liquidator—Order appointing receiver—Order

varied, and limited to property conveyed by debenture security.]—Where debenture-holders in a suit against a company to enforce their mortgage security obtained the appointment of a receiver before, but subsequently to an application for, an order to wind-up the company, and there was a dispute between the receiver and the liquidator in the winding-up as to what property was conveyed by the mortgage, and the liquidator had obtained liberty to dispute in the suit the validity of the mortgage, the Court declined to discharge the receiver, or to appoint the liquidator receiver in his place. Order appointing receiver in a debenture-holders' suit varied by limiting property to be received by him to property conveyed by their mortgage security.

Bank of Montreal v. Maritime Sulphite Fibre Co., Limited, 2 N.B. Eq. 328.

—Winding-up—Right of creditor — No available assets—Examination of officers—R.S.C. 1886, c. 129.]—The Court has a discretion to grant or withhold a winding-up order under s. 9 of R.S. Canada, 1886, c. 129. Re Maple Leaf Dairy Co. (1901), 2 O.L.R., followed. A company will not be compulsorily wound-up at the instance of unsecured creditors where it is shown that nothing can be gained by a winding-up, as for example, where there would not be any assets to pay liquidation expenses. On the hearing of a winding-up petition which was dismissed, the petitioner did not avail himself of an opportunity to examine the officers of the company:—Held, on appeal, that it was too late then to grant an inquiry.

In Re Okell & Morris Fruit Preserving Co., Limited, 9 B.C.R. 153.

—Bank Act, s. 46—Inspection of customer's account—Company — Manager—Private liabilities.]—S. 46 of the Bank Act, 1890, 53 Vict. c. 31 (D.), providing that "no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank," does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a Court of law between the bank and another customer who attacks them, and shows good cause for requiring the information he seeks. The company had an account with the bank (claimant), and the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator showed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim:—Held, that the liquidator, in examining the agent of the bank for the purpose of showing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party to the proceeding; more especially as the bank had set up certain transfers of cash from one account to the other as justifying them in charging the company's account with the manager's liabilities. Held, also, that there was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no further. Held, also, that periodical acknowledgments given by the manager to the bank of the correctness of the company's account could not be set up as a bar to an inquiry into the account, where specific errors in it were charged, to the knowledge of the bank.

Re Chatham Banner Co.; Bank of Montreal's Claim, 2 O.L.R. 672 (D.C.).

—Distribution of surplus—Shareholders—By-laws—Resolutions.]—A municipal water company, incorporated under the Ontario Joint Stock Companies Act, sold their undertaking and franchise to the municipality, and passed a resolution providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares, and for payment of the liabilities and the costs of winding-up, etc, and directing that the surplus should be distributed amongst the members according to their rights and interests in the company. By by-law of the company, holders of second preference shares were to be paid dividends at six per cent., and for a period of five years were not to participate further in the profits of the company. In case of default in payment of any dividend, the deficiency was to be paid out of the net profits of succeeding years, and no dividend was to be paid on the ordinary stock until such deficiency should be fully paid. Second preference shareholders also had the right, under the by-law, upon foregoing their secured dividend of six per cent., to surrender their shares and receive the par value thereof, or a corresponding number of ordinary shares, in which case they would have the same rights and privileges as the ordinary shareholders; but none of them exercised this option. The by-law also provided that, in the event of the company being wound-up, if any surplus

of the capital assets of the company was to be returned to the shareholders, the holders of second preference shares were to be paid the full amount of their shares and all dividends before the return of the capital of any ordinary shares, "and, subject thereto and to the first preference stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets:"—Held, that the second preference shareholders were not entitled to share in the surplus assets. Held, also, that the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares, not to the amounts paid on their shares. Birch v. Cropper, in re Bridgewater Navigation Co. (1889), 14 App. Cas. 525, followed.

Morrow v. Peterborough Water Co., 4 O.L.R. 324 (MacMahon, J.).

—Liquidator's bond—Money received as assignee—Appeal—Finality of certificate.] —After the assignee for the benefit of creditors of an incorporated company had sold part of the assets and received the proceeds he was appointed liquidator under the Winding-up Act, and gave security by a bond which recited all the proceedings and orders and was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay as liquidator:—Held, that the funds and property in the hands of the assignee became vested in him as liquidator upon his appointment as such and that the sureties were responsible for his subsequent misappropriation thereof. The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties and should form a valid and binding charge against them:—Held, that the sureties had the right to appeal from the certificates in accordance with the usual practice of the Court. Judgment of a Divisional Court affirmed.

In Re Army and Navy Clothing Co. of Toronto, Limited, 3 O.L.R. 37 (C.A.).

—Voluntary liquidation—Notice of meeting.]—A notice sent by mail to all the shareholders of a company of a special meeting for the purpose of placing the company, which was not insolvent, in voluntary liquidation, and accompanied by forms of proxies, is sufficient, and if a resolution is passed for the winding-up of the company no further notice is required of the application to the Court. The intention to nominate a certain person for liquidator is sufficiently indicated by the mention of his name in the forms of proxies sent to prevent any interested party from claiming that he is taken by surprise if such person is appointed liquidator.

In re North-West Cattle Co. v. Allan, 5 Que. P.R. 30 (Sup. Ct.).

—Company—Dominion Winding-up Act—Staying proceedings in another province—Staying execution—Setting aside sale.]—There is jurisdiction under s. 13 of the Dominion Winding-up Act R.S.C. 1886, c. 129, to restrain proceedings against the company, even in actions outside the ordinary territorial jurisdiction of the Court, and the enforcing of an execution is a proceeding within this section:—Held, therefore, that there was jurisdiction in the High Court in this Province to make an order staying proceedings under an execution in the hands of the sheriff of a county in the Province of New Brunswick, as had been done in this case. But the sheriff having, notwithstanding, proceeded with the sale under the execution against the lands of the company, and executed a deed of the same to the purchaser:—Held, that there was no jurisdiction in the Court under the Winding-up Act to make an order summarily declaring the sale void.

Re Tobique Gypsum Company, Costigan v. Langley, 6 O.L.R. 515 (C.A.).

—Voluntary liquidation—Appointment of liquidator—Notice to shareholders and creditors—R.S.C. c. 119, s. 20.]—The appointment of a liquidator to a company should be set aside if a person interested shows that such appointment had been made without notice to the creditors, contributories and shareholders of the company.

Stimson v. Northwest Cattle Co. and Allan, 5 Que. P.R. 181.

—Pending action for calls—Counterclaim for rescission—Leave to proceed refused.]—Previous to an order for the winding-up of the company under the Dominion Winding-up Act, an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus:—Held, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim; and his application for leave to proceed in the action notwithstanding the winding-up order was refused, but leave to apply again was reserved. Dictum of Strong, C.J., in Re Hess Manufacturing Co., 23 Can. S.C.R. 644, at pp. 665-6, explained. Leave to appeal from the order of a Judge in Court affirming the dismissal by the referee of the application for leave to proceed was refused.

In re Pakenham Pork Packing Co., 40 C. L.J. 35 (Britton, J.).

—Winding-up—Final order—Order dissolving company—Order rescinding.]—On March 24th, 1902, a County Court Judge made an order, upon an affidavit of a liquidator, declaring the above association dissolved. On June 21st, 1902, on the application of a dissatisfied shareholder, he made an order revoking his former order, and also one which he had made on April 7th, 1902, staying proceedings in actions against the association:—Held, that the order of June 21st was an appealable order, for even if the appeal to the Court of Appeal under s. 27 of the Ontario Winding-up Act was to be restricted to appeals from final orders, yet this was a final order since it put an end to the order of dissolution. Held, however (Maclennan, J.A., dissentiente, on the ground that County Court Judge had been misled when making the order), that the County Court Judge had no authority to make the order of June 21st, as he had no further material before him than he had had when making that of March 24th, and there was no reason for saying that he had been misled in making the former order, and the proper way to have attacked the latter order was by appeal.

Re The Equitable Savings Loan and Building Association, 6 O.L.R. 26 (C.A.), 2 Commercial L.R. 446.

— Company in liquidation — Opposition —Costs.]—A person executing a judgment against the goods of a company in liquidation may be condemned for costs incurred by the liquidator, on an opposition to such execution.

The Great Northwestern Telegraph Co. v. La Compagnie du Journal Le Monde, 5 Que. P.R. 379.

—Security taken bona fide—Holder of—Regularity of proceedings — Liquidator suing in his own name—Liability for costs.]—Where an action is brought by the liquidator of a company in liquidation in his own name he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect. A person who bona fide takes a security in the ordinary course of business from an incorporated company is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. In this respect a shareholder stands on the same footing as a stranger.

Jackson v. Cannon, 10 B.C.R. 73.

—Winding-up—Leave to bring action—Secured creditors—Proving claims.]—A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security. It is not optional for a secured creditor to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under s. 63 et seq. of the Winding-up Act.

In re Lenora, 9 B.C.R. 471, 2 Commercial L.R. 423.

—Winding-up—Petition by shareholder—Insolvency—R.S.C. c. 129, s. 5 (c.) and 62-63 Vict. c. 43, s. 4.]—By s. 5 (c.) of the Winding-up Act (Dominion), a company is deemed insolvent "if it exhibits a statement showing its inability to meet its liabilities:—Held, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders. On the hearing of a petition based on such a statement the statement must be accepted as correct.

In re United Canneries, 9 B.C.R. 528, 2 Commercial L.R. 396.

—Liquidator—Winding-up Act, 1886, ss. 15 and 31—Restricted power of liquidators of bank to sue in their own names.]—Under the Winding-up Act (Can.), 1886, ss. 15 and 31, a company in liquidation retains its corporate powers including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name or in that of the company, according to the nature of the action; in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property. Where liquidators sued in their own name to recover a debt due to the company:—Held, that the error was one of form, which the Court had power to give leave to amend under ss. 516 and 521 of the Code of Civil Procedure. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion.

Kent v. La Communaute des Soeurs de la Providence, [1903] A.C. 220, 2 Commercial L.R. 379.

—Two petitions—Conduct of proceedings.]—When there were two petitioners for a winding-up order against the one company although orders were made under both petitions, the conduct of the proceedings was given to the later petitioner, a creditor for money paid, in preference to the earlier one who was shown to be an employee of and in close touch with the company.

Re Estates Limited, 8 O.L.R. 564 (Magee, J.).

—Purchase by inspector—Fiduciary capacity—Liquidator — Jurisdiction.]—An inspector appointed in a liquidation under the Winding-up Act, R.S.O. 1866, c. 129,

cannot be allowed to purchase property of the insolvent. It rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator.

Re Canada Woollen Mills Company, 8 O.L.R. 581 (MacMahon, J.).

—Material supporting petition—Necessity for proof of insolvency.]—To enable a company to be wound up under the Winding-up Act, R.S.C. 1886, c. 129, it is not sufficient for the company to appear by counsel and admit insolvency and consent to be wound up, but the facts, as required by the Act, showing insolvency must be disclosed on the material on which the petition is based.

Re Grundy Stove Company, 7 O.L.R 252 (Meredith, C.J.).

—Winding-up — Discretion—Assignment for the benefit of creditors.]—When an assignment for the benefit of its creditors has been made by a joint stock company a creditor of the company is not entitled as of course to a winding-up order. A discretion to grant or refuse the order exists notwithstanding the making of the assignment. Wakefield Rattan Co. v Hamilton Whip Co. (1893), 24 O.R. 107, and Re Maple Leaf Dairy Co. (1901), 2 O.L.R. 590, approved. Re William Lamb Manufacturing Co. (1900), 32 O.R. 243, considered. Where an assignment for the benefit of its creditors had been made by a company, and its assets had been sold with the approval of the great majority of its creditors and shareholders, an application to wind up the company made by a creditor and shareholder who had taken part in all the proceedings, and had himself tried to purchase the assets, was refused. Judgment of Teetzel, J., affirmed.

Re Strathy Wire Fence Company, 8 O.L.R. 186 (C.A.).

—Contributories — Inscription in law — Pleading.]—1. An inscription in law founded on grounds which apply to several paragraphs of a pleading, should be directed against all of such paragraphs, and not against only one of them. 2. In proceedings to put an alleged shareholder on the list of contributories and to obtain payment of the balance of stock subscribed by him, he is not entitled to plead that conditions precedent to the organization of the company were not fulfilled, and the company never validly existed. Common v. McArthur, 29 Can. S.C.R. 239, followed.

Victoria-Montreal Fire Ins. Co. v. Hyde, 6 Que. P.R. 302 (Davidson, J.).

—Company in liquidation—Appeal to the Court of Review—Winding-Up Act, s. 74.]—The liquidator of a company in liquidation, whose action has been dismissed, may, with the leave of a Judge, appeal from that judgment to the Court of Review.

Montreal Coal & Towing Company v. Standard Life Assurance Company, 6 Que. P.R. 243 (C.R.).

—Foreign company—Seizure of shares—Art. 103 C.P.Q.]—The Superior Court at Montreal has jurisdiction in the case of a saisie-revendication of shares in the capital stock of a foreign company, when plaintiff and defendant, as well as the third party who is in possession of the shares, are domiciled there; and the company cannot, by declinatory exception, demand that the seizure be set aside as against it.

Kinsela v. Kinsela, Q.R. 25 S.C. 270 (Sup. Ct.).

—Notice to contributories—Details thereof.]—A notice that the Court will proceed to fix the list of contributories on a certain day at the Court House, without indicating the hour at and the room in which such operation will take place, is insufficient; the same should be in the form usually followed for notices of proceedings before the Superior Court.

Citizens Insurance Co. v. Montreal Trust and Deposit Co., 6 Que. P.R. 275 (Tait, A.C.J.).

—Leave to proceed with action—Debenture holder—Judgments registered prior to winding-up.]—The fact that prior to a winding-up order judgments against the company being wound up were registered, will not disentitle a mortgagee or a debenture holder of his right to obtain leave to proceed with an action to enforce his security.

Re Giant Mining Company, 10 B.C.R. 327.

—Winding-up petition—Appearance thereto—Costs—Waiver.]—Held, that creditors and debenture holders who neglected to enter an appearance to a winding-up petition as required by Rule 56 of the Winding-up Rules (B.C.) passed by the Judges on 1st October, 1896, but who appeared by counsel on the return of the petition which was dismissed with costs, were not entitled to costs. The fact that their counsel was heard without objection by petitioner's counsel makes no difference.

Re Albion Iron Works Company, 10 B.C.R. 351.

—Petition—Notice of—Proof of facts.]—Under s. 8 of the Winding-up Act, R.S.C. c. 129, which directs that a creditor may, after four days' notice of the application to the company, apply by petition for a winding-up order, a notice given on the first of the month for a hearing on the fifth is sufficient:—Semble, the Court may allow the facts alleged in the petition to

be proved on the hearing, although the petition was not verified by affidavit.

Re Maritime Wrapper Company, Limited, 35 N.B.R. 682.

—Security—On contesting claim—R.S.C. c. 129.]—The security required by the Winding-up Act, R.S.C. c. 129, applies only to contesting claims filed or admitted by the dividend sheet, and not to contesting the dividend sheets as a whole.

In re Union Brewery, 6 Que. P.R. 395 (Sup. Ct.).

—Order for liquidation—Prior distress for rent—Effect.]—A distress for rent is not avoided by proceedings taken under the Winding-up Act, 2 R.S.C. c. 129, to put a company in liquidation if the distress is made before the making of the winding-up order.

Re Colwell Candy Company, 35 N.B.R. 613.

—Inability to pay debts as they become due—Dominion Winding-up Act.]—In a petition for the winding-up of the above company, under the Dominion Winding-up Act, R.S.C. 1886, c. 129, the petitioner alleged that the company was unable to pay its debts as they became due, within the meaning of s. 5 (a) of the above Act, but gave no evidence of the demand in writing, and neglect by the company to pay within sixty days thereafter, as required by s. 6:—Held, that the petition must be dismissed, unless amended and fresh evidence given, since s. 6 specifies the only way of proving a case under clause (a) of s. 5.

Re Ewart Carriage Works, 8 O.L.R. 527.

—Cancellation of letters patent—Action by Attorney-General—Order in council pendente lite—Injunction.]—An action having been brought by the Attorney-General against an incorporated company for a declaration that they were carrying on an illegal business and for forfeiture of their charter, the Attorney-General, while the action was pending, summoned the defendants before him to show cause why their charter should not be revoked by order in council:—Held, that, whether the right of cancellation of letters patent of incorporation be now only statutory (see R.S.O. 1897, c. 191, s. 99), and merely a power, not a duty, or whether the prerogative right still subsists, the bringing of an action does not clothe the Court with jurisdiction to restrain the exercise of the power. The Court has no jurisdiction, at the suit of a subject, to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign. It is not proper for a Judge to express an extra-judicial opinion as to the mode in which the discretion of the Attorney-General should be exercised.

Attorney-General for Ontario v. Toronto Junction Recreation Club, 8 O.L.R. 440.

—Conservatory attachment—Petition to quash.]—The liquidator of an extra-provincial company which is being wound-up in another province, can by petition ask that the seizure of the goods of the company in Quebec be quashed, as made without leave of the Courts of that province.

Phillips v. Canada Cork Company, 7 Que. P.R. 223 (Davidson, J.).

—Insolvent banks.]—

See BANKING.

—Inspector—Purchase of assets—Liquidator—Sale of assets—Approval of Court.]—An inspector appointed in liquidation proceedings under the Dominion Winding-up Act, R.S.C. 1886, c. 129, is in a fiduciary position as regards the disposal of the assets and cannot, without the consent of all persons interested, become the purchaser thereof. In such liquidation proceedings the power to sell the assets is by the Act vested in the liquidator, not in the Court, though the liquidator must obtain the approval of the Court as a condition of exercising the power of sale.

Re Canada Woollen Mills, Limited; Long's Appeal, 9 O.L.R. 367 (C.A.).

—Foreign company as petitioner—Power of attorney.]—A power of attorney given in the name of a company and under its common seal by the managing officers of the company and also signed by the secretary, is valid and is prima facie the act of the company.

Re Brook Co. and Leitch Co., Limited, 7 Que. P.R. 206.

—Calls on shares—Charter restrictions—Winding-up Act, s. 49.]—S. 49 of the Winding-up Act provides that no calls shall compel payment before maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in the section contained:—Held, that, under the above section the liquidator of a company in liquidation cannot, with or without the authorization of the Court, make calls of such a nature as to make the obligations of the contributory more onerous than provided by the charter incorporating the company.

Victoria and Montreal Fire Insurance Co. v. Brown and Hyde, 26 Que. S.C. 282 (Dunlop, J.).

—Suit by liquidator—Requirements of petition.]—A petition whereby the liquidator of a company asks to be allowed to sue one of the debtors thereof, need not be served upon the said debtor, before its presentation to the Court or Judge.

Opéra Comique v. Desaulniers, 7 Que. P.R. 83 (Curran, J.).

—**Contributories—Preference shares—Common shares—By-law—Directors — Allotment of shares.**]—The shareholders of the company passed a resolution in favour of the creation of preference stock, with a direction to the directors to pass a by-law, which the directors failed to do:—Held, that s. 22 of the Ontario Companies Act not having been complied with, there was no valid creation of preference stock, and G., a person who had signed an application for sixteen shares of preference stock, could not be held liable as a contributory in respect of these shares, there being no acquiescence, delay, or conduct on his part to estop him from alleging and shewing that, at the time when he made his application, and thenceforth until the liquidation proceedings, the company were not in a position to give him that for which he applied. G. also applied in writing for eight shares of the common stock, and undertook to accept the same or any less amount, paying therefor $60 per share according to the terms named in the prospectus. But, in lieu of these terms, it was arranged between G. and an agent of the company that he should give a promissory note at twelve months for the whole amount, which was done. The application was never brought before or dealt with by the directors, but the secretary notified G. that the directors had allotted him the shares in accordance with his application. They had not, however, passed a by-law or otherwise ordained, as required by s. 26; they had merely passed a resolution that "the secretary be instructed to allot all stock as applications are passed in:"—Held, that the directors could not delegate their duty to a subordinate officer, and there never was any valid acceptance of G.'s application, and he was, therefore, not liable as a contributory in respect of the eight shares. Held, also, upon the evidence, that, at the time of G.'s application, the company held no shares of the common stock which they could validly allot to him. In the case of R., another person charged as a contributory:—Held, that it was covered by the decision in G.'s case, the additional circumstances set out in the report making no difference. In the case of H., another person charged as a contributory, the allotment of shares was professed to be made by the secretary, and the notice thereof was given in the same manner and under the same circumstances and authority as in the other cases. But at the time of H.'s application there were shares of the common stock which could have been allotted. H. gave his promissory note for the price of shares for which he applied, and afterwards made payments thereon, and he attended meetings of shareholders and moved resolutions thereat. He had no notice, however, until after the liquidation, of any irregularities in the creation of the preference stock, and was not aware of the irregularities in connection with the allotment of shares:—Held, that, as there was no contract in fact, both by reason of there being no preferred stock in existence and the want of allotment, making payments in ignorance of these facts was not a conclusive act, and the attendance and conduct at the meetings was not such an active participation in the affairs and business as to debar any question as to the status of an alleged shareholder. If there was any holding of himself out as a shareholder by H., it was not under circumstances which could affect creditors or create any change of position to their prejudice.

Re Fakenham Pork Packing Co., 12 O. L.R. 100 (C.A.).

—**Contributory—Subscription for shares—Contract under seal—Offer—Acceptance—Allotment.**]—The respondent, by a writing under seal, dated the 29th July, 1903, subscribed for one share in the capital stock of the company, and agreed to pay $100 for it, 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and the balance as the directors might deem advisable. It was arranged that the company should draw upon the respondent for the amount payable on application. On the next day, and before anything had been done by the company, the respondent wrote to the company, cancelling his subscription. The company drew on the respondent for the 10 per cent., but he refused to accept the draft, and, being pressed by the company, by letter of the 16th September, 1903, to accept the draft, again declined to do so. On the 8th September, 1903, a resolution was passed by the directors "that the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment." The company did not draw on the respondent for the second payment, and he was not notified of the allotment, but his name was recorded in the book required by s. 71 of the Ontario Companies Act to be kept by the company, as a shareholder holding one share. He was not afterwards in any way treated or dealt with as a shareholder. In a proceeding for the winding-up of the company, it was sought to make him liable as a contributory:—Held, following Nelson Coke and Gas Co. v. Pellatt (1902), 4 O.L.R. 481, that the instrument signed by the respondent was not a mere offer which he could withdraw before acceptance; but that the company never accepted or intended to accept him as a shareholder unless the down payment of 10 per cent. was made, and, after the refusal to make that pay-

ment, they made it evident that they had not accepted him; and, even if they had accepted him, it was not shown that the acceptance was communicated to him; and he was not, therefore, liable as a contributory.

Re Provincial Grocers, Limited; Calderwood's Case, 10 O.L.R. 705 (Meredith, C.J. C.P.).

—Bonus shares—Transfer of before winding-up—Liability—Contributory.] — Held, that a former holder of bonus shares, which he had before winding-up transferred to persons entitled to hold them as fully paid up, is not liable to be placed on the list of contributories in respect to them, unless subjected to such liability by the Act under which the company was created or some Act relating thereto. Semble, however, that such a shareholder, if a director, commits a breach of trust in being a party to the allotment of the shares as fully paid up, as well as in putting them off on his tranferees to the prejudice of the company as fully paid up shares; and such a case is a proper one for an order under s. 83 of the Winding-up Act.

Re Wiarton Beet Sugar Co., 12 O.L.R. 149 (Meredith, C.J.C.P.).

—Winding-up—Settlements with claimants.]—Transactions between a liquidator, with the authority of a Judge, and a claimant under s. 61, R.S.C. c. 129, bind the creditors of a company in liquidation and parties interested; they cannot be impeached except on the ground of nullity. (2) The statute 63 Viet. c. 43 (D.), permitting meetings and consultation of creditors, in certain cases, does not repeal or modify the provisions of said s. 61, although it adds thereto.

Ward v. Mullin, Q.R. 14 K.B. 49.

—Contributories—Application for shares—Withdrawal—Absence of allotment and notice—Notice of call.]—An agent of the company canvassed the respondents to subscribe for shares and took them to the company's office, where they signed and handed to the manager an application, not under seal, by which they subscribed for 25 shares of the common stock of the company, at the par value of $100 per share, for which they agreed to pay upon the delivery of the regular stock certificate. In the stock ledger of the company, under the names of the respondents and the heading "common stock," of the same date as the application, an entry was made: "Allotted bought Dr. 25 shares, amount $2,500, balance 25 shares, Dr. $2,500." On the same day the respondents gave the canvassing agent a cheque for $100 on account of the payment for the shares, but on the following morning they determined to withdraw from the application, and stopped payment of the cheque, which had been already presented and payment refused for want of funds. On the same day they told the agent that they would have nothing more to do with the stock they had applied for, but they gave no written or other notice of withdrawal. The company's minute book contained no note or entry nor was any evidence given of any resolution of the directors allotting stock to the respondents or directing notice of allotment to be sent to them, and a formal notice of allotment was not sent. No attempt was made to enforce payment of their cheque, and they received no further communication on the subject of the shares until three months later, when the company's manager sent them notice of a call and demanded payment. There were two subsequent calls, of which notices were also sent to the respondents, and all three were authorized by resolutions of the directors:—Held, that neither of the respondents ever became a shareholder of the company, and that they were therefore properly struck off the list of contributories in a winding-up. Per Osler, J.A., that there had been no allotment or appropriation of specific shares to the respondents; the entry of their name in the stock ledger was not conclusive; the resolutions authorizing the calls, dealing with stock which had been already allotted, could not be regarded as equivalent to an allotment; the fact that notices of calls were sent to the respondent amounted to nothing if the stock had not been already allotted to them by the directors. Quære, per Osler, J.A., whether notice of a call can be regarded as equivalent to notice of allotment. Semble, also, per Osler, J.A., that, on the evidence, the respondents, as they had a right to do, withdrew their application, and that this came to the notice of the company on the day after the application was signed, which would be another answer to the liquidator's demand. Per Meredith, J.A.:—The real question is not whether there was or was not a formal allotment of stock; but is whether there was a concluded bargain for the sale of the shares; the onus of proof of the company's binding acceptance of the offer to buy was upon the liquidator, and that was not clearly proved. Upon the whole evidence it ought to be found that there was no acceptance binding upon the company, at the time of the withdrawal of the offer to buy.

Re Canadian Tin Plate Decorating Co.; Morton's Case, 12 O.L.R. 594 (C.A.).

—Liquidator—Remission of debt.]—A curator has no power to remit debts due to the insolvent company, except upon a compromise.

Re Laurie Engine Co., 7 Que. P.R. 431.

—Costs of alleged contributories payable out of assets—Deficiency of—Costs of peti-

tioning creditors—Liquidator's costs and compensation—Priority.]—On the application of the liquidator of a company directed to be wound up, an order was made by a local Judge directing two persons to be placed on the list of contributories, which was affirmed by a Judge of the High Court and by the Court of Appeal, but was reversed by the Supreme Court of Canada with costs to be paid by the liquidator as well of that Court as of the prior appeals:—Held, that the successful appellants were entitled to their costs out of the assets of the estate in priority to those incurred by the liquidator—the reasonableness of the liquidator's claim forming no element in the matter—but subject to certain costs payable by the liquidator to the petitioning creditors, and to such costs of litigation as were incurred by the liquidator in the realization of certain assets, as well as a reasonable sum as compensation for his care and trouble in such realization, payable out of the assets so realized.

In re Baden Machinery Co., 12 O.L.R. 634.

—Winding-up—Petition for—Service on assignee for creditors—Agent of company.]—Service of a petition for a winding-up order on an assignee for creditors of a company is not service upon the company as required by s. 8 of the Winding-up Act, R.S.C. c. 129, such assignee not being an agent of the company for the purposes of such service within Con. Rule 159, at any rate when the president and directors are readily accessible, and have given no express authority to the assignee to accept such service.

Re Rodney Casket Company, 12 O.L.R 409 (Anglin, J.).

—Appointment of liquidator—Notice to creditors, shareholders, etc.]—The appointment of a liquidator under the Winding-up Act, R.S.C. c. 129, without a previous notice to the creditors, contributories, shareholders or members of the company, in the manner and form prescribed by the Court, is null and void. The power given to the Court by s. 11 of 52 Vict. c. 32, to dispense with notices, etc., does not extend to that required for the appointment of a liquidator under s. 20 of the former Act.

Stimson v. North-West Cattle Company, 14 Que. K.B. 279.

—Judge's order—Power to vary—Mistake.]—A company against which a winding-up order had been made obtained at the instance of the large majority of its shareholders and holders of its bonds an order in an action by it against C., granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this Province confirming a judgment of the Supreme Court in Equity, and entrusting the conduct of the appeal to the company's solicitors. Subsequently the liquidators of the company moved to vary the order by adding a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this Province refusing to set aside the winding-up order was determined, and that the company's solicitors on the appeal in the action against C. should act therein only on instructions of the liquidators or their solicitor:—Held, that as there was no error or omission in the order resulting from mistake or inadvertence, and the order expressed the intention of the Judge who made it, the motion should be refused.

Re The Cushing Sulphite Fibre Company, 3 N.B. Eq. 231 (see next case).

—Order for liquidation—Form of—Appeal—Bond secured by trust mortgage—Right of holder to petition—Valuing security—Company when deemed insolvent.]—An order made under the Winding-up Act, 2 Rev. Stat. of Can. c. 129, directing the winding-up of a company instead of the business of a company, is good. The Court refused to dismiss an appeal taken under s. 74 of the Act, where an order had been made settling and allowing the appeal on the ground that the appellants had not complied with the practice governing in similar cases of appeal by serving or filing a notice or the grounds of appeal. A company issued bonds payable to bearer, the payment of which was secured by a trust mortgage, by which the company purported to assign certain of its property to trustees, in trust, for the benefit of the bondholders, and covenanted with the trustees for the payment of the principal and interest of the bonds to the bondholders:—Held, per Barker, McLeod and Gregory, JJ., that the holder of some of the bonds, the interest on which was overdue, was entitled to petition for the winding-up of the company. Held, per Tuck, C.J., and Hanington, J., that the bonds and trust mortgage must be read together, and that under the terms of the trust mortgage a bondholder was not a creditor within the meaning of the Act, and was not entitled to petition for a winding-up order. Per Tuck, C.J., Barker, McLeod and Gregory, JJ., that a secured creditor can make a demand under s. 6, and petition for the winding-up of the company, and is not bound to value in his petition his security under s. 62; that where a demand is made under s. 6, and the time for payment has elapsed, and the demand has not been complied with, and no reason is given why payment is not made, the company must be deemed insolvent within the meaning of the Act; that where the Judge has exercised his discretion under s. 19 and refused to regard the request of a majority of the creditors and shareholders opposed to the petition,

who did not offer or propose to continue business, but intended to allow the trust mortgage to be foreclosed, it should not be reviewed on appeal. Per Hanington, J., that the refusal to regard the wishes of all the unsecured creditors and the great majority of the secured creditors and shareholders was not a reasonable exercise of judicial discretion under s. 19, and the appeal should be allowed on that ground. That the petitioner's claim being amply secured, he had no right to petition and force the company into liquidation.

Re Cushing Sulphite Fibre Company, 37 N.B.R. 254.

—Winding-up order—Leave to appeal—Amount involved.]—In a case under the Winding-up Act, R.S.C. c. 129, an appeal may be taken to the Supreme Court of Canada by leave of a Judge thereof if the amount involved exceeds $2,000:—Held, that a judgment refusing to set aside a winding-up order does not involve any amount and leave to appeal therefrom cannot be granted.

Cushing Sulphite Fibre Company v. Cushing, 37 Can. S.C.R. 427.

—Application by shareholder for winding-up.]—A company incorporated under the Nova Scotia Companies Act, R.S. (1900), c 128, for the purpose of carrying on mining operations after operating its property for a time at a loss, disposed of it to another company, the consideration for the transfer being shares in the latter company. Application was made by one of the shareholders for a winding-up order under the provisions of the Companies Winding-up Act, R.S. (1900), c. 129, s. 5, the grounds being (1) that the substratum of the company had gone; (2) that it was not possible for the company to carry on the business for which it was created, and (3) that the sale of its property for shares in another company was illegal and unauthorized. The application was opposed by the company and it did not appear that either the creditors or the shareholders generally desired a winding-up:—Held, that the Judge to whom the application was made, was right under these circumstances in refusing an order. Also, that before giving effect to the application and taking the matter out of the hands of the directors and of the company, the learned Judge was right in requiring the shareholder to bring himself within the principle of the cases by showing, inter alia, that the company was in such a state of solvency that there was a reasonable probability of sufficient assets being left for the shareholders to give him a tangible interest in having the company wound up.

Re Tangier Amalgamated Mining Co., 39 N.S.R. 373.

—Lien of liquidator—Art. 1713 C.C.]—Under Article 1713 C.C. the liquidator of an insolvent company has no lien on the books, papers or movables of the company for the amount of his advances and of his remuneration.

Ross v. Walker, 8 Que. P.R. 156 (K.B.).

—Insolvent company—Stock subscription—False representations—Liquidator.] — (1) Subscribers for shares of a company who would, as against the company itself, be in a position to claim the avoidance of their contracts on the ground that they had been secured by fraudulent means have not the same right as against the liquidator of the company when placed in liquidation the latter acting, not in exercise of the company's rights but as representing the creditors. (2) Oral evidence to contradict or alter the terms of a written contract is inadmissible but the party who permits its reception without objection cannot demand its rejection on the hearing of an appeal.

Brownlee v. Hyde, Q.R. 15 K.B. 221.

—Liquidator—Want of authorization.]—The fact, that the liquidator of a company has not been regularly authorized to institute an action, must be pleaded by an exception to the form, and not by a plea to the merits.

Engineering Contract Co. v. Midland Railway Co., 8 Que. P.R. 293

—Liquidation operating as a discharge of servants.]—Plaintiff was engaged as accountant of defendant company in April, 1904. In the following August, the debenture holders seized the property and put in charge a receiver and manager, to whom plaintiff delivered the books of account, plaintiff himself having actually made the seizure. He afterwards continued in the same position as before the seizure, but was paid by the receiver:—Held, reversing Forin, Co. J. (who found that the seizure was fictitious), that there had been an actual seizure known to the plaintiff, and that, following Reid v. Explosives Company (1887), 19 Q.B.D. 264, the appointment of a receiver and manager operated as a discharge of the servants of the company, and the plaintiff could not recover.

Rolfe v. Canadian Timber and Saw Mills, 12 B.C.R. 363.

—Payment of dividends out of capital—Action by liquidator against directors—Claim of relief over against shareholders—Joinder of as third parties.]—In an action by the liquidator of an insolvent company against the directors, specifying several alleged illegal acts, amongst which was that of payment of dividends out of capital, the Master in Chambers, at the instance of two of the defendants, who claimed indemnity over against the share-

holders for any amount so paid, issued the usual third party order, under Con. Rule 209, directing that two out of a large number of shareholders should be joined as third-party defendants, as a test case, but no order for their representing the class was obtained, though it was stated that if they appeared such order would be applied for. On appeal by the plaintiff and the third parties, to a Judge in Chambers, the order was set aside. An appeal therefrom by the defendants to a Divisional Court was dismissed, the plaintiff undertaking that any moneys realized in the action would not be distributed without notice to the defendants and without leave therefor being obtained from the local Judge.

London and Western Trusts Co. v. Loscombe, 13 O.L.R. 34 (D.C.).

—Option in lease—Winding-up of lessor company—Liquidator—Sale by—Disregard of option—Damages.] — The defendants leased a house to the plaintiff, the lease containing a clause: "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same the lessee shall be given the option of purchasing on same terms as in said offer." Subsequently an order for the winding-up of the company was made, and the liquidator sold the premises without giving the plaintiff an opportunity to exercise his option:—Held, that the winding-up order did not in any way cut down the rights of the plaintiff or change his position; that the liquidator was authorized to sell the premises, but only subject to the terms and conditions of the lease; and that he was bound to submit to the plaintiff, who had not waived his rights, the offer received, and, not having done so, the company was liable in damages, notwithstanding that the plaintiff was aware that the liquidator was making efforts to sell the premises.

McCarter v. York County Loan Company, 14 O.L.R. 420 (Mabee, J.).

—Suit by shareholders to set aside subscription—Winding-up order—Continuance of proceedings.]—If before a winding-up order, under R.S.C. c. 129, is made, a suit is brought against a company by a shareholder to have his subscription set aside for fraud, he will be authorized on motion to continue his proceedings after the order has been obtained.

Johnston v. Ewart Company, 31 Que. S.C. 336.

—Jurisdiction—Action instituted in Circuit Court—Declinatory exception.]—The Winding-up Act has established a special tribunal of exclusive jurisdiction (to wit, the Superior Court) for disposal of claims against a company in liquidation; an action taken in the Circuit Court will therefore be referred to the Superior Court.

Baxter v. International Steel Co., 10 Que. P.R. 27.

—Foreign company—Receiver appointed by foreign Court.]—A receiver appointed by an order of the High Court of Justice in England to an insolvent company incorporated in that country, but owning real estate in this Province, has no status or quality in which he can make an opposition to a seizure of such real estate in execution of a judgment rendered against the company.

Beauvais v. British and Canadian Lead Co., 31 Que. S.C. 289.

—Conflict between garnishing creditor and liquidator—Priorities.]—A creditor who, prior to the granting of a winding-up order, has served a garnishee summons on a shareholder, and obtained judgment against the company, is entitled to be paid the amount of his judgment out of moneys due by the shareholder for calls on stock at the time of the service of the garnishee summons, in priority to the claims of the liquidator in the winding-up proceedings.

Cross v. Alberta Brick Co., 1 Alta. R. 103.

—Action originating outside the Province.]—An action will lie before the Superior Court of this Province against an insurance company that has its chief place of business in Ontario to recover, on a policy issued in that Province, a loss by fire of property in the United States, but it must be brought in the district where the company has its chief place of business for this Province, and service of process must be effected at such chief place of business.

Mutinier v. Traders' Fire Insurance Co., 33 Que. S.C. 411.

—Ontario Joint Stock Winding-up Act—Order under—Appeal.]—Where a winding-up order under the Ontario Winding-up Act is made in violation of the provisions of the statute, or is obtained by fraud or misrepresentation, or is otherwise open to attack, any shareholder prejudicially affected may obtain redress, either by direct application to the County Court Judge if the order has been made by him ex parte, or if made by him after notice then by way of appeal to the Court of Appeal. The High Court of Justice for Ontario has no jurisdiction to intervene and set aside or vacate or declare invalid what has been done by the County Court Judge under the Ontario Winding-up Act, R.S.O. 1897, c. 222.

Deacon v. Kemp Manure Spreader Company, 15 O.L.R. 149 (D.C.).

—Appeals in Quebec.]—An appeal from a decision or order of the Superior Court or

of a Judge thereof, in any proceedings under the Winding-up Act of Canada, may only be taken to the Court of King's Bench by leave of a Judge of the Superior Court.

Brayley v. Ross, 9 Que. P.R. 103.

—Directions of Court to liquidator—Proceedings against former directors for fraud.]—The company being in process of voluntary winding-up under the Manitoba Winding-up Act, R.S.M. 1902, c. 175, the liquidator applied, under s. 23 of the Act, for a direction as to whether or not he should take proceedings against a number of former directors of the company to cancel certain shares in the stock which they had issued to themselves as fully paid up, but without payment of any kind, and to recover the dividends which, to the extent of over $62,000, they had afterwards paid to themselves on said shares: —Held, that this was not "a question arising in the matter of the winding up" for the determination of which an application may be made to the Court under s. 23, and that no order could be made as the liquidator in such a proceeding is not an officer of the Court or under its control, except to the extent stated in sub-s. (f) of s. 19 of the Act. The Judge, however, expressed the opinion that it was the liquidator's duty, under the circumstances, to take the suggested proceedings and that, if he refused, the Court would have jurisdiction, under sub-s. (f) of s. 19, to compel him to do so.

Re Great Prairie Investment Co., 17 Man. R. 554.

—Appeal—Winding-up Act—R.S.C. c. 144, s. 101.]—The right of appeal from judgments can only be exercised under the conditions and in the manner provided by the law permitting it. Hence, when the Winding-up Act provides that an appeal will lie from orders and decisions rendered under it by leave of a Judge of the Court appealed from an appeal taken without permission or even with that of a Judge of the Court of Appeal is informal and will be rejected.

Brayley v. Ross, Q.R. 17 K.B. 152.

—Dominion letters patent—Head office of company.]—A petition for a winding-up order of a company incorporated by Dominion letters patent must be presented where the company has its head office.

Wetzel Company v. Oriental Silk Co., 9 Que. P.R. 289.

—Petition by foreign company—Right to institute proceedings.]—Held, that a foreign corporation, not registered under the provisions of the Foreign Companies Ordinance, cannot maintain an action or institute proceedings unless it be shown by such corporation that the contract in respect of which such action is brought or proceedings taken arose by an order given to a traveller in the Province or by correspondence and that the corporation has not in this Province any place of business.

Re Nelson Ford Lumber Co., 1 Sask. R. 108.

—Winding-up order—Company—Stay of actions against—Decree of foreclosure—Leave to proceed—Right of mortgagee.]—By s. 16 of the Winding-up Act (Rev. Stat. Can. c. 129), proceedings by a mortgagee under a decree of foreclosure of the company's premises is stayed, but the mortgagee has the absolute right to have leave to proceed unless special circumstances make it inequitable for him to do so. The exercise of discretion in granting or refusing leave by the Judge having charge of the winding-up proceedings may be reviewed on appeal. The liquidators have no equity to have the conduct of the sale under foreclosure proceedings, and an order made at their instance by the Judge directing the winding-up proceedings, postponing the sale and directing the referee as to the advertising and fixing a subsequent date for the sale is bad. A Judge other than the Judge directing the winding-up proceedings may grant leave to appeal from his order, and any Judge has the abstract right to make orders in a winding-up proceeding, but ought not to do so unless specially requested by the Judge in charge, or under exceptional circumstances. The appeal from the order of a Judge in charge of winding-up proceedings is to the Court, and can not be varied or rescinded by an order of a single Judge, though made in excess of his jurisdiction under the Winding-up Act.

Re Cushing Sulphite Fibre Co. (1905), 38 N.B.R. 581.

—Dominion Winding-up Act—Application of Act to provincial corporation.]—The provisions of the Dominion Winding-up Act (R.S.C. 1906, c. 144), do not apply to a company incorporated under the Ontario Companies Act unless such company is shown to be insolvent.

Re Cramp Steel Co., Ltd., 16 O.L.R. 230 (Mabee, J.).

—Insolvent company—Warranty.]—An action founded on a lease executed by a company before it was put in liquidation and delivered afterwards, without authority, by the liquidator, should be brought against the company itself and not against the liquidator. Kent v. Les Soeurs de la Providence, 72 L.J.P.C. 62, followed. In such case the liquidator cannot, in his own name, maintain an action en garantie

against a third party whom he claims to be liable.

Stevenson v. McPhail, 9 Que. P.R. 199 (K.B.).

—Lien under writ of execution placed in sheriff's hands.]—Sub-s. 1. of s. 84 of the Winding-up Act, R.S.C. 1906, c. 144, so far as applicable to the rights of an execution creditor under a writ of execution against the goods of a company placed in the sheriff's hands after the commencement of the winding-up, is not different in effect from s. 66 of the Winding-up Act as it stood in the former revised statutes of 1886, and the execution creditor cannot proceed to realize his judgment out of the goods of the company:—Quære, what would be the result in a case where the sheriff had sold the goods and had the proceeds of the sale in his hands when notice of the petition was served? Under the Act as it stood before the last revision, the money would have gone to the liquidator, but, to obtain that result under the present Act, sub-s. 2 of s. 84 would have to be read into sub-s. 1.

Re Ideal Furnishing Co., 17 Man. R. 576.

—Seizure of goods by sheriff before liquidation—Right of sheriff to sell.]—An order was made, under the provisions of the Companies Winding-up Ordinance (c. 13 of 1903), to wind up a company, and a liquidator was appointed. Before the appointment of the liquidator the sheriff seized the goods of the company under a writ of execution. On an application for an order directing the sheriff to hand over the goods so seized to the liquidator:—Held, that the Court had, under the Companies Winding-up Ordinance, 1903, no jurisdiction to require the sheriff to hand over the goods seized by him under execution.

Re Regina Windmill and Pump Co., 2 Sask. R. 32.

—General manager — Transactions on his own behalf similar to those of company—Liability to account for profits.]—In an order for the winding-up of a company, it was provided that the liquidators, with the consent and approval of the inspectors appointed to advise in the winding-up might exercise any of the powers conferred upon them by the Winding-up Act (Can.), without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers. S. 38 of the Act enables the Court to provide by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court:—Held, that it is necessary to obtain an order, subsequent to the winding-up order, so as to get the benefit of s. 38. Defendant, as general manager of a company, engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber, which he disclosed to defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the company. Defendant drew a cheque on the funds of the company for the government dues on this timber, but did not cash the cheque, and the transaction appeared on the books as "Kitimat limits." Held, in an action to account for the proceeds of the sale of this timber, that defendant was not acting as the representative of the company, and was not a trustee; and that the making of the entries in the books did not estop him from explaining the circumstances.

Kendall v. Webster, 14 B.C.R. 390.

—Evidence of membership—Condition attached to application not stated in writing—Application in writing unconditional.]—On an application to settle the list of contributories of a company, one Robertson, who had made application for shares and whose application had been accepted, objected that his application was conditional upon his appointment as agent of the company and his acceptance of that agency. He also objected that his membership in the company had not been properly proved, as the register had not been produced:—Held, that the register of the company is not conclusive or the only evidence of membership therein, but membership may be proved without reference to the register. (2) That the application for shares being an unconditional one, and there being no evidence that any notice of a condition attached had ever been given to the company, Robertson's name must be placed on the list of contributories.

Re The Globe Fire Insurance Co., Robertson's Case, 2 Sask. R. 266.

—Provisional liquidators.]—In the absence of special reasons to the contrary, a person who has entered upon his duties as voluntary liquidator, should be appointed provisional liquidator under a petition for the winding up of a company.

Price v. Villeneuve Co., 10 Que. P.R. 338.

—List of contributories—Interest of each contributory.]—In proceedings under the Federal Winding-Up Act, every contributory has a right to be furnished with a complete list of all; he is an interested party and entitled to demand that all the contributories should, in limine, be on the list, so that the Court may determine the amount he can be called upon to pay. By dilatory exception he can have the proceedings stayed until he receives the list.

In re La Banque de St. Jean, 10 Que. P.R. 223.

—**Appeal.**]—There is no appeal to the Court of Review from a judgment rendered by the Superior Court in proceedings under the Winding-up Act.

Compagnie des Theatres v. Turgeon, 10 Que. P.R. 215.

—**Action by seamen for wages—Arrest of vessel—Leave to proceed in admiralty.**]—Where a company is being wound up pursuant to the Dominion Winding-up Act, in the Supreme Court, proceedings in the Admiralty Court on a claim for seamen's wages, taken without leave of the Court having charge of the winding-up, are not void, but only irregular:—Held, further, that, in the circumstances here the leave should be granted without the imposition of terms.

Re B.C. Tie and Timber Co., 14 B.C.R 204.

—**Contributories—Shares payable in cash—Time for signing agreement—Shares subscribed for by memorandum of association, when deemed issued.**]—Shares in the capital stock of the company, registered under the Companies Ordinance, which have been subscribed for by the memorandum of association, are deemed to be issued at the date of the registration of the company. Consequently an agreement filed with the registrar of joint stock companies, subsequent to such date, although the shares certificates were not issued until after such filing, cannot be relied on to relieve the shareholder from a liability to pay for the shares in question under the Companies Ordinance, s. 43. The repeal of s. 43 by 7 Edw. VII. c. 5, s. 13, sub-s. 4, has not altered the liability of the shareholder in the above respect so far as the liability existed at the date of the repeal of the section. S. 43, read with s. 47 of the Companies Ordinance, fixes the liability in such case. The effect of the new subsection substituted for sub-s. (6) of s. 110 of the Companies Ordinance by 7 Edw. VII. c. 5, s. 13, sub-s. (6), is to continue the liability to pay in cash, in the absence of a contract of sale or for services or other consideration in respect of which such allotment was made, but to permit of the contract being filed subsequent to the issue of the shares, within the time specified. The consideration, however, for which the shares were issued must be a valuable consideration, and must have been something existing at the time and not something subsequently accruing. The provision that "the Court, if satisfied that the omission to file the contract or a sufficient contract was accidental or due to inadvertence, or that for any other reason it is just and equitable to grant relief," has no application where there was no contract at all in existence at the time of the issue of the shares. In any case, before granting relief, the applicant must satisfy the Court that creditors will not be injuriously affected by the order. Consideration of the circumstances in this case which rendered it not "just and equitable" to grant relief:—Quære, whether it is possible for a subscriber to a memorandum of association to escape liability for payment in cash for the shares subscribed for, and if so, under what considerations.

Re Red Deer Mill and Elevator Company, MacDonald's Case, 1 Alta. R. 538.

—**Mortgagees—"Proceeding against the company."**]—A company being in liquidation, the mortgagees went into possession prior to the issue of the winding-up order. On an application to restrain the mortgagees from selling under their security, objection was taken that the attendance of the mortgagees on the application and the approving of the winding-up order was such a taking part in the winding-up as gave the Court jurisdiction to restrain them. This being overruled, the liquidator sought to restrain the mortgagees from selling without the sanction of the Court on the ground that such sale would be a "proceeding against the company" under s. 22 of the Winding-up Act, R.S.C. c. 144:—Held, that the mortgagees were proceeding rightfully.

Re B.C. Tie and Timber Co., 14 B.C.R. 81.

—**Dominion Winding-up Act—Companies incorporated under provincial legislation.**]—An application was made under the Dominion Winding-up Act to wind up a company incorporated under the provisions of the North-West Territories Companies Ordinance, c. 20 of 1901. Evidence was adduced for the purpose of showing that the company was insolvent, but this was largely dependent upon hearsay:—Held, that the Dominion Winding-up Act (c. 144, R.S.C. 1906), applies only to corporations incorporated under provincial legislation when it is shown that such corporations are insolvent, in liquidation or in process of being wound up and as it was not shown that the corporation in question was in liquidation or being wound up and as there was no sufficient evidence to establish insolvency the Dominion Act did not apply.

In re Nelson Ford Lumber Co., 1 Sask R. 503.

—**Winding-up order made after contestation by the company—Right of a shareholder to attack it by opposition to judgment.**]—(1) The general rule that a winding-up order made against a company, after appearance and contestation by it, is conclusive against the shareholders, does not apply where the ground taken is that the company was not subject to the Winding-up Act, or that the petition for the order had not been served upon it and was a fraudulent abuse of the process of the

Court. (2) The Winding-up Act, R.S.C. c. 144, applies to a foreign company which has done business in Canada, although the same has been discontinued for a period of five or six years, if there be unsatisfied obligations arising therefrom. (3) A foreign company doing business in Canada is subject to the Winding-up Act and the Superior Court has jurisdiction and power to make a winding-up order against it thereunder, although no liquidation proceedings are taken against it at its domicile, and the correct view is that, in its application, the act is to be construed, not strictly, but liberally.

Scott v. Hyde, 18 Que. K.B. 138, affirming 34 Que. S.C. 432.

—Jury trial—Judgment refusing same—Leave to appeal.]—In winding-up proceedings, leave to appeal is obtainable from a Judge of the Court in regard to "an order or decision," without limitation as to whether it is final or interlocutory. Therefore leave to appeal will be allowed from a judgment refusing a jury trial in a winding-up proceeding.

Tetrault Shoe Co. v. Kent, 10 Que. P.R. 283.

—Representation of shareholders by a company in winding-up proceedings.]—(1) A winding-up order made against a company, after appearance and contestation by it of the petition, is res judicata and conclusive against the shareholders. (2) The authority of attorneys and advocates who have acted for and represented a party, in judicial proceedings, cannot be challenged otherwise than by disavowal.

Re The Great Northern Construction Co. and Hyde, 34 Que. S.C. 432.

—Conclusiveness of list of contributories—Res judicata—Alleged insolvency of company—Necessity for meeting of directors to call general meeting of shareholders to pass winding-up resolution.]—Shares in the capital stock of a company, registered under the Companies Ordinance, which have been subscribed for by the memorandum of association, are deemed to be issued at the date of the registration of the company, consequently an agreement filed with the registrar of joint stock companies subsequent to such date, although the share certificates were not issued until after such filing, cannot be relied on to relieve the shareholder from his liability to pay for the shares in cash, under Companies Ordinance, s. 43 (x):—Semble, that the decision of the Judge in settling the list of contributories in winding-up proceedings, is as to all questions involved res judicata. Semble, that the mere fact that a company has large liabilities, and has decided that in view of them it is unable to carry on its business, is not proof of "insolvency." Where no regular meeting of directors was held to proceed to convene an extraordinary meeting of the company to consider a resolution for winding up, but it was shown that the requisite number of shareholders had joined in the requisition pursuant to s 118 of the Companies Ordinance, among them being all the directors, all of whom subsequently signed an endorsement directing the secretary—himself a director—to call the meeting, held, that the want of a regular meeting of the directors, was a mere irregularity, and did not invalidate the meeting of shareholders subsequently held in pursuance of notice by the secretary at which the winding-up resolution was passed.

Red Deer Mill and Elevator Company v. Hall, 1 Alta. R. 530.

—Limitation of action—Liquidator—Fraudulent deed.]—An action by the liquidator of an insolvent company to set aside a deed executed in fraud of creditors should be brought within one year from the date on which the liquidator was appointed; otherwise the right of action is barred.

Hyde v. Ross, 10 Que. P.R 384.

—Trading company—Petition for winding-up—Service.]—A company for the manufacture and sale of gas for lighting purposes is a "trading company" under c. 144, s. 2 (d) of R.S. [1906] and is subject to the provisions of that Act. The powers given to the Superior Court by said Act (the Winding-up Act) may be exercised by a Judge in Chambers. Service of a petition for a winding-up order may be made at the office of the company by delivering a copy to an employee who is in charge.

DeLorimier v. Canadian Gas & Oil Co., Q.R. 34 S.C. 381.

—Rights of purchase of railway at sale—Incorporation of company—Directors' salary—Set-off.]—A purchaser of a railway does not acquire an absolute right to the railway. What he acquires is an interim right to operate the railway to be followed up by incorporation as provided by s. 280 of 51 Vict. c. 29. (See now s. 299 of the Railway Act, R.S.C. 1906, c. 37.) (2) While an independent purchaser buying with his own money and selling at an enhanced price to a company, with full disclosure and without fraud, can claim his profit, promoters, who stand in a fiduciary relationship to the company, cannot take such profit. Hence, where promoters bought with the moneys of a company incorporated by themselves, to whom they turned over the property, they were not permitted to recover against the company any profits on the transaction. (3) A resolution of shareholders is necessary to authorize the payment of salaries to directors of a company. (4) Having regard to the provisions of Arts. 1031 and 1187 C.C.

P.Q., creditors were allowed by the referee to set off the claims of certain debtors, officers of the company, for salaries taken by them without proper authority, and for expenditures made by them out of the company's funds for a purpose ultra vires of the company. No objection was taken to this ruling before the referee, and the Court, on appeal from his report, confirmed such ruling, but expressed some doubt as to the jurisdiction of the referee to set off such claims.

Minister of Railways and Canals v. Quebec Southern Railway Company; Hodge's Claim, 12 Can. Exch. R. 11.

—**Contributories—Allotment of shares—Withdrawal of application.**]—On the day after signing an application for shares in a company the applicant decided to withdraw and mailed a notice of such intention to the party who had taken the application, which in the ordinary course of the mail should have reached him the following day. There was no evidence that this letter did reach the party to whom it was addressed on that day or that he was an agent or officer of the company authorized to receive such a notice. In the meantime and without notice of withdrawal the company accepted the application and allotted the shares, but notice of allotment was not given until twelve days later. On an application to settle contributories:—Held, that an application for shares cannot be withdrawn after allotment. (2) That in the absence of a statutory provision or custom of business to the contrary, a notice sent by mail is not operative in the absence of evidence that it was actually received. An applicant for shares resisted the application to place his name on the list of contributories on the ground that he had been induced to take the shares by misrepresentation. Held, that fraud was no answer to the application, as the applicant should have taken proceedings to have the shares cancelled before winding-up. A shareholder set up that the company was indebted to him in a large amount, being for amount due under one of the company's policies upon property destroyed by fire, and claimed the right to set off each amount. Held, that in view of the provisions of sub-s. 2 of s. 44 of the Companies Ordinance and paragraph 2 of s. 14 of the Winding-up Ordinance, the shareholder was entitled to set off such debt.

Re Globe Fire Insurance Company, 2 Sask. R. 234.

—**Settling list of contributories—Certificates declaring stock paid up in full.**]—Where, under an order of a High Court Judge, a reference has been directed to an officer of the Supreme Court of Judicature to take all necessary proceedings for the due winding-up of a company, and delegating to him for such purpose the powers conferred on the Court therefor by the Winding-up Act, such officer has jurisdiction, in settling the list of contributories, to inquire into and decide as to whether stockholders, holding certificates declaring the stock to have been duly paid up, have in fact paid anything thereon.

Re Cornwall Furniture Company, 18 O.L.R. 101.

—**Company having ceased to do business—Shareholder opposing judgment granting a winding-up order.**] — A shareholder is deemed to have been represented by the company in the proceedings which have led to the granting of a winding-up order of said company, when the company appeared and contested the petition for said order; this shareholder is without right to attack by an opposition the judgment granting the same, said judgment being chose jugée against him. (2) The provisions of the Winding-up Act apply to companies after their business have been discontinued, if there be unsatisfied obligations, even if the company has been incorporated in the United States, and has its place of business there.

Scott v. Hyde, 10 Que. P.R. 164.

—**Contributories — Subscriptions for shares —Agreement with company for issue of paid-up shares—Consideration.**]—

Re Jones & Moore Electric Co. of Manitoba, 7 W.L.R. 527, 10 W.L.R. 210 (Man.).

— **Winding-up — Debenture holder — Preferred shareholder.**]—

In re Touquoy Gold Mining Co., 1 E.L.R. 142 (N.S.).

—**Winding-up — Insolvency — Boom company — Shareholders — Double liability.**]—

In re Fredericton Boom Co., 2 E.L.R. 451 (N.B.).

—**Contributories — List settled — Application to set aside order.**]—

Re D. Wade Co., 10 W.L.R. 527 (Alta.).

—**Winding-up—Action by liquidator in his own name without leave—General authority to take proceedings.**]—

Stavert v. Lovett, 1 E.L.R. 233 (N.S.).

—**Calling meeting to approve of arrangement with bondholders.**]—

Re Port Hood Coal Co., 1 E.L.R. 81 (N.S.).

—**Payment to creditor within 30 days—Preference—Restoration of trust moneys.**] —On the 14th October, 1905, a sum of $1,340.57 was deposited in a bank to the credit of H., executor, and was on that day withdrawn by him and placed to the credit of a company, of which he was president, in its account with the same bank. This money was held by H. in

trust for the children of M., and the placing of the money to the credit of the company was a breach of trust by him. On the 6th December, 1906, the company being then insolvent, H. withdrew from the assets of the company for his cestuis que trust a sum of $1,969.61, the purpose being admittedly to protect the cestuis que trust and to give them a preference. This sum was debited to an account in the books of the company, headed "H. in trust for M.," etc., at the credit of which there was a large balance, including the $1,340.57. A petition for an order for the winding-up of the company was served on the same day on a solicitor who accepted service on behalf of the company, and on the 11th December, 1906, a winding-up order was made:—Held, that the money handed over by the trustee to the company was, when the $1,969.61 was withdrawn, no longer capable of being ear-marked, and it was impossible for the cestuis que trust to follow it; the company was simply a debtor to the trust estate for the amount which it had received from the trustee, and the withdrawal of the company was in substance and effect a payment by the company to its creditors of so much of what it owed them; and therefore s. 90 of the Winding-up Act, R.S.C. 1906, c. 144 applied, and the liquidator of the company was entitled to recover from the trustee and cestuis que trust the amount withdrawn. By s. 99 the payment is void when made to a person knowing the inability of the company to meet its engagements, and the view of the debtor in making the payment is not made an element to be inquired into in the application of the section.

Trusts and Guarantee Co. v. Munro, 19 O.L.R. 480.

IV. REGISTRATION AND LICENSING.

--Registration—Commencement of "operations and business."]—1. A penal action against a company for its failure to file a declaration according to law is prescribed if it is not taken within one year from the expiry of the sixty days after it commenced to do business; the failure to file such a declaration is not a continuous offence and there is a single penalty. 2. The words "operations and business" in Art. 4754 R. S. Q. mean that the prescription of one year runs, not from the beginning of the operations of the company, id est, the election of officers, purchase of land, borrowing of money, erection of buildings, etc., but from the beginning of the business intended to be carried by the company, in this case, the renting of rooms and the giving of baths. 3. A motion to amend the declaration, the object of which is to revive a prescribed or dead action into a live one, cannot be granted.

Croyskill v. Crescent Turkish Bath Company, 11 Que. P.R. 191.

—Dominion and provincial—Companies incorporated with same trade name—Injunction.]—Where plaintiff company had obtained incorporation under the Dominion Companies Act with a certain name, a company subsequently formed under a Provincial Act with the same name, was restrained from operating under such name.

Semi-Ready, Limited, v. Semi-Ready, Limited, 15 B.C.R. 301.

—Foreign Companies Ordinance—Carrying on business—Liability to register.]—The plaintiff, an unregistered foreign company, was shown to have made contracts with different merchants who purchased its goods, giving exclusive rights in respect thereof, and preserving privileges to the plaintiff; was shown to have advertised its goods throughout the province, and designated its customers as "exclusive agents" for its goods. It was also shown that the customers who purchased plaintiff's goods for retail were entitled to use the plaintiff's trade-mark; one advertisement stated that if the prospective purchaser should not be suited from the stock carried by the retailer he could go to the retailer and have the plaintiff's brand of goods made to order:—Held, that although the plaintiff's customers took full responsibility as to the sales of plaintiff's goods and were not strictly agents for sale, but themselves were purchasers and sellers, they were representatives of the plaintiff within the meaning of sub-s. 3 of s. 3 of the Foreign Companies Ordinance, 1903, as amended by c 19, s. 1, of the Ordinances of 1903, second session, and the company, under the circumstances, was carrying on part of its business within the meaning of and contrary to the provisions of the Ordinance.

Semi-Ready, Limited v. Hawthorne, 2 Alta. R. 201.

—Unlicensed foreign company—Infringement of their trade mark.]—See TRADE MARK.

Extra-provincial company — Failure to file statement before doing business—Contract—Illegality.]—

American Hotel & Supply Co. v. Fairbanks, 2 E.L.R. 345 (N.S.).

—Foreign corporation — Application by shareholder to compel inspection of books, etc.]—Plaintiff, a shareholder in defendant corporation, a foreign corporation doing business in the Province of Nova Scotia, obtained a mandamus ordering the defendant to produce for the inspection of plaintiff the register of stockholders, showing the names and the places of residence of persons holding shares and stock in the company, and the number of shares held

by each person. Also, to produce and file in the office of the Provincial Secretary an abstract of receipts and expenditures, profits and losses of the company within the province for each year during which the company did business within the province. Also, to file at the office of the Commissioner of Mines for the province a copy of the charter or Act of incorporation of the company, and of the by-laws and regulations of the company, together with a list of officers, etc.:—Held, setting aside the order and allowing defendants' appeal, that it was not just and convenient to grant the order, as the effect of it would be to decide the whole case upon affidavit, leaving nothing to be disposed of at the hearing. Held, that while such an order might be useful in some cases, in order to preserve the rights of parties, or the subject matter, until there could be a deliberate disposition made of it at the hearing, or where the matter could not wait until a hearing, it should not otherwise be disposed of in a summary way. Semble, that under the rules enabling a case to be set down for hearing at any time, a strong case must be made out for pursuing a different course. Held, that as the merits of the case must be disposed of later, the costs of both parties to the appeal ought to abide the event.

Merritt v. Copper Crown Mining Co., 34 N.S.R. 416.

—Procuration—Art. 177 C.C.P.] — The authority given by a foreign company to its attorney or representatives should be the act of the company itself or of the directors sitting as a board and acting for the company, and not that of the majority of the directors acting as individuals. The authority given by an insurance company to one of its employees empowering him to inspect agencies and bring actions does not enable him to give the company's advocates the power of attorney required by Art. 177 C.C.P.

Kavanaugh v. Norwich Union Fire Ins. Soc., 4 Que. P.R. 229 (K.B.).

—Shares of foreign company—Revendication—Venue.]—An action for revendication of shares of a foreign company may be brought in the Court of the domicile of one of the defendants and one of the mis-en-cause and the other mis-en-cause, the company, cannot obtain a dismissal as against it on the ground that it is a foreign company.

Kinsella v. Kinsella, 6 Que. P.R. 137 (Lavergne, J.).

—Foreign corporation—Action by shareholder to compel inspection of books.]—A shareholder in a company incorporated under the laws of a foreign state, but having its principal place of business, offices and works in Nova Scotia, may maintain an action in the Courts of this Province to enforce the performance of duties imposed upon the company in relation to its shareholders. The non-residence of the shareholders is no bar to such action There is no distinction between a foreign and a domestic corporation in respect to the relief asked in such case, and notwithstanding the rule not to interfere in matters of internal management, the Court has power to compel the inspection of books in proper cases. Proof of a foreign statute by admission is as effective as proof by an expert in haec verba. In the absence of proof to the contrary, it will be assumed that the rules of construction in the foreign state are the same as in this Province. There being no individual right of action to enforce compliance with the provisions of statutes of this Province intended for the protection of the public, the decree appealed from was varied to this extent.

Merritt v. Copper Crown Co., 36 N.S.R. 383.

—Non-registered foreign company—Registering as the owner of lands.]—The registrar is not justified in refusing to register a non-registered foreign company as the owner of land.

Ex parte New Vancouver Coal Mining and Land Company, 9 B.C.R. 571, reversing 2 B.C.R. 8.

—Power of attorney—Foreign company—Form.]—A foreign company may give a general power of attorney to its solicitors to act in all the causes in which it is or may be concerned. A power of attorney signed in the name of the foreign company by its president and secretary, before a notary in England, and sealed with the company's seal, is valid. The power of attorney may be given after the institution of the action.

Great Northern Railway Co. of Canada v. Furness Withy Co., 6 Que. P.R. 404 (K.B.).

—Registration and licensing fee in N. W. T.]—(1) Subject to the controlling powers of the Dominion Parliament, the Legislature of the North-West Territories has the like power to provide for the licensing of companies doing business in the Territories as a province has within its boundaries. (2) Such powers include the right to require a company incorporated under the Dominion "Companies Act" to register with an officer of the Territories and to deposit a copy of the charter and regulations of the company and a power of attorney to a resident of the Territories to receive process issued against the company. (3) A company incorporated by letters patent under the Companies Act, R.S.C. 1886, c. 119, to carry on business as implement dealers in

the Dominion of Canada, is, quod the Territories, a company carrying on a business to which the legislative authority of the Territories Legislature extends, and is therefore subject to summary conviction under the Territories Foreign Companies Ordinance, 1903, if it carries on business without registering and paying the license fee under the Ordinance.

The King v. Massey Harris Company; Massey Harris Company v. Wright (N. W. T.), 9 Can. Cr. Cas. 25.

—**Extra-provincial corporation—Sale of goods without license—Resident agent.**]—The plaintiffs, a foreign corporation not licensed to do business in Ontario, authorized F., a resident of the Province, to sell their engines at certain specified prices, upon commission. F. never went out to solicit orders, but took only those which came to him at his place of business. He sold an engine for the plaintiffs to the defendant, and this action was brought to recover the price:—Held, that F. was a resident agent or representative of an extra-provincial corporation, within the meaning of s. 6 of 63 Viet. c. 24 (O.), and the plaintiffs, being unlicensed, were, by s. 14, incapable of maintaining the action. Judgment of the County Court of Lambton reversed.

Bessemer Gas Engine Co. v. Mills, 8 O.L.R. 647 (D.C.).

—**Foreign Companies' Ordinance—Unlicensed company—Right of action of indorsee of note made to the company.**]—The Foreign Companies' Ordinance, 1903 (c. 14 of 1903, 1st session), provides (s. 3) that no foreign company having gain for its object, or a part of its object, shall carry on any part of its business in the Territories unless it is duly registered under the said ordinance, and imposes a penalty for breach of this provision; it further provides (s. 10) that any foreign company required by the said ordinance to become registered shall not while unregistered be capable of maintaining an action or other proceeding in any Court in respect of any contract made in whole or in part in the Territories, in the course of or in connection with business carried on without registration, contrary to the provisions of s. 3:—Held, that an indorsee with notice of a promissory note made to a foreign company in the course of and in connection with business carried on in contravention of the above provisions could not recover. Plaintiff was the indorsee of a promissory note made by defendants in favour of the Sawyer & Massey Co., Ltd., to secure the price of certain threshing machinery. Defendants, with other defences, set up by the 3rd paragraph of their defence that the note in question was given to an unregistered foreign company engaged in selling machinery for gain within the Territories by resident agents, of which facts the plaintiff had notice when he became the holder of the note, and that they would rely upon the provisions of the Foreign Companies Ordinance. On argument of the question of law thus raised, the facts above set out were admitted:—Held, a good defence in law.

Ireland v. Andrews, 6 Terr. L.R. 66.

—**Foreign company—Agent—One transaction—"Doing business."**]—Plaintiff sued the defendant company for an account incurred by P. who was engaged in negotiations for the sale of one of defendant's engines to the city of H., and while so engaged incurred the account in question. P. left the province, leaving the account unpaid and attachment proceedings were commenced against the defendant company under the provisions of O. 47, R. 6:—Held, that as the evidence showed the agent to have been employed only for the one transaction and no further or other business was contemplated, this did not constitute "carrying on business" within the meaning of the rule of Court, and the writ and attachment with the service thereof must be set aside.

Halifax Hotel Co. v. Canadian Fire Engine Co., 41 N.S.R. 97.

—**Use of charter.**]—A joint stock company formed by letters patent from the Lieutenant-Governor of the province for the manufacture of wines, etc., and carrying on business having relation thereto, which after the receipt of subscriptions to its capital stock elects and re-elects directors, acts through the latter at several meetings and sells a considerable stock of wines and other merchandise though such sale is not followed by delivery of the goods "makes use of its charter and commences regular operations" so as to avoid the forfeiture intended by Article 4750 R.S.Q.

Cie Boissons Generale Canadiennes v. Attorney-General of Quebec, Q.R. 15 K.B. 536.

—**Registration of company—Penalty—Contract by unregistered company.**]—S. 123 of the B.C. Companies Act, 1897, although it penalizes the carrying on of business within the province by non-registered companies, does not avoid contracts entered into within the jurisdiction:—Semble, the forwarding of goods to an agent to be sold by him in his own name, is not a transaction within the prohibition of s. 123. Quære, whether the creating within the jurisdiction of an obligation which is to be performed without the jurisdiction is carrying on business within the jurisdiction within the meaning of the section.

De Laval Separator Company v. Walworth, 13 B.C.R. 74. (Overruled by Northwestern v. Young, 13 B.C.R. 297.)

—Extra provincial corporations—Company carrying on business in Ontario.]—The plaintiffs, a company incorporated in the State of Pennsylvania, to carry on a printing, publishing and bookbinding business, with the head office in that State, carried on, as one of its departments, under a special charter therefor, procured in the same State, and with the same head office, what was called "The International Correspondence School," the object being to give by correspondence through the mails, instruction to applicants for enrollment as students, the company having representatives throughout the Province for procuring such applications, all of which were submitted to the head office for approval, and, if accepted, the certificates of enrollment were sent direct to the students with the lesson and instruction papers, followed at stated intervals by further instruction and lesson papers, pamphlets, etc., and when the contract so provided, lesson books in bound form, drawing materials, phonographic and other outfits, were loaned to the students. The company had an office in Toronto, over which their name was affixed, with a superintendent, cashier, and number of stenographers, to which all moneys collected in this province were forwarded, and from there remitted to the head office, while the bound lesson books, etc., for convenience of passage through the customs were sent from the head office to Toronto, and after the payment of the duties were forwarded by the postmaster to the students. Salaries, etc., were paid by the cashier at Toronto out of the moneys in his hands:—Held, that the Act 63 Vict. c. 24 (O.) for licensing of extra provincial corporations, was intra vires the Provincial Legislature as coming within s. 92, sub-s. 2 of the B.N.A. Act, being a mode of direct taxation within the province, or as relating to the issuing of licenses in order to the raising of a revenue; and that the plaintiffs were carrying on business in Ontario within the meaning of the Act, so as to necessitate their taking out a license, and their omission to do so precluded them from maintaining an action for the recovery of moneys claimed to be due from one of the enrolled students.

International Text-Book Company v. Brown, 13 O.L.R. 644 (D.C.).

—Unlicensed foreign company suing on a foreign judgment.]—A foreign company is not precluded by any provision in the Companies Act, 1897, compelling registration before it can transact any of its business within the province, from access to the Courts of the province in the capacity of an ordinary suitor. Judgment having been obtained against defendants in a foreign jurisdiction, suit was brought in British Columbia on the foreign judgment. The defendant company had been wound up prior to the commencement of the suit, but this was not pleaded and was only raised by counsel for defendant Johnston at the opening of the trial, the liquidator of the company not being present or represented; nor was the permission of the Court obtained to sue the company:—Held, that the plaintiff must pay the costs occasioned subsequent to the receipt of notice of the company's legal position. The liquidator of such a company appearing for the first time in the action when it came to appeal. Held, that he should have only such costs as he could have obtained on an application to a Judge in Chambers.

Charles H. Lilly Co. v. Johnston Fisheries Co., 14 B.C.R. 174.

—Failure by a company to file a declaration—Prescription of action.]—(1) Semble, any one can take a penal action, even if he is not a British subject; in any event, one is presumed to be so. (2) A penal action against a company for its failure to file a declaration according to law, is prescribed if it is not taken within a year after the company has commenced to do business; the failure to file such a declaration is not a continuous offence, and there is a single and unique penalty.

Croysdill v. Anglo-American Telegraph Co., 10 Que. P.R. 397.

—Doing business in province without license.]—Plaintiff company, incorporated by the Dominion Companies Act, but not licensed in British Columbia, entered into an agreement in British Columbia, through their resident agent, to supply certain machinery to defendant company, a British Columbia corporation. The machinery was rejected for faultiness, and also because it was not delivered within the time agreed, thus necessitating the purchase of other machinery:—Held, on the facts, that the machinery was faulty in construction and the rejection of it was justified; also that defendants knew that it was being held at their disposal and risk. Held, further, that plaintiffs were carrying on business within the province as contemplated by the Companies Act, 1897, and should have taken out a license to do so. Held, further, that s. 123 of the Companies Act, 1897, is not in conflict with the Dominion Companies Act. The latter gives a company the capacity or status to carry on business in the various provinces of the Dominion, consistently with the laws thereof and in British Columbia, a pre-requisite to doing business is the securing of a license.

Waterous Engine Works Co v. Okanagan Lumber Co., 14 B.C.R. 238.

—Foreign company—Failure to register—Contract.]—Plaintiff company, a company incorporated under the laws of Illinois, and having its head office in Chicago in

that State, sought to recover damages against defendant for breach of a contract made at Halifax, in this Province. Under the provisions of R.S. 1900, c. 127, s. 18, it is provided that every company not incorporated in the Province, shall appoint a resident manager or agent and that such company, before beginning business in the Province, shall transmit to the Provincial Secretary a statement under oath giving certain particulars including the situation of the head office, the amount capital stock, authorized, subscribed and paid up, etc., and every company failing to comply with the provisions of the statute is made liable to a penalty of ten dollars per day during the continuance of such default:—Held, that non-compliance with the provisions of the statute did not render invalid contracts entered into by the company within the Province or prevent the company from re covering thereon.

American Hotel Supply Co. v. Fairbanks, 41 N.S.R. 444.

—Action qui tam—Registration of a company—Designation of plaintiff—British subject.]—(1) In a penal action taken by a plaintiff as well in his own name as in the name of His Majesty against a company for want of registration, it is not necessary to add, in the writ after the name of the plaintiff, the words, "Prosecuting as well in his own name as for us." (2) It is not sufficient to allege that it does not appear in the writ of summons that the plaintiff is a British subject, but defendant must specifically allege that said plaintiff is not de facto a British subject:—Quære, must one be a British subject to take a qui tam action?

Croysdill v. Shawinigan Carbide Co., 10 Que. P.R. 67.

—Promissory note—Action upon by unregistered foreign company—Sale of shares by unregistered company—Carrying on business.]—Held, that when a note is not made payable at any stated place it is not necessary to allege or prove presentation. (2) That the fact that a promissory note is endorsed in blank by the payee does not preclude such payee from suing thereon if the note is produced from the custody of the payee or his solicitor. (3) That the sale, in Saskatchewan, of its capital stock by a foreign company not registered in Saskatchewan is not a transaction in the course of or in connection with its business and such company may therefore maintain an action in the Province to recover the price of such stock.

Canadian Co-operative Co. v. Trauniczek, 1 Sask. R. 143.

—Extra-provincial corporation—License—Resident agent—Contract.]—The plaintiff company, an unlicensed extra-provincial corporation, sold absolutely to the defendant, a corporation within New Brunswick at Bloomfield, in the State of New Jersey, two car loads of its empire cream separators to be delivered f.o.b. at Sussex and Saint John, to be paid for by promissory notes to be given on delivery. Defendant company to have the exclusive right of sale in certain named counties and undertaking not to sell or handle any other separators in said counties. The defendant company, advertised in New Brunswick as the sole agent of the separators, with the consent and at the expense of the plaintiff:—Held, per McLeod, J., and Tuck, C.J. (Landry, J., doubting, and Hanington, J., dissenting), that the defendant was the resident agent of the plaintiff in New Brunswick, and the sale was a contract made in part within the Province within the meaning of ss. 12 and 18 of the Act, C.S.N.B., 1903, c. 18, and no action could be maintained on the notes.

Empire Cream Separator Company v. Maritime Dairy Company, 38 N.B.R. 309.

—Registration of company—Penalty.]—An unlicensed extra-provincial company, carrying on business within the Province, sued for a balance due on a contract to deliver building stone, entered into within the Province. The defence advanced was that, by reason of s. 123 of the Companies Act, the contract was illegal and void:—Held, on appeal, that as the Act to be done in pursuance of the contract was prohibited by statute, the contract was therefore unenforceable. De Laval Separator Company v. Walworth (No. 1), 13 B.C.R. 74, overruled.

Northwestern Construction Co. v. Young, 13 B.C.R. 297.

—Foreign company—Ordinance respecting.]—The Foreign Companies Ordinance is intra vires of the Territorial Legislature, and extends to companies incorporated by the Dominion to carry on throughout Canada a business which the Territorial Legislature might have authorized it to carry on in the Territories.

Rex v. Massey-Harris Company, 6 Terr. L.R. 126.

V. TAXATION.

See ASSESSMENT.

COMPENSATION.

—By way of set-off.]—See SET-OFF.

—Expropriation.]—See that title.

—Workman—Injuries.]—
See MASTER AND SERVANT.

CONDITIONS.

Of grant—Condition subsequent—Breach of—Forfeiture—Assignment by vendor before re-vesting.—On the grant of a fee simple defeasible on breach of a condition no estate is left in the grantor, but only a possibility of reverter, and, therefore, before breach there is nothing capable of assignment. After breach, where the deed does not provide for ipso facto forfeiture, the fee does not revest automatically, and until re-vesting by suit or otherwise there is nothing capable of assignment. Land was conveyed subject to certain conditions to be performed by the purchasers, and, in default of the performance of such conditions, the purchasers were to hold the land in trust for the grantor, and reconvey to him, notwithstanding that any prior breach may have been waived. The conditions were not performed. In an action by the assignee under seal of the vendor for a declaration that the purchasers held the land in trust for him, and for an order for the conveyance thereof to him:—Held, by the full Court, that after the conveyance there was no estate left in the grantor, but only a possibility of reverter, which was not assignable, and no action lay.

Clark v. City of Vancouver, 10 B.C.R. 31.

—Impossibility of performance.]—

See TIMBER.

Manley v. Mackintosh, 10 B.C.R. 84.

—Conditional sale of goods.]—

See SALE OF GOODS.

CONFLICT OF LAWS.

Life insurance—Revocation by assured of trust in favour of beneficiary.]—The plaintiffs were the executors and trustees under the will of R. R. Hughes, and brought action to obtain a decision as to the effect of a clause in his will directing that the money payable under a policy of insurance on his life in the London Life Insurance Co. of Canada should become part of his estate and be paid to his executors, and absolutely revoking the appropriation of same in favour of his wife, which was expressed on the face of the policy. Hughes and his wife were residents of Manitoba, and the policy had been procured through an agent also resident in Manitoba, but the company's head office was in Ontario, where the policy was issued, and where the insurance money was made payable. By the Life Insurance Act, R.S.M., c. 88, s. 12, as re-enacted by 62 & 63 Vict., c. 17, it is provided that, in the case of a policy of insurance effected by a man or woman, on its face expressed to be for the benefit of his wife or her husband, the insured, may, by an instrument in writing attached to, or indorsed on, or identifying the policy by its number or otherwise, absolutely revoke the benefit previously made, and divert the insurance money wholly or in part to himself or his estate. The corresponding statutory provision in Ontario (R.S.O., c. 203, s 160), while it permits a person who has effected an insurance on his life for the benefit of his wife, to alter or vary the benefit of the policy as between his wife and children, prohibits him from absolutely revoking his wife's benefit in it and diverting the insurance money to himself or his estate. The decision of the question before the Court, therefore, depended upon whether the right of revocation was governed by the law of Ontario or by that of Manitoba:—Held, that although the contract of insurance itself must be interpreted and carried out according to the Ontario law, yet the law of Manitoba should be applied as regards the collateral right of the assured to make any assignment, revocation or other appropriation of the insurance moneys payable under it. Toronto General Trusts Co. v. Sewell, 17 Q.R. 442, and Lee v. Abdy, 17 Q.B.D. 309, followed. The question was one not of the construction of the policy or contract, but of the capacity of the insured to make a disposition of the benefit of the policy; and, as he was living in Manitoba when he effected the insurance through an agent of the company there, it was reasonable to presume that it would be in the contemplation of all the parties that he could deal with the benefit that he had given his wife in the policy in such manner as the laws of Manitoba empowered him.

National Trust Co. v. Hughes, 14 Man. R. 41.

—Contract—Lex loci—Lex fori.]—The lex fori must be presumed to be the law governing a contract unless the lex loci be proved to be different.

Canadian Fire Ins. Co. v. Robinson, 31 Can. S.C.R. 488.

CONSERVATORY SEIZURE.

See ATTACHMENT.

CONSIDERATION.

Deed — Maintenance bond—Lien.] — Where land was conveyed in consideration of a bond by the grantee to maintain the grantor and his wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a lien for the performance of the agreement in the bond.

Duguay v. Lanteigne, 3 N.B. Eq. 132.

—Sale of goods.]—See that title.

—Sale of lands]—See that title.

CONSOLIDATION.

Consolidation of cases — Discretion.] — Consolidation of cases is left to the discretion of the Judge, and Appellate Courts will not interfere with the exercise of such discretion unless in case of manifest injury or error.

North American Life Co. v. Lamothe, 7 Que. P.R. 177, Hall, J.

Consolidation of actions—Art. 292 C.C. P.]—Art. 292 C.C.P. only applies to causes pending and heard at the same time.

Harding v. Bickerdike, 4 Que. P.R. 471 (Sup. Ct.).

—Damages for accident—Joinder of cases.] —When several parties sue for damages alleged to have been caused by the same party, in one and the same accident, such cases may be united for the purposes of proof, except as to the amount of damages suffered by each claimant respectively.

Cantin v. The Royal Electric Co.; Bayard v. The Royal Electric Co., 5 Que. P.R. 327 (Sir M. Tait, A.C.J.).

—Different plaintiffs against same defendant.]—See STAYING PROCEEDINGS.

Bodi v. Crow's Nest Pass Coal Co., 9 B.C.R. 332

—Consolidation of actions—Judicial discretion—Art. 291 C.C.P.]—The consolidation of actions provided for in Art. 291 C.C.P., is entirely a matter for the exercise of judicial discretion which will not be interfered with by the Appellate Courts, except in a case of manifest injury or error.

North American Life Ins. Co. v. Lamothe, 14 Que. K.B. 334 (Hall, J.).

CONSPIRACY.

Conspiracy to defraud—Indictment—Necessity to set out overt acts—Preliminary proof.]—In an indictment charging a conspiracy to defraud it is not necessary to set out overt acts done in pursuance of the illegal agreement or conspiracy, nor is it necessary to name the person defrauded or intended to be defrauded. Before the acts of alleged conspirators can be given in evidence there ought to be some preliminary proof to show an acting together, but it is not necessary that a conspiracy should first be proved. A party may not introduce general evidence to impeach the character of his own witness, but he may go on with the proof of the issue, although the consequences of so doing may be to discredit the witness.

Rex v. Hutchinson, 11 B.C.R. 24, 8 Can. Cr. Cas. 486.

—Combination in restraint of trade—Conspiracy to prevent or lessen competition—Criminal Code, s. 520.]—Defendant was president and took an active interest in an association, one of the declared objects of which was the protection of its members who were dealers in coal, against the shipment of coal direct to consumers by producers. It was also formed to prevent members, including any local organization who had become members, from buying coal from any producer, who sold direct to consumers or to dealers who refused to maintain prices as fixed. When notified no member was permitted to purchase coal of any producer, etc., who sold direct to a consumer in any place where there was a member of the organization, or who sold to dealers who refused to maintain prices. For violations of these provisions, a claim for 50 cents a ton might be made for coal so irregularly sold, and if allowed and not paid by the defaulting member, after notice, any member dealing with the defaulter was liable to be expelled from the association. All these provisions and others having the same object were embodied in the printed constitution and by-laws of the organization, which were in force up to the time of the trial. Evidence was given of sales having been refused to dealers, not members of the association, for that reason and that dealers could not become members as of right; that a list of members and non-members was published, the latter of whom were not allowed to purchase except at retail prices, and that the association was in effective and active operation according to its constitution and by-laws. By s. 520, sub-s. (d) of the Criminal Code, as amended, every one is guilty of an indictable offence, etc., who conspires, combines, agrees or arranges with any other person . . . To unduly prevent or lessen competition in the production, manufacture, purchase, barter or sale, transportation or supply of any article or commodity which may be a subject of trade or commerce:— Held, that the defendant was rightly convicted of an offence under the sub-s. The plain object of the association being to restrict and confine the sale of coal by retail to its own members, and to prevent anyone else from obtaining it for that purpose from the operators and shippers. Held, also, that the offence being a continuing one, s 930 of the Code (if applicable to indictable offences) which limits the time for laying any information to within two years after the offence is committed did not apply. Held, finally, that a cross appeal by the Crown did not lie as s. 5 of 52 Vict. c. 41 only gives an appeal from a conviction.

Rex v. Elliott, 9 O.L.R. 648, 9 Can. Cr. Cas. 505, C.A.

—Trade combine—Deposit by member.]—See BILLS AND NOTES.

Hately v. Elliott, 9 O.L.R. 185.

—Conspiracy — Indictment.]—The defendants were indicted for unlawfully conspiring and agreeing together and with each other to deprive one W. G. of the necessaries of life, to wit, proper medical care and nursing, whereby his death was caused:—Held, that this count did not charge the defendants with a conspiracy to commit any indictable offence known to the law, and should have been quashed. A second count charged that the defendants did unlawfully conspire and agree together and with each other to effect the cure of W. G. of a sickness endangering life, by unlawful and improper means, thereby causing the death of the said W. G.:—Held, that this count was equally bad, and was properly quashed.

Rex v. Goodfellow, 11 O.L.R. 359 (C.A.). 10 Can. Cr. Cas. 424.

—Illegal combination or conspiracy unduly to enhance prices and lessen competition.]—The plaintiffs, manufacturing chemists and sole owners of certain proprietary medicines, brought this action for damages and for an injunction to restrain the breach of two contracts entered into between themselves and the defendants, in one of which the defendants covenanted not to sell wholesale any of the plaintiffs' preparations below the price therein mentioned, and in the other not to sell the same to any retailer except at the prices therein mentioned, and then only when such retailer had signed an agreement with the plaintiffs. The agreement was in the form adopted by the committees representing a large part of the wholesale and retail trade and the evidence showed that the commodities in question could not be purchased by the defendants or anyone else unless and until they had signed the agreements in question:—Held, that the agreements were a breach of ss. 516 and 520 of the Criminal Code, inasmuch as they unduly prevented, and, in fact, entirely destroyed competition in the articles referred to, and affected the entire trade in such articles.

Wampole & Co. v. F. E. Karn Co., Limited, 11 O.L.R. 619 (Clute, J.).

—Restraint of trade—Damages.]—See RESTRAINT OF TRADE; TRADE COMBINE.

—Conspiracy in restraint of trade — Evidence.]—Held, that upon an indictment of two incorporated trade associations for conspiracy in restraint of trade under s. 520 of the Criminal Code, the defendants were to be judged and condemned, if condemned at all, upon the acts proved to have been committed by them after incorporation, but in weighing and estimating such acts the Court might look at the immediately or proximately antecedent acts of the individuals now comprising the corporation and directing its operation; and that, in this case, the acts occurring after incorporation were, in view of their history, origin, and apparent purpose, sufficient to support a conviction:—Held, per Garrow, J.A., that it was not a sound objection to the indictment that it would not lie against any corporation except those named in s. 520, nor that there must be at least one natural person as distinct from a corporation indicted as a co-conspirator.

Rex v. Master Plumbers, 14 O.L.R. 295 (C.A.); Rex. v. Central Supply, 12 Can. Cr. Cas. 371.

—Trade combine—Conspiracy in restraint of trade—Particulars.]—The offences enumerated in ss. (a), (c), and (d) of s. 498 Criminal Code are not governed by the definition in s. 496, and it is not necessary where a charge is laid under any of these sub-sections, to allege or prove an "unlawful" act. It is within the discretion of the trial Judge to order particulars or not, and, where there are several counts, to direct whether they shall be tried together or not. A charge that the accused "did conspire with certain persons (naming them), and others unknown, or some or one of them," is not too indefinite. Where there are several counts in a "charge" or indictment for conspiracy, and the accused is convicted on one count only, the conviction will not be quashed merely by reason of the fact that some evidence had been received that would have been inadmissible if the charge or indictment had been confined to the single count under which the conviction was made. In any event the Appellate Court can review the evidence to determine whether there was evidence on which the judgment can reasonably be supported.

Rex v. Clarke, 1 Alta. R. 358, 14 Can. Cr. Cas 46, 57

CONSTABLE.

Negligent performance of duty—Appointment by municipality—Agency.]—See MUNICIPAL LAW.

McCleave v. City of Moncton, 32 Can. S.C.R. 106.

—Protection as public officer.]—See PUBLIC OFFICERS.

—Arrest by.]—See CRIMINAL LAW.

CONSTITUTIONAL LAW.

Awards as to accounts of common school lands fund—Jurisdiction of arbitrators—Submission as to accounts and destination of moneys received.]—By s. 9 of the awards dated September 3, 1870, made in pursuance of the British North America Act, 1867, s. 142, it was directed that all moneys received by the Province of Ontario since June 30, 1867, from the school

lands set apart by the Canadian statutes (consolidated by Can. Cons. Stat., 1859, c. 26) and called the common school fund, should be paid to the Dominion and that income derived therefrom should be paid to the Provinces of Ontario and Quebec in the proportions specified in s. 5 of that statute. On April 10, 1893, the three Governments of the Dominion, Ontario, and Quebec, entered under statutory authority into an agreement of submission as to the matters in difference in the settlement of the accounts between them under the award of 1870, and for the ascertainment and distribution of the said school fund. Thereunder Quebec claimed that certain moneys, which it was admitted had not been actually received by Ontario, had been constructively received, since they were deductions which Ontario was not authorized to make except at her own expense, and should be the subject of distribution between them:—Held, that the Supreme Court was right in affirming an award to the effect that the arbitrators had no jurisdiction. Moneys actually received by Ontario were alone the subject of the submission, the terms of which could not be extended so as to force a contribution from a larger constructive receipt. Attorney-General for Ontario v. Attorney-General for Quebec (1903), A.C. 39, followed.

Attorney-General (Quebec) v. Attorney-General (Ontario), [1910] A.C. 627.

Powers of Dominion Parliament — Animals Contagious Diseases Act, 1903.]—

Brooks v. Moore, 4 W.L.R. 110 (B.C.).

—Supreme Court Act, R.S.C. (1906) c. 139, ss. 3, 60—References by Governor-General in Council—Opinions and advice—Jurisdiction of Parliament—Independence of Judges—Judicial functions.]—Per Fitzpatrick, C.J. and Davies, Duff and Anglin, JJ.—The provisions of s. 60 of the Supreme Court Act, R.S.C. (1906) c. 139, are within the legislative jurisdiction of the Parliament of Canada. Per Girouard and Idington, JJ.:—The provisions of that section assuming to authorize references by the Governor-General in Council to the Judges of the Supreme Court of Canada for their opinions in respect to matters within provincial legislative jurisdiction are ultra vires of the Parliament of Canada; but, if the governments of the Dominion and of a province unite in the submission of the questions so referred the Judges of the Supreme Court of Canada should entertain the reference. Per Idington, J.—The administration of justice in each province having been assigned exclusively to it the power of Parliament in regard to the same is limited to creating a Court of Appeal and Courts for the administration of the laws of Canada. Per Idington, J.—Parliament has no power to authorize the interrogation of the Supreme Court of Canada except where the question submitted relates to some subject or matter respecting which it is competent for Parliament to legislate and respecting which it has legislated and competently constituted judicial authority in that Court to administer or aid in administering the laws so enacted. Per Idington, J.:—Quære.—As to the constitutionality of adopting a system of interrogations of the judiciary even when the questions are confined to subjects of the kind thus indicated.

Re References by the Governor-General in Council to the Supreme Court, 43 Can. S.C.R. 536.

—Statute of province restricting use of motor vehicles on highway.]—

Re Rogers, 7 E.L.R. 212 (P.E.I.).

—Treaty extinguishing the Indian interest in lands—Payments by the Dominion under the treaty—Suit by Dominion against the Province of Ontario for contributions as respects lands within the Province.]—By a treaty dated October 3, 1873, the Dominion Government, acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the Ojibeway Indians certain payments and other rights, at the same time extinguishing by consent their interest over a large tract of land about 50,000 square miles in extent, the greater part of which was subsequently ascertained to lie within the boundaries of the Province of Ontario. It having been decided that the release of the Indians' interest affected by the treaty enured to the benefit of Ontario, the Dominion Government sued in the Exchequer Court for a declaration that it was entitled to recover from and be paid by the Province of Ontario as a proper proportion of annuities and other moneys paid and payable under the treaty:—Held, affirming the judgment of the Supreme Court, that, having regard to the jurisdiction conferred upon the Exchequer Court, the action must be dismissed as unsustainable on any principle of law. In making the treaty, although it resulted in direct advantage to the Province, the Dominion Government did not act as agent or trustee for the Province or with its consent, or for the benefit of the lands, but with a view to great national interests—that is, for distinct and important interests of their own—in pursuance of powers derived from the British North America Act, 1867. St. Catharines and Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46, considered.

Dominion of Canada v. Province of Ontario, [1910] A.C. 637.

—Powers of Provincial Legislature—Prohibition of sale of medicine—Trade and commerce—License under Dominion Proprietary and Patent Medicine Act.]—The sole jurisdiction to regulate trade and commerce being vested in the Dominion Parliament, it is not competent for a provincial legislature to prohibit the sale of that

which the Dominion Parliament has given license to sell. Russell v. The Queen, 7 App. Cas. 829, 838, and Grand Trunk R.W. Co. v. Attorney-General for Canada [1907], A.C. 65, 68, specially referred to. S. 64 of c. 28 of the statutes of Saskatchewan, 1906, is ultra vires, in so far as it provides that "if any person not registered . . . shall . . . for hire, gain, or hope of reward . . . furnish medicine," he shall be guilty of an offence, etc. The defendant, being the representative of a company licensed under the Dominion Proprietary or Patent Medicine Act, 7 and 8 Edw. VII. c. 56, to sell certain specified medicines, could not be convicted under the Provincial Act for so selling.

Rex v. Ferries, 15 W.L.R. 331 (Sask.).

See ELECTRIC LIGHT AND POWER.

Legislative powers—Appeals from the Quebec Court of Review.]—The power of the Parliament of Canada under s. 101 of the British North America Act, 1867, respecting a general court of appeal for Canada is not restricted to the establishment of a court for the administration of the laws of Canada, and, consequently, there was constitutional authority to enact the provisions of the third section of the Dominion Statute, 54 & 56 Vict., c. 25, authorizing appeals from the Superior Court, sitting in review, in the Province of Quebec.

L'Association St. Jean-Baptiste de Montreal v. Brault, 31 Can. S.C.R. 172.

—Courts of General Sessions in Ontario.]—An appeal from a summary conviction under the Criminal Code is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury; and Code s. 881, constituting such Court the absolute judge as well of the facts as of the law in respect of the conviction or decision appealed against, in intra vires of the Dominion Parliament. A statutory provision that the Appellate Court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the Court.

R. v. Malloy, 4 Can. Cr. Cas. 116 (McDougall, Co. J.).

—Resident of one province sued in another —Jurisdiction—Foreign judgment—B. N. A. Act.]—No province can pass laws to operate outside its own territory; and no tribunal established by a province can extend its process beyond the province so as to subject persons and property elsewhere to its decisions; and consequently a judgment obtained in one province by service of process out of the jurisdiction against a domiciled resident of another province, who has not in any way attorned to the jurisdiction, has no extra-territorial validity, even though regularly obtained under the procedure of the former province:—Aliter, where the rule or judgment of such other province has been obtained upon the non-resident's own application.

Deacon v. Chadwick, 1 O.L.R. 346.

—Appeal per saltum—Indian lands—Legislative jurisdiction.]—Under the provisions of s. 26, sub-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from the final judgment of a Divisional Court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario, and the fact that an important question of constitutional law is involved and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave.

Ontario Mining Company v. Seybold, 31 Can. S.C.R. 125.

—Lotteries—Provincial legislative powers.]—The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.

L'Association St. Jean-Baptiste de Montreal v. Brault, 30 Can. S.C.R. 598, 4 Can. Crim. Cas. 284.

—Powers of the Dominion Parliament — Railway Act—Prohibited contract.] — The Consolidated Railway Act, 1879, s. 19, sub-s. 16, enacts:—"No person holding any office, place or employment in or being concerned or interested in any contracts under or with the company, shall be capable of being chosen as a director, or of holding the office of director, nor shall any person being a director of the company enter into, or be directly or indirectly, for his own use and benefit interested in any contract with the company, not relating to the purchase of land necessary for the railway, or be or become a partner of any contractor with the company." It was admitted that the appellant was a director and the president of the Temiscouata Railway Company at the time he entered into certain agreements with the contractors for the construction of the road, which agreements gave him an interest in their contracts:—Held, (1) The provisions of the enactment above cited are constitutional. The Dominion Parliament having the right to legislate on matters concerning railways, it has also the power to legislate on all incidents which may be required to carry out the object it had in view, provided such incidents are essentially and strictly connected with the principal object, and are primarily intended to assist in carrying out such principal object; and the capacity or incapacity of directors is a matter essentially connected with the internal economy of a railway company. (2) Where a contract is prohibited by statute, such contract is void, although the statute itself does not state that it is so, and only imposes a penalty on the offender. (3) Consequently,

where the president of a railway company entered into a secret partnership with the contractors for the construction of the road, no action can be maintained by him against his partners to enforce such contract.

Macdonald v. Riordan, 30 Can. S.C.R. 619, affirming, 8 Que. Q.B. 555.

—Railways—Farm crossings—Jurisdiction of provincial legislature.]—The provincial legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of The Railway Act of Canada.

The Canadian Pacific Railway Co. v. The Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367, followed; Grand Trunk Railway v. Therrien, 30 Can. S.C.R. 485.

—Dominion official—Order to pay judgment debt by instalments—Jurisdiction of local legislature.]—K., M. and W. were officers of the government of Canada and were in receipt of annual salaries amounting to $1,800, $400, and $700 respectively. K., upon being examined before the Judge of the County Court of W., was, under the provisions of 59 Vict., c. 28, s. 53, ordered to pay the amount of the judgment against him by instalments at the rate of five dollars per month. M. and W., being examined before the Judge of the County Court of S., were, under the same section, ordered to pay the amounts of the judgments against them by instalments at the rate of five and ten dollars per month respectively. Orders nisi having been obtained to bring up the three orders for the purpose of quashing them, upon the returns thereof, it was held, per Tuck, C.J., Hanington, VanWart and McLeod, JJ., Landry, J., dissenting, (1) That the provisions of 59 Vict., c. 28, s. 53, authorizing the Judge or other officer before whom the examination is held, upon it being made to appear to him that the judgment debtor is unable to pay the whole of the debt in one sum, but is able to pay the same by instalments, to make an order that the debtor shall pay the amount of the judgment debt by instalments, in so far as it is sought to apply the same to salary or income derived from office or employment under the government of Canada, is ultra vires of the provincial legislature, and, therefore, that the orders against K., M. and W. should be quashed.

Ex parte Killam; Ex parte McLeod, and Ex parte Wilkins, 34 N.B.R. 530.

—Taxation—Civil servants.]—Members of the civil service are not subject as such to the additional personal tax of $2 imposed by the corporation of the city of Quebec under the Provincial Act 40 Vict., c. 52, s. 3.

Desjardins v. City of Quebec, 18 Que. S.C. 434 (Cir. Ct.).

—Ice-cutting—Waters and watercourses — Public harbour.]—Judgment of the Court of Appeal for Ontario in McDonald v. Lake Simcoe Ice & Cold Storage Co., 26 Ont. App. 411, reversed by the Supreme Court of Canada. See WATERS AND WATERCOURSES.

Lake Simcoe v. McDonald, 31 Can. S.C. R. 130.

—Jurisdiction of parish Court commissioners—Canada Temperance Act.]—

See CANADA TEMPERANCE ACT.

—Provincial legislation—Municipal Act — Dominion legislation — Petroleum Inspection Act.]—The defendant was convicted of a breach of a city by-law, which enacted that no larger quantity than one barrel of crude oil, burning fluid, naptha, benzole, benzine, or "other combustible or dangerous materials" should be kept at any one time in a house or shop in the city, except under certain limitations. The by-law was passed under sub-s. 17 of s. 542 of the Municipal Act, R.S.O. 1897, c. 223, such section being headed "Storing and transportation of gunpowder," and providing "for regulating the keeping and storing of gunpowder and other combustible or dangerous materials," and was one of a group of sections under Division VI. of the Act headed "Protection of life and property," sub-division 3 of said division, which included s. 542, being under the heading of "Prevention of fires":—Held, that sub-s. 17 authorized the passing of the by-law and that the conviction could be supported thereunder; that the words "other combustible or dangerous materials" were not limited by the ejusdem generis rule to gunpowder or other similar substances, but would include the substances set out in the by-law. Held, also, that such legislation was not superseded by Dominion legislation, the Petroleum Inspection Act, 1899, 62 & 63 Vict., c. 27 (D.), dealing with the subject being expressly made conformable thereto.

Rex v. McGregor, 4 O.L.R. 198 (Div. Ct.), 5 Can. Cr. Cas. 485.

—Act prohibiting the sale of real or personal property on Sunday—Whether or not ultra vires of the provincial legislature—Act of Assembly.]—S. 1 of 62 Vict., c. 11, whereby the sale of real or personal property or the exercise of any worldly business or work on Sunday is prohibited, is within the authority of the Legislature of New Brunswick. Therefore, where G. was convicted under the above section before the police magistrate of S. of selling cigars on Sunday, a rule nisi for a certiorari to bring up the conviction in order to quash the same was discharged. The fact that the Parliament of Canada can make the doing of such an act on Sunday a crime, and prohibit it under the general criminal law, does not necessarily show that the local legislature has no jurisdiction to

deal with it under its powers to make regulations of a police or municipal nature. A subject matter of legislation though falling within some of the classes entrusted to the federal parliament by s. 91 of the British North America Act, may likewise, when looked at from another point of view, come within some of the classes over which, by s. 92 of the same Act, the provincial legislatures have exclusive jurisdiction.

Ex parte Green, 35 N.B.R. 137, 4 Can. Cr. Cas. 182.

—Sunday observance—Ontario Lord's Day Act—Matter relating to criminal law and not to civil rights—Legislative power of Dominion parliament—British North America Act.]—The Ontario Lord's Day Act, R. S.O. 1897, c. 246, is ultra vires of the Ontario Legislature as the subject thereof comes under the classification of "criminal law," which by the British North America Act, is under the exclusive legislative authority of the Parliament of Canada.

Attorney-General (Ont.) v. Hamilton Street Railway, [1903] A.C. 524.

—Ontario Liquor Act—Voting on by electors—Delegation of legislative power—Appointment of judge to conduct trial—Jurisdiction.]—The subject matter of the Ontario Liquor Act, 1902, is one with regard to which the Legislature is competent to enact a law or laws. Attorney-General for Ontario v. Attorney-General for Dominion (1896) A.C. 348, and Attorney-General of Manitoba v. Manitoba License Holders' Association, (1902) A.C. 73, followed. The legislature, in enacting the Liquor Act, did not exceed or fail to properly exercise its powers. Legislation which provides a law, but leaves the time and manner of its taking effect to be determined by the votes of the electors, is not a delegation of legislative power to them. Russell v. The Queen, 7 App. Cas. 829, The Queen v. Burah, 3 App. Cas. 889, and City of Fredericton v. The Queen, 3 S.C.R. 505, followed. By s. 91 (4), providing that the president of the High Court shall designate a County or District Judge to conduct the trial of persons accused of corrupt practices at the taking of the vote under Part I., the legislature did not assume the power of appointing Judges, and did not exceed its powers in providing that a County or District Judge designated should exercise jurisdiction outside of his own county or district; and a Judge so designated may try the accused without a jury. The provisions of sub-ss. (2) and (3) of s. 91 are amplifications of the provisions of the Ontario Election Act, which are incorporated in the Liquor Act, and the Judge in this case did not exceed his powers in sentencing the accused, whom he found guilty of personation, to one year's imprisonment in addition to the payment of a penalty of $400 and costs. The jurisdiction is to try at any place in Ontario, and it appearing in the order of conviction that the trial was held under the Act and that the offence was committed at the city of Toronto, and the prisoner being sentenced to be imprisoned in the common gaol of the county of York at the city of Toronto, the order showed jurisdiction, although it did not specify the place of trial.

Rex v. Carlisle, 39 Can. Law Jour. 757, 6 O.L.R. 718, 7 Can. Cr. Cas. 470.

—Lands in Ontario surrendered by the Indians—Proprietary right—Power of disposition.]—Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the Province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the ministers of the Province and under the seal of the Province. St. Catharines Milling Co. v. Reg. (1888), 14 App. Cas. 46, followed. The Dominion Government having purported, without the consent of the Province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty: —Held, that this was ultra vires the Dominion, which had by s. 91 of the British North America Act of 1867 exclusive legislative authority over the lands in question, but had no proprietary rights therein. The consent of the Province having been subsequently provided for by a statutory agreement between the two Governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been made.

Ontario Mining Co. v. Seybold, [1903] A.C. 73, affirming 32 Can. S.C.R., 1 and 32 O.R. 295.

—Naturalization and aliens—British Columbia Provincial Elections Act — Privileges conferred or withheld after naturalization.] —S. 91, sub-s. 25 of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion parliament the subject of naturalization—that is, the right to determine how it shall be constituted. The provincial legislature has the right to determine, under s. 92, sub-s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it. Accordingly, the British Columbia Provincial Elections Act, 1867, c. 67, s. 8, which provides that no Japanese whether naturalized or not, shall be entitled to vote, is not ultra vires.

Cunningham and Attorney-General for British Columbia v. Tomey Homma and Attorney-General for Dominion of Canada, [1903] A.C. 151.

—Interest Act—Mortgage running over five years — Payment—Foreign company.]—Ac-

tion to compel a mortgagee in Great Britain under the provisions of R.S.C. 1886, c. 127, s. 7, to accept the principal money and interest due on a ten year mortgage, which had run over six years:—Held, that the section is intra vires of the Dominion parliament and is not restricted in its application to such mortgages as are mentioned in s. 3 of the Act, but applies to every mortgage on real estate executed after the first of July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage." Held, also, that words of s. 25 of c. 205 R.S.O. 1897, are wide enough to apply to mortgages executed prior to the passing of that Act. Held, also, that the loan having been made, the property being situate, and the mortgage giving the option of payment, in Canada, the law of Canada must govern in relation to the contract and its incidents and that the tender made as described in the judgment was sufficient.

Bradburn v. The Edinburgh Life Assurance Co., 5 O.L.R. 657 (Britton, J.).

—Lord's Day Acts.]—See SUNDAY OBSERVANCE.

—Ferries—Public harbours—River improvements.]—See FERRIES.

Perry v. Clergue, 5 O.L.R. 357 (Street, J.).

—B. N. A. Act, 1867, s. 51—Construction—"Aggregate population of Canada."]—In determining the number of representatives to which Nova Scotia and New Brunswick are respectively entitled after each decennial census the words "aggregate population of Canada" in sub-s. 4 of s. 51 of the B.N.A. Act, 1867, mean the whole population of Canada including that of provinces which have been admitted subsequent to the passing of the Act.

Re Representation in the House of Commons of Certain Provinces, 33 Can. S.C.R. 475.

—The Liquor Act, 1902 — Referendum — Power of legislature—Trial of offenders — Constitution of Court—County Judge—Special Court—Issue of summons—Adjournment for sentence—R.S.O. 1897, c. 9, s. 191.] —On a motion to quash a conviction for attempting to put a paper other than the ballot box while the question referred to the electors by the 2nd section of the Liquor License Act, 1902, was being voted upon throughout the province, contrary to the provisions of s. 191 of the Ontario Election Act, R.S.O. 1897, c. 9, and s. 91 of the Liquor Act, 1902:—Held, that the reference by the legislature of such a question, as that mentioned in s. 2 of the Liquor Act, 1902, to the vote of the electors, instead of deciding it themselves, although unusual, was well within their powers. Held, also, that the intention of the legislature, under sub-s. 4 of s. 91, was to create a tribunal with authority to try certain specified offences, and that the Court, so created had power under the words "to conduct the trial" to bring the party charged before the Court, try him for the offence and sentence him, if found guilty; and that the County Judge appointed to conduct the trial does not act as a County Judge, but as a Court specially created; and who should act out of his own county in holding the actual trial; and that he may issue his summons in his own county or elsewhere; and has power after finding the accused guilty to adjourn the Court to a subsequent day for the purpose of passing sentence.

Rex v. Walsh, 5 O.L.R. 527 (D.C.).

—Expense of militia service—Aid of civil power.]—Sub-ss. 5 and 6 of s. 34 of the Militia Act of Canada, R.S.C. c. 41, by which the cost of militia corps called out in aid of the civil power, is imposed on the municipality in which their services are required, are intra vires of the Parliament of Canada.

Gordon v. City of Montreal, 24 Que. S.C. 465 (Fortin, J.).

—Dominion legislation—Preamble—"Work for the general advantage of Canada"—Expropriations of private land.]—The preamble to an Act of the Dominion Parliament recited, that it was desirable for the general advantage of Canada that a company should be formed for the purpose of utilizing the waters of certain navigable rivers in the province of Ontario, with the object of promoting manufacturing industries and inducing the establishment of manufacturing and other businesses in Canada; and the Act then expressly authorized the construction of certain works connected therewith and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada, and also authorized the company to enter into certain contracts extending beyond the limits of the Province, which Act was subsequently amended by the Dominion Parliament and recognized by the Legislature of Ontario:—Held, that the preamble showed by implication the intention of Parliament to give the power to deal with public property of the Dominion and to expropriate private property in the Province, and the reason for so doing; and was a Parliamentary declaration that the formation of the company for the purposes mentioned was for the general advantages of Canada.

Hewson v. Ontario Power Co., 8 O.L.R. 88 (C.A.), affirming Re The Ontario Power Co. and Hewson, 6 O.L.R. 6.

—Legislative assembly—Powers of speaker —Precincts of house—Expulsion.]—The public have access to the Legislative Chamber and precincts of the House of Assembly as

a matter of privilege only, under license either tacit or express which can be revoked whenever necessary in the interest of order and decorum. The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sittings as well as when the House is in session. A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed. Judgment of the Supreme Court of Nova Scotia (36 N.S.R. 211) reversed and a new trial ordered.

Payson v. Hubert, 34 Can. S.C.R. 400.

—Constitutional law—Powers of provincial legislature—R.S.O. 1897, c. 254—Fraudulent entry of horses at exhibition.]—The Act to Prevent the Fraudulent Entry of Horses at Exhibitions, R.S.O. 1897, c. 254, is within the powers of the Ontario Legislature. A conviction of the defendant for an offence against that Act, with an adjudication of a fine and imprisonment in default of payment, was affirmed.

Rex v. Horning, 8 O.L.R. 215, 8 Can. Cr. Cas. 268.

—Constitution of criminal courts.]—Though the organization of courts of criminal jurisdiction is within the exclusive powers of the provincial legislatures, the Parliament of Canada may impose upon existing courts or upon individuals the duty of administering the criminal law, without the aid of supplementary provincial legislation.

Re Vancini. 34 Can. S.C.R. 621, 8 Can. Cr. Cas. 228.

—Service of process out of jurisdiction.]—The Legislature of the North-West Territories has power to provide for service of process upon defendants residing outside the Territories.

McCarthy v. Brener, 2 Terr. L.R. 230.

—Foreshore of Vancouver harbour—Occupation of by Canadian Pacific Railway terminals—Powers of Dominion Parliament.]—Held, in an action by the Attorney-General of British Columbia ex rel the City of Vancouver against the Canadian Pacific Railway, for a declaration that the public has a right to access to the waters of Vancouver harbour through certain streets, and that the streets at the time of the construction of the Canadian Pacific Railway, were public highways extending to low water mark and that the public right of passage over said highways existed at the time of the admission of British Columbia into Canada, but that these public rights have been extinguished or suspended by reason of the construction of the said railway. The foreshore of Vancouver harbour is under the jurisdiction of the Parliament of Canada, either as having formed part of the harbour at the time of the union of British Columbia with the Dominion, or by reason of the jurisdiction of the Dominion attaching at the Union. The Parliament of Canada has power to appropriate provincial public lands for the purposes of a railway connecting two or more Provinces. The Act respecting the Canadian Pacific Railway, 44 Vict. Cap. 1, should not be construed in the same way as an ordinary Act of incorporation or any ordinary railway, but it should be interpreted in a broad spirit, and bearing in mind the objects sought to be accomplished. Per Hunter, C.J.: The British North America Act assigns public harbours to the Dominion, not so much qua property or land as qua harbours; the jurisdiction of the Dominion is latent and attaches to any inlet or harbour so soon as it becomes a public harbour, and is not confined to such harbours as existed at the time of Union.

Attorney-General for British Columbia v. Canadian Pacific Railway Company, 11 B.C.R. 289.

—Sunday observance—Reference to Supreme Court—Legislative jurisdiction.]—The statute 54 and 55 Vict. c. 25, s. 4, does not empower the Governor-General in Council to refer to the Supreme Court for hearing and consideration supposed or hypothetical legislation which the legislature of a Province might enact in the future. Sedgewick, J., dissenting. The said section provides that the Governor in Council may refer important questions of law or fact touching specified subjects "or touching any other matter with reference to which he sees fit to exercise this power." Held, Sedgewick, J., contra, that such "other matter" must be ejusdem generis with the subjects specified. Legislation to prohibit on Sunday the performance of work and labour, transaction of business, engaging in sport for gain, or keeping open places of entertainment, is within the jurisdiction of the Parliament of Canada. Attorney-General for Ontario v. Hamilton Street Railway Co. [1903] A.C. 524, followed.

Re legislation respecting abstention from labour on Sunday, 35 Can. S.C.R. 581.

—B.N.A. Act, 1867, s. 92, sub-s. 10 (c)—Legislative jurisdiction—Parliament of Canada—Local works and undertakings—General advantage of Canada.]—In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded. Where the subject matter of legislation by the Parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada or for the advantage of two or more of the Provinces. Semble, per Sedgewick and Davies JJ. (Girouard and Iding-

ton JJ. contra).—A recital in the preamble to a special private Act, enacted by the Parliament of Canada, is not such a declaration as that contemplated by sub-s. 10 (c) of s. 92 of the British North America Act, 1867, in order to bring the subject matter of the legislation within the jurisdiction of Parliament. A motion made, while the case was standing for judgment, to have the case remitted back to the Courts below for the purpose of the adduction of newly discovered evidence as to the refusal of Parliament to make the above-mentioned declaration was refused with costs.

Hewson v. Ontario Power Company, 36 Can. S.C.R. 596.

—B.N.A. Act, s. 51, sub-s. 4; ss. 3, 146—Readjustment of representation — "Aggregate population of Canada."]—Held, first: that for the purpose of determining whether the representatives of New Brunswick are liable to be reduced, the expression "aggregate population of Canada," in s. 51 (4) of the B.N.A. Act means the whole of Canada as constituted by the Act, and not merely the four Provinces originally federated, but includes those and all other Provinces subsequently incorporated by Order in Council under s. 146. Held, secondly, that Prince Edward, which had been admitted under s. 146 by Order in Council directing it to have six members, its representation to be readjusted from time to time under the provisions of the Act, was not by s. 51 (4) protected from reduction, until an increase thereof had been previously effected. The judgment of the Supreme Court of Canada re Prince Edward Island, 33 Can. S.C.R. 594, was affirmed.

Attorney-General of Prince Edward v. Attorney-General of Canada [1905] A.C. 37.

—Masters and Servants Ordinance—B.N.A. Act—Constitution of Courts—Appointment of Judges—Justices of the Peace.]—The Masters and Servants Ordinance, R.O. 1888, c. 36, enacted that it should be lawful for any Justice of the Peace on complaint . . by any . . . servant of . . . nonpayment of wages . . . by his master . . . to order such master to pay such complainant one month's wages in addition to the amount of wages then actually due him . . . together with the costs of prosecution, the same to be levied by distress . . . and in default of sufficient distress, to be imprisoned . . .:—Held, Rouleau, J., dissenting, and Scott, J., expressing no opinion—against the contention that the provision was ultra vires of the Territorial Legislature, on the grounds that it assumed (1) to impose a penalty with imprisonment to enforce it, and (2) to provide for the appointment of judicial officers —that the provision was within the powers conferred upon the Territorial Legislature by the orders-in-council promulgated under the N.W.T. Act, R.S.C. c. 50, s. 13 of 11th May, 1877, and 26th June, 1883. The former order-in-council gave power to pass ordinances in relation to "6. The administration of justice, including the constitution, organization and maintenance of Territorial Courts of civil jurisdiction." 7. The imposition of punishment by fine, penalty, or imprisonment for enforcing any Territorial ordinance, and, 8. Property and civil rights in the Territories subject to any legislation by the Parliament of Canada on these subjects." The latter order-in-council contained clauses in the same words. Per Wetmore and McGuire, JJ.—The provision in question of the Masters and Servants Ordinance did not purport to constitute a criminal offence, but was designed to give enlarged rights, and a more effective and speedy remedy with respect to a civil contract; the remedy by imprisonment is a competent exercise of the power to legislate under the above cited paragraphs of the order-in-council; and paragraph 6 does not exclude the power of appointing judicial officers. The Dominion Statute, 54-55 Vic. (1891) c. 22, s. 6, substituting a new section for s. 13 of the N.W.T. Act, R.S.C. c. 50, is more restrictive than the terms of paragraph 6 of the order-in-council, paragraph 10 of the section reading as follows: "10. The administration of jutsice in the Territories, including the constitution, organization and maintenance of Territorial Courts of civil jurisdiction, including procedure therein, but not including the power of appointing any judicial officers." Per Richardson, Wetmore and McGuire, JJ.—The Legislature having power to pass the provision in question of the Masters and Servants Ordinance at the time it was passed the provision did not cease to be valid by reason of the subsequent restriction placed upon the power of the Legislature. Per Wetmore, J.—The British North America Act, 1867, s. 96, which provides that "the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick," does not prevent a Provincial Legislature from constituting Courts other than Superior, District or County Courts, and appointing or providing for the appointment of Judges or other judicial officers therefor. Per McGuire, J.—The provision in question of the Master and Servants Ordinance did not attempt to create a Court or to appoint judicial officers; the Legislature found a Court and judicial officers already existing and appointed under federal authority, namely, Justices Courts and Justices of the Peace, and assigned to them, as it had power to do, duties respecting matters within its legislative power.

Gower v. Joyner, 2 Terr. L.R. 387.

—B.N.A. Act, ss. 91, 92 (10)—Powers of Dominion Parliament—Local undertakings extending beyond province.]—Held, affirming the judgment of the Court of Appeal, 6 O.L.R. 335, that the Bell Telephone Co.,

under the Dominion Act of incorporation, 43 Vict. c. 67, have power and authority to enter upon the streets and highways of the City of Toronto, and construct conduits or lay cables thereunder or erect poles or string wires therefrom along the streets without the leave or license of the corporation. This Act is intra vires of the Dominion Parliament under B.N.A. Act, s. 92 (10), and the Provincial Act, 45 Vict. c 71, passed to authorize the exercise of the above powers, subject to the consent of the corporation, is ultra vires. The latter statute could not by reason of having been passed on the application of the respondent company be validated as a legislative bargain.

Toronto v. Bell Telephone Co. (1905) A.C. 52.

—Railway—Liability for negligence—Power of Parliament to prohibit agreements exempting.]—See RAILWAYS.

Re Railway Act Amendment, 1904, 36 Can. S.C.R. 136.

—Yukon—Imperial statutes—Lis pendens.]—See YUKON.

—Alien Labour Act.]—See ALIEN.

—Interprovincial and international ferries—Powers of Parliament.]—See FERRIES.

—Extradition Courts.]—The Parliament of Canada has power to establish Courts and to authorize the appointment of officers to administer the extradition laws.

Gaynor v. Lafontaine, Q.R. 14 Q.B. 99, 36 Can. S.C.R. 247.

—British North America Act, 1867, ss. 91, 92, 108—Power of the Dominion to legislate for certain provincial Crown property—Provincial foreshore.]—Section 108 of the British North America Act, 1867, empowers the Dominion Parliament to legislate for any land, including foreshore, which is proved to form part of a public harbour. Sections 91 and 92, read together, empower the Dominion to dispose of provincial Crown lands, and, therefore, of a provincial foreshore, for the purpose of the respondent railway, which is a trans-continental railway connecting several Provinces:—Held, that s. 18 (a) of the respondents' incorporating Dominion Act, 44 Vict. c. 1, is not controlled by the Consolidated Railway Act, 1879, and applies to Provincial as well as Dominion Crown lands. Power given hereunder to appropriate the foreshore in question includes a power to obstruct any rights of passage previously existing across it.

Attorney-General for British Columbia v. Canadian Pacific Railway Company, [1906] A.C. 204.

—Land in British Columbia—Military reserve—Title of the Dominion—Transfer by Imperial Government—British North America Act, 1867, ss. 108, 117.]—The land in suit, called Deadman's Island, was de facto a "reserve" by the Government of British Columbia under paragraph 3 of the Proclamation of 1859, and, according to the evidence a military reserve:—Held, that it remained Imperial property at the time of the British North America Act, 1867, and was transferred to the Dominion by special grant dated March 27, 1884. It did not, therefore, fall to the colony in virtue of s. 117 of the Act, nor to the Dominion in virtue of s. 108. Appeal from decision in Attorney-General v. Ludgate, 11 B.C.R. 258, dismissed.

Attorney-General of British Columbia v. Attorney-General of Canada, [1906] A.C. 552.

—Power of Dominion Parliament—Validity of Dominion Act, 60 and 61 Vict. c. 11, s. 6, amended by 1 Edw. VII. c. 13—Power to expel and deport aliens.]—Held, that s. 6 of the Dominion Statute, 60 and 61 Vict. c. 11, as amended by 1 Edw. VII. c. 13, s. 13, is intra vires of the Dominion Parliament. The Crown undoubtedly possessed the power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government, which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power. Re Gilhula & Cain, 10 O.L.R. 469, reversed.

Attorney-General v. Cain, [1906] A.C. 524 (P.C.).

—Concurrent statutes, Provincial and Federal.]—See LIQUOR LICENSE.

Ex parte O'Neill, 28 Que. S.C. 304.

—Animals' Contagious Diseases Act.]—This Statute of Canada, 1903, is within the legislative power of the Federal Parliament.

Brooks v. Moore, 13 B.C.R. 91.

—Vancouver Island Settlers' Rights Act, 1904—Construction—Powers of local legislature—British North America Act, s. 92, sub-s. 10.]—The British Columbia Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservations as to mines and minerals should be issued to settlers therein defined, and thereunder a grant was made to the appellant of the lot in suit. By an Act of the same legislature in 1883, land which included the said lot had been granted with its mines and minerals to the Dominion Government in aid of the construction of the respondents' railway, and in 1887 had been by it granted to the respondents under the provisions of a Dominion Act passed in 1884:—Held, that the Act of 1904 on its true construction legalized the grant thereunder to the appellant, and superseded the respondents' title. Held, also, that the Act of 1904 was intra vires of the local legisla-

ture. It had the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related to land which had become the property of the respondents, and affected a work and undertaking purely local within the meaning of s. 92, sub-s. 10, of the British North America Act.

McGregor v. Esquimalt and Nanaimo Ry. Co., [1907] A.C. 462, reversing judgment of British Columbia Supreme Court, 12 B.C.R. 257.

—Liabilities of Province at Confederation—Special funds—Rate of Interest—Trust funds or debt.]—Among the assets of the Province of Canada at Confederation were certain special funds, namely, U.C. Grammar School Fund, U.C. Building Fund and U.C. Improvement Fund, and the Province was a debtor in respect thereto and liable for interest thereon. By s. 111 of the B.N.A. Act, 1867, the Dominion of Canada succeeded to such liability and paid the Province of Ontario interest thereon at five per cent. up to 1904. In the award made in 1870 and finally established in 1887, on the arbitration, under s. 142 of the Act to adjust the debts and assets of Upper and Lower Canada, it was adjudged that these funds were the property of Ontario. In 1904 the Dominion Government claimed the right to reduce the rate of interest to four per cent., or if that was not acceptable to the Province to hand over the principal. On appeal from the judgment of the Exchequer Court in an action asking for a declaration as to the rights of the Province in respect to said funds:—Held, affirming said judgment (10 Ex. C.R. 292), Idington, J., dissenting, that though before the said award the Dominion was obliged to hold the funds and pay the interest thereon to Ontario, after the award the Dominion had a right to pay over the same with any accrued interest to the Province and thereafter be free from liability in respect thereof. Held, also, that until the principal sum was paid over the Dominion was liable for interest thereon at the rate of five per cent. per annum.

Attorney-General of Ontario v. Attorney-General of Canada, 39 Can. S.C.R. 14.

—Prairie Fires Ordinance, N.W.T.—Railways.]—See RAILWAYS.

(Canadian Pacific v. The King, 39 Can. S.C.R. 476; 13 Can. Cr. Cas. 160.)

—Legislative powers—Amendment to Pre-confederation Act.]—Where by an Act passed before Confederation by the Parliament of the Province of Canada vagrancy is made punishable by a fine of $20, the legislature of Quebec has no power to enact that "in the case of habitual and incorrigible vagrancy" the magistrate may sentence the offender to imprisonment for not less than six months nor more than one year.

Beaulieu v. City of Montreal, Q.R. 32 S.C. 97 (Sup. Ct.).

—Powers of legislature—Criminal law—Recorder's Court.]—When the Parliament of Canada has declared an action to be criminal, has provided the procedure whereby it shall be punished, and declared what Court shall have jurisdiction over it, a local legislature has no power to pass an Act for punishment of the same offence, to authorize a tribunal to inflict the punishment, and provide the procedure to be followed. The Recorder's Court of Quebec has no jurisdiction over an offence under the Criminal Code when the jurisdiction is given to two justices of the peace though the recorder himself has.

Dallaire v. City of Quebec, Q.R. 32 S.C. 118 (Sup. Ct.).

—County Court judge—Appointment to fill temporary vacancy—Provincial Act.]—The Provincial Acts of 1901, c. 22, s. 12, amended the County Court Act by providing that "in case of a vacancy in the office of Judge for any district the governor in council may designate and appoint the Judge of any other district to act during the whole or any part of such vacancy." Under this provision the governor in council appointed the Judge of the County Court for district No. 6 to act in district No. 5 during a temporary vacancy in the office of Judge for that district:—Held, following In re County Courts of British Columbia, 21 S.C.C. 464, that the Act authorizing the appointment was intra vires the provincial legislature, and that the appointment thereunder was a mere extension of the district for which the Judge, who had been duly appointed, was authorized to act, and that it was not open to the objection of being an encroachment upon the power of appointment vested in the Government of Canada under the provisions of the British North America Act, s. 92, sub-s. 14. Defendant, who was confined in the lock-up of the town of Springhill on a charge of unlawfully stealing or receiving stolen goods, was tried and convicted before the Judge so appointed, under the Criminal Code, s. 161, of the offence of breaking prison. The evidence showed that the lock-up was situated in the same building with the office of the police magistrate of the town and had been used for years as a place of detention for persons charged with the commission of criminal offences and that there was no other place in the town used for such purpose:—Held, that defendant was a person confined on a criminal charge within the meaning of the Code, tit. I., pt. 1, s. 3, sub-s. (u), and that, with respect to the place of detention, the maxim omnia præsumuntur rite esse acta appiled, and that the regularity of all proceedings necessary to constitute the lock-up a place of confinement in such cases was to be assumed.

The King v. Brown, 41 N.S.R. 293.

—Company—Provincial charters.]—See COMPANY.

(Canadian Pacific v. Ottawa Fire Ins. Co., 39 Can. S.C.R. 405.)

—British North America Act, s. 91, sub-s. 29; s. 92, sub-s. 10 (a)—Railway Act.]—The Railway Committee of the Privy Council of Canada, by order made under ss. 187 and 188 of the Dominion Railway Act (51 Vict. c. 29), directed certain measures to be taken to safeguarding the respondents' railway, which is a through railway, and for the protection of the public in traversing it at certain level crossings where it passes across public streets at points within or immediately adjoining the boundary of the appellant city, and directed the cost thereof to be borne in equal proportions by the railway and the city. In a suit by the railway after the execution of works as directed to recover the apportioned amount from the corporation:—Held, that ss. 187 and 188 were intra vires of the Dominion Legislature by force of the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10(a). Held, also, that, having regard to s. 7, sub-s. 2, of the Interpretation Act (R.S.C., 1886, c. 1), "person" in s. 188 includes a municipality.

City of Toronto Corporation v. Canadian Pacific Railway Company, [1908] A.C. 54.

—Ontario Succession Duty Act (R.S.O., 1897, c. 24)—Provincial taxation of property not within the Province ultra vires.]—It is ultra vires the Legislature of Ontario to tax property not within the Province: see British North America Act, 1867, s. 92, sub-s. 2:—Held, accordingly, that the Succession Duty Act (R.S.O., 1897, s. 24) does not include within its scope movable properties locally situated outside the Province of Ontario which it was alleged that the testator, a domiciled inhabitant of the province, had transferred in his lifetime with intent that the transfers should only take effect after his death. Blackwood v. Reg. (1883), 8 App. Cas. 82, followed.

Woodruff v. Attorney-General for Ontario, [1908] A.C. 508.

—Indian lands—Extinguishment of Indian title—Payment by Dominion—Liability of province.]—Where a dispute between the Dominion and a Province of Canada, or between two Provinces comes before the Exchequer Court as provided by s. 32 of R.S.C. 1906, c. 140, it should be decided on a rule or principle of law and not merely on what the Judge of the Court considers fair and just between the parties. In 1873 a treaty was entered into between the Government of Canada and the Salteaux tribe of Ojibeway Indians inhabiting land acquired by the former from the Hudson Bay Co. By said treaty the Salteaux agreed to surrender to the Government all their right, title and interest in and to said lands and the Government agreed to provide reserves, maintain schools and prohibit the sale of liquor therein and allow the Indians to hunt and fish, to make a present of $12 for each man, woman and child in the bands and pay each Indian $5 per year and salaries and clothing to each chief and sub-chief; also to furnish farming implements and stock to those cultivating land. At the time the treaty was made the boundary between Ontario and Manitoba had not been defined. When it was finally determined, in 1884, it was found that 30,500 square miles of the territory affected by it was in Ontario and in 1903 the Dominion Government brought before the Exchequer Court a claim to be re-imbursed for a proportionate part of the outlay incurred in extinguishing the Indian title. The province disputed liability and, by counterclaim, asked for an account of the revenues received by the Dominion while administering the lands in the province under a provisional agreement pending the adjustment of the boundary:—Held, reversing the judgment of the Exchequer Court (10 Ex. C.R. 445) Girouard and Davies, JJ., dissenting, that the Province was not liable; that the treaty was not made for the benefit of Ontario, but in pursuance of the general policy of the Dominion in dealing with Indians and with a view to the maintenance of peace, order and good government in the territory affected; and that no rule or principle of law made the province responsible for expenses incurred in carrying out an agreement with the Indians to which it was not a party and for which it gave no mandate.

Province of Ontario v. Dominion of Canada, 42 Can. S.C.R. 1.

—Dominion overrides provincial legislation.]—Where a given field of legislation is within the competence both of the Dominion Parliament and of Provincial Legislatures, and both have legislated, the Dominion enactment must prevail:—Held, accordingly, that the respondent company, which under Dominion Act, 60 & 61 Vict. c. 72, was empowered to supply, sell and dispose of gas and electricity, with other powers, could not be restrained from operating thereunder, at the suit of the appellants, who, under late Quebec Statutes, had exclusive power of operating in the locality chosen by the respondents.

St. Francis Water Co. v. Continental Heat & Light Co., 18 Que. K.B. 193 (P.C.), [1909] A.C. 194, affirming 16 Que. K.B. 406.

—Property and civil rights—Statute disposing of rights in litigation.]—

See MINING.

(Florence Mining Co. v. Cobalt Lake Co., 18 O.L.R. 275.)

—North-West Territories Act, s. 11 — English statutes passed subsequent to 15th July, 1870, when "applicable" — Infants' Relief Act, 1870) (Imp.).]—The word "applicable" where it first occurs in s. 11 of the North-West Territories Act, means "suitable" or "properly adapted to the conditions of the

country; where it occurs the second time, it has the same meaning as in the Colonial Laws Validity Act, and means, "applicable by the express words or necessary intendment of any Act of Parliament." The Infants' Relief Act, 1874, not being applicable by express words or necessary intendment, was not in force in the Territories, and is not in force in Alberta.

Brand v. Griffin, 1 Alta. R. 510.

CONSTRUCTION OF STATUTE.

"Porch or projection attached to any dwelling"—Verandah.]—When an Act of Parliament begins with words which describe things of an inferior degree and concludes with general words, the latter shall not be extended to anything of a higher degree. A statute confirming a survey of a town provided that houses built before a named date need not be removed though encroaching upon streets as ascertained by such survey, but that this "shall not apply to any fence, steps, platform, sign, porch or projection attached to any such dwelling house":—Held, that a verandah of wood, resting on stone pillars, having its own roof, and firmly attached to such a house was an integral part of the house, and not a porch or projection attached to it, and need not be removed under this Act. Held, also, that the position of the house and verandah did not debar the owner from applying for compensation under the Ontario Municipal Act for damage sustained, within s. 448 of that Act, by lowering the grade of the street in front.

Williams v. Town of Cornwall, 32 O.R. 255.

—57 Vict. (Q.), c. 57, s. 1—**Properties fronting on lines of streets.**]—1. Where it is clear on the face of a statute that it was intended to govern and provide for a particular state of facts the Court will modify the ordinary meaning of words so as to permit such intention to have effect. Therefore, in 57 Vict. (Q.), c. 57, s. 1, the word "widening," in reference to Milton street, being used evidently by inadvertence for "opening," the statute should be read in connection with other statutes relating to the same subject, and should be interpreted so as to give effect to the intention of the legislature. Joseph v. City of Montreal, R.J.Q., 10 C.S. 531 (decided under the same statute), referred to. 2. The clause "properties fronting" on the line of a street includes properties adjoining or contiguous to the line of the street on any side, although the buildings thereon front on a street intersecting the other and the properties are only bounded on the side line by the street first mentioned (Court of Review affirming 15 Que. S.C. 268).

Watson v. Maze, 17 Que. S.C. 579.

And see STATUTE.

—Privilege—Monopoly.]—Every limitation imposed by the legislature when a privilege is granted as a monopoly to the owner of a bridge, should be interpreted as intended to diminish, to the greatest possible extent, the inconvenience, trouble and burdens imposed by the monopoly upon the public.

Rouleau v. Pouliot, Q.R. 25 S.C. 88 (Sup. Ct.).

—Error in printing—Effect of amending Act—Absence of words giving retrospective effect.]—The Assessment Act, R.S., (1900), c. 73, s. 4, sub-s. (p), by the accidental insertion of the word "exempted" rendered liable to assessment property of the plaintiff company, which had previously been exempted. It was admitted that the word imposing the liability was not contained in the manuscript revision of the statutes, but was inserted, by error, in the printed copy, deposited in the office of the Provincial Secretary, which, it was declared, by the Act respecting the Revised Statutes, Acts of 1900, c. 44, s. 5, should be held to be the original. By an Act of the following year (Acts of 1902, c. 25), the error was corrected, by striking out of s. 4, sub-s. (p) of c. 73 of the Revised Statutes, the word "exempted." Held, that, by this amendment, the Court was precluded from coming to the conclusion that the insertion of the word "exempted," in the chapter of the Revised Statutes, amended, was a mistake, and inserted and printed accidentally, it being assumed, in the amending Act, that the section amended was in full force and effect from the time it came into operation, the amendment being one that would be out of place if the legislature had intended from the first that the word should not be there. Held, further, that, in the absence of words giving the amendment a retrospective effect, it could not be so read, and that the Act, as amended, would only apply to future assessments. Held, further, the liability of the plaintiff company having been fixed by R.S., c. 73, and there having been no appeal, that the amendment would not have the effect of preventing the collection of the rate complained of.

Dominion Iron and Steel Co. v. McDonald, 37 N.S.R. 1.

CONTEMPT OF COURT.

Scandalizing the Court—Attachment—Court sitting in one district and publication in another.]—(1) A rule of the Superior Court, issued at the instance of the Attorney-General, calling on a party to show cause why he should not be attached and punished for contempt of Court by scandalizing the Court, is a proceeding in a matter of a criminal nature, and an appeal from an order declaring the rule absolute and ordering the imprisonment of the party, will lie to the Court of King's Bench,

under the provisions of the Criminal Code, if the jurisdiction of the Superior Court to deal with the matter, either relatively, because of the place in which it sits, or absolutely, on the ground that the subject matter is not one of contempt, is put in issue. But the Court of King's Bench, sitting in appeal, if it finds that the Superior Court has jurisdiction from both points of view, will not further inquire into the merits of the order. Per Archambeault, J., the order declaring the rule absolute is a final judgment of the Superior Court from which an appeal lies to this Court under Art. 43 C.P., as well on the merits as on the question of jurisdiction. (2) The Superior Court, sitting at Quebec, has jurisdiction to take cognizance of, and adjudicate upon, proceedings for contempt by scandalizing the Court, in newspaper articles written and published in Montreal. (3) The Superior Court has jurisdiction to attach and punish for contempt by comments published in newspapers on judicial proceedings, both before and after disposal of them by final judgment. (4) The power to punish for contempt is inherent in Courts of superior original jurisdiction, such as the Superior Court of this province, independently of enactments in the codes and statutes relating to their disciplinary powers. (5) All writings or publications which tend to pervert or to obstruct the ordinary course of justice and to shake or destroy confidence in its due administration, are contempts of Court.

Fournier v. Attorney-General, 19 Que. K.B. 431.

17 Can. Cr. Cas. 108.

—Contempt of Court—Corporation.]—Corporations are subject to penalties for contempt of Court. A company publishing a magazine which refuses to obey the order of the Court forbidding it to publish therein the judgment condemning it to pay damages for libel is guilty of contempt.

Garneau v. Vigie Co., 11 Que. P.R. 404.

Publication of articles reflecting on decision and conduct of revising officer under Election Act.]—The publication of newspaper articles reflecting on the conduct of a Revising Officer acting under the Election Act in such a way that they might have been made the subject of proceedings for libel, but not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, does not constitute a contempt of Court punishable by summary proceedings.

Rex v. Bonnar (No. 2) 14 Man. R. 481, (Killam, C.J., Dubuc and Richards, JJ.).

—Husband and wife—Abandonment of domicile.]—A wife, who having been ordered by the Court to resume her marital relations, abandons the conjugal domicile after having returned to it, cannot in consequence of such act, be imprisoned for contempt of Court.

Tessier v. Guay, Q.R. 23 S.C. 75 (Sup. Ct.).

—Comment upon pending cause in newspaper—Comment by a party to the cause.]—(1) The question whether a contempt has been committed is for the sole decision of the Court; and the fact that the contemnor denies any disrespectful or contemptuous design to reflect on proceedings pending before the Court, will not justify him if such comments appear to the Court to amount to a flagrant contempt. (2) Proceedings are pending in a criminal case from the time the information has been laid, and so long as any proceedings can be taken. Where the jury have disagreed and a new trial has been ordered, the cause is pending until ended by a verdict or otherwise.

The King v. Charlier, 12 Que. K.B. 385, (Wurtele, J.).

—Party appealing in contempt—Rights of parties in contempt.]—Motion by the plaintiff to stay a pending appeal from a judgment dismissing an application to set aside service as an individual for the defendant Federation on the ground that the Federation was not an incorporate body or a partnership and could not be served as a body, for the reason that the Federation were in contempt for disobedience of an injunction: —Held, following The Metallic Roofing Co. of Canada, Ltd. v. The Local Union No. 30, Amalgamated Sheet Metal Workers' International Association (1903), 5 O.L.R. 424, that the Federation were not a body capable of being sued or being served, and if so they are not capable of being enjoined or of committing a contempt and that as the very object of the appeal was to determine whether it can be sued and served with process it could not be determined whether a contempt had been committed without hearing the appeal. Held, also, that the rule is not universal, that persons guilty of contempt can take no step in the action; a party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself, and as the defendants here were ordered to appear within ten days, on pain of having judgment signed against them, they had the right to show if they could, that the service upon them was not permitted by the practice. Motion refused, under the circumstances without costs. Fry v. Ernest (1863), 9 Jur. N.S. 1151, and Ferguson v. County of Elgin (1893), 15 P.R. 399, followed.

Small v. American Federation of Musicians, 5 O.L.R. 456 (D.C.).

—Attachment for contempt—Order—Power of Judge to vary—Appeal.]—On motion for an attachment for contempt, for the publication of newspaper articles touching a matter before the Court, and liable to interfere with the fair trial thereof, the learned Judge

before whom the motion was made, allowed it, with costs, and concluded his judgment by saying that the defendant must, in addition to paying the costs, undertake not to publish or circulate anything calculated or liable to prejudice the course of justice in respect to the action, while pending, and that he must also publish, in an early number of "The Truth," (a paper conducted by defendant), an expression of regret for having published therein anything touching this action. The order taken out was granted in different terms, requiring the defendant to deposit with the prothonotary of the Court a statement, under his hand, stating his regret at having made such a publication, and undertaking not to publish further comments upon this suit, etc. Held, that as the order was not drawn up at the time judgment was delivered, there was no necessity for following the terms of the written decision, but that it could be varied in any way that seemed proper to the Judge. Also, that the case was one in which an appeal would not lie.

Grant v. Grant, 36 N.S.R. 547.

— Proceedings for contempt — Suspension thereof pending appeal—C.P. 1212.]—Proceedings for contempt of Court will not be stopped by reason of the fact that an appeal has been taken from an interlocutory judgment in the same case.

Mergenthaler Linotype Company v. Toronto Type Foundry Co., 7 Que. P.R. 76, (Hall, J.).

—Refusal of witness to answer question—Materiality of question—Criminal Code, s. 585.]—1. Under s. 585 of the Criminal Code a magistrate would not be justified in committing a witness to jail for refusing to answer a question unless it were in some way relevant to the issue, as that section only applies when the refusal is made "without offering any just excuse," and the form of the warrant of committment referred to in that section contains the words, "now refuses to answer certain questions concerning the premises now put to him." 2. If B. is charged with making an alteration of a document received from A., the question put to A., on his examination as a witness on the trial of B., as to the person from whom he, A., had received this document, would not be material if the document is produced; but, if it cannot be found, proof of its contents would have to be given, and that might involve, as a part of the claim, information as to the source from which A., had obtained the document, and it could not be held that the question was not in some way material.

Re Alexander Ayotte, 15 Man. R. 156, Perdue, J., 9 Can. Cr. Cas. 133.

—Newspaper editorial — Controverted election.]—Having regard to the principle that the summary remedy of committal for contempt because of comments on a matter sub judice should be granted only when it clearly appears that the course of justice has been or is likely to be restricted or impaired to the prejudice of the applicant, the Court refused a motion to commit the editor of a newspaper because of comments made in an editorial, pending the trial of an election petition in which the applicant, the member elect, was respondent, upon his election methods and expenditure, especially as after the argument of the motion the petition and a cross petition—both containing many charges of corrupt practices—had come on for trial and no evidence having been offered on either side had been dismissed, the applicant then resigning the seat.

Re North Renfrew Election, 9 O.L.R. 79.

—Injunction—Disobedience of — Sequestration — Stay of proceedings — Right of appeal.]—The plaintiffs, by the judgment at the trial of this action, were awarded an injunction restraining the defendants from continuing to make binders and sheets in imitation of the plaintiffs', for disobedience of which the issue of a writ of sequestration against the property of the defendants for contempt of Court was, on March 28th, 1907, directed by a Judge, whose order for sequestration was made, an order had been made by a Judge of the Court of Appeal, who, by his reasons in writing, delivered March 4th, 1907, directed that "execution of the injunction be stayed," pending the disposition of an appeal by the defendants from the judgment at the trial, but the formal order thereupon merely directed that "the operation of the judgment appealed from" should be stayed:—Held, that the Court had power to entertain the appeal, and that the order directing the issue of the writ of sequestration should be set aside, on the ground that it was made at a time when there was a stay of execution of the judgment by virtue of the order of March 4th, 1907. Per Moss, C.J.O., and Meredith, J.A.:—The subject matter of the appeal was not a "criminal matter" within the meaning of the British North America Act, 1867, s. 91, sub-s. 27, and was not excluded from the operation of the Judicature Act and the Consolidated Rules (see rule 4), as being the matter of "practice or procedure in criminal matters." O'Shea v. O'Shea (1890), 15 P.D. 59, and Ellis v. The Queen (1892), 22 S.C.R. 7, distinguished.

The Copeland-Chatterson Co. v. Business Systems Co., 16 O.L.R. 481.

—Attachment—Appeal—Reduction of penalty—Discretion.]—A Judge may, in the long vacation, issue a rule nisi for contempt of Court in disobeying an injunction. A Judge may proceed to enforce a judgment which he has given, though it has been carried to review or appeal if it is evident that no such appeal will lie in the case. To

enable an Appeal Court to reduce the amount of a fine or lessen the period of imprisonment imposed for contempt of Court it is necessary that the condemnation be so plainly excessive that a reasonable man would not have imposed it. When the Judge, on application for punishment for disobedience of an injunction decides to proceed to proof by affidavits instead of ordering a regular enquete he exercises a discretion given him by law and his decision will only be set aside by a higher Court when it works a manifest injustice.

Ricard v. Electric Co. of Grand'mere, Q.R. 32 S.C. 10 (Ct. Rev.).

CONTESTATION.

Want of affidavit—Filing after expiry of time limited — Motion to reject.]—If a motion to file a contestation of collocation, after the expiration of the time limited, has been rejected, because the contestation was not accompanied by an affidavit, it does not suffice that the party produces such affidavit, but he should obtain leave on application to the Court for the production of a contestation accompanied by an affidavit.

Labelle v. Heirs of Ouimet, 5 Que. P.R. 232.

CONTINUANCE.

Continuance of suit—Putting in default—Art. 271 and 273, C.C.P.—Where continuance of suit is not effected by the party bound to continue the same, the opposite party, to be entitled to costs, is obliged to put him in default before taking action to compel him to do so by a demand in accordance with Art. 273 C.C.P. But the service of such action is of itself a sufficient putting in default, and the party defendant, in answer thereto, should confess judgment without costs, instead of pleading and asking for a dismissal of the action with costs.

Arcand v. Yon, 21 Que. S.C. 18, Archibald, J.

CONTRACT.

Work and labour.]—See WORK; LIEN.

—Sale of goods.]—See that title.

—Sale of lands.]—See that title.

—Company shares or debentures.]—See COMPANY.

Conditions printed on back—Party signing in ignorance thereof.]—A party to a contract is not bound by conditions, printed on the back thereof, of which he was ignorant, and to which his attention was not called before he signed the contract, although the contract bears on its face an acknowledgement by the signer that he has had communication of the conditions printed on the back and consents to be bound by them, but also bears on its face the statement that the other party to the contract will not be bound by it until it shall have been accepted by a duly authorized agent and notice in writing by registered letter sent to the signer's address, which was never done.

Royal Electric Company v. Dupéré, 17 Que. S.C. 534.

—Unconscionable agreement — Invalidity.]—See MASTER AND SERVANT.

Johnston v. Keenan, 3 Terr. L. R. 239.

—Agreement conditional on consent of third party—Time for fulfilment of condition.]—Where an agreement is made subject to the consent of a third party, it must be looked upon as a conditional agreement, dependent upon such consent being given within a reasonable time; in default of which the agreement must be taken not to have become effective:—Held, on the evidence, that, assuming there was evidence of such a conditional agreement, the date at which it was alleged the consent of the third party was obtained could not, under the circumstances, be reasonably found by the jury to be within a reasonable time after the making of the agreement; and that therefore the charge of the learned trial Judge to the effect that there was no evidence of an agreement was not objectionable, as no substantial wrong or miscarriage of justice was occasioned thereby.

Martin v. Reilly, 1 Terr. L.R. 217.

—As to timber.]—See TIMBER.

—Unlawful consideration—Account—Public policy — Monopoly — Trade combination —Conspiracy.]—In an action to recover advances with interest under an agreement in respect to the manufacture of binder twine at the Central Prison at Toronto, the defence was the general issue, breach of contract and an incidental demand for damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract:—Held, per Sedgewick, King and Girouard, JJ., that the evidence disclosed a conspiracy and that, although under the provisions of the Civil Code the moneys so advanced could be recovered back, yet no interest before action could be allowed thereon, as the law merely requires that the parties should be replaced in the position they respectively occupied before the illegal transactions took place. Rolland v. La Caisse d'Economie, Notre-Dame de Quebec, (24 S.C.R. 405) discussed and l'Association St. Jean-Baptiste de Montreal v. Brault, (30 S.C.R. 598) referred to:—Held, also,

that laws of public order must be judicially noticed by the Court ex proprio motû, and that in the absence of any proof to the contrary the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action ex contractu.

Consumers Cordage Company v. Connolly, 31 Can. S.C.R. 244.

—With railway.]—

See RAILWAY; ELECTRIC RAILWAY.

—Condition as to sub-letting—Withholding consent.]—Where a contract with a municipal corporation provides that it shall not be sublet without the consent of the corporation it is incumbent on the contractor to obtain such consent before sub-letting, for not carrying on the portion of the work an action against a proposed sub-contractor and if he fails to do so he cannot maintain he agreed to do. In an action against the sub-contractor the latter pleaded the want of assent by the council whereupon the plaintiff replied that the assent was withheld at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract. Issue was joined on this replication:—Held, that the only issue raised by the pleadings was whether or not the defendant had wrongfully caused the consent to be withheld and that the plaintiff had failed to prove his case on that issue.

Ryan v. Willoughby, 31 Can. S.C.R. 33.

—Of affreightment.]—See SHIPPING.

—Accident insurance — Notice — Condition precedent.]—An accident insurance policy contained a condition that written notice must be immediately given to the company at the office in Montreal . . . and "that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corporation":—Held, that the giving of notice forthwith was not thereby made a condition precedent to the right of recovery on the policy.

Shera v. Ocean Accident and Guarantee Corporation, 32 O.R. 411.

— Completion — Telegram.] — A contract made by telegraph is only complete when the offering party is notified by the person to whom it is offered of his acceptance. Such a contract is considered as made at the place where it is completed.

Beaubien Produce & Milling Co. v. Robertson, 18 Que. S.C. 429 (S.C.).

—Course of instruction—Default—Damages.]—Plaintiff agreed to give defendant a course of lessons in cutting clothes, the latter to pay therefor $100 by payments at intervals during the course. Defendant took a number of lessons and then refused to continue them. In an action for the $100:—Held, that plaintiff could only recover the price of the lessons he had given, his recourse for the remainder being for damages on account of non-execution by defendant of his contract.

Dulude v. Jutras, 18 Que. S.C. 327 (S.C.).

—Of conditional sale of goods.]—See SALE OF GOODS.

—Of lease.]—See LANDLORD AND TENANT.

—Of mortgage.]—See MORTGAGE.

—Construction — Option.] — A contract stipulating that the first party shall have the hauling of all ore shipped up to 15,000 tons and not less than 10,000, as required by the second party, does not bind the second party to supply more than 10,000 tons, although the first party is under obligation to the second party to haul 15,000 tons if required.

Haggerty v. Lenora Mount Sicker Copper Mining Co., Limited, 9 B.C.R. 6.

—Parol contract to drive logs—Statute of Frauds, s. 4.]—M., who had agreed with the defendants and a number of other lumber manufacturers, to drive down their logs for them, the defendants' contract being a parol one, arranged with the plaintiff to act for him, the obligation to drive the defendants' logs to continue to a named date, for which the plaintiff was to be paid a specified sum, and if M. did not then arrive and take over the drive, the plaintiff was to continue it and to be paid a specified sum per day for himself and those employed by him. M. did not arrive and the drive was continued by the plaintiff. Subsequently, M. having some difficulty in paying his men, a parol agreement was entered into between him and the defendants, whereby, in consideration of his assigning over to them the amounts due him by the defendants and other manufacturers, the defendants undertook to continue the drive, and to pay the existing as well as the indebtedness thereafter to be incurred, the plaintiff being instructed and agreeing to continue the drive on these terms:—Held, by Robertson, J., that there was a new contract founded on new and substantial consideration so that the fourth section of the Statute of Frauds did not apply. On appeal to the Divisional Court the judgment was affirmed, but on the grounds (1) of novation, or (2) that even if M.'s indebtedness still continued, the moneys coming to him having been assigned to the defendants upon their express promise to pay the indebtedness thereout, and the plaintiff having continued the drive on such terms, there was a binding obligation to pay him, and that, in either view, the Statute of Frauds did not apply.

Bailey v. Gillies, 4 O.L.R. 182 (Div. Ct.).

—Acceptance—Sale of goods—Contract by delivery.]—The plaintiff, who had had previous dealings with the defendants, wrote

to them on May 5th asking them if they were going to buy cucumbers that year, and what they were going to pay for them; adding, "please let me know, as I want to put in quite a few this year." The defendants replied, "We are pleased to learn that you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties:—Held, that the defendants' letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256, distinguished. Judgment of Falconbridge, C.J., K.B., affirmed.

Baston v. Toronto Fruit Vinegar Co., 4 O.L.R. 20.

—As to mines and mining.]—See MINING.

—Contract—Duration—Right to cancel—Repugnant clauses.]—A contract for supplying light to a hotel containing the following provisions. "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. . . . Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer:—Held, reversing the judgment of the Court of Appeal (1 Ont. L.R. 73), that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term.

Ottawa Electric Co. v. St. Jacques, 31 Can. S.C.R. 636.

—On behalf of company before incorporation.]—See COMPANY.

(Coit v. Dowling, 4 Terr. L.R. 464.)

—Contract by correspondence—Place of acceptance—Art. 94 C.P.]—A contract by correspondence is made at the place where the acceptance is sent, by letter or telegram, to the party making the offer.

Schmidt v. Crowe, 5 Que. P.R. 361, Fortin, J.

—Of service.]—

See MASTER AND SERVANT; WORK AND LABOUR.

—Unlawful contract—Lottery.]—The association having obtained from the Lieutenant-Governor of the Province of Quebec (thereto authorized by a statute of the Legislature), the privilege of holding and operating a lottery in aid of its objects recognized by the Legislature as permissible objects and of public utility, delegated its powers to the plaintiff (appellant) on condition of an annual payment by him of $5,000. The appellant operated the lottery for two years, realizing considerable profits, and during that period paid $10,000 to the association in virtue of his contract. The operation of this lottery having been declared illegal, the appellant claimed reimbursement of the $10,000, which he had so paid to the association. Both parties admitted the unconstitutionality of the statute of the Legislature in virtue of which the lottery had been authorized:—Held, affirming the judgment of the Court of Review, Lacoste, C.J., and Bossé, J., dissenting, that the payment in question having been made by the appellant, voluntarily and without error, he having made considerable profits out of his contract with the association, the appellant, asserting the illegality of this contract, could not recover back the amount so paid, the contract having been executed in good faith upon both sides.

Brault v. l'Association St. Jean-Baptiste, 12 Que. K.B. 124. (Cf. 30 Can. S.C.R. 598; 31 Can. S.C.R. 172.)

—For electric power.]—

See ELECTRIC POWER.

Ontario Electric v. Baxter, 5 O.L.R. 419, 2 C.L.R. 125.

—Illegality—Breach of Weights and Measures Act.]—See WEIGHTS AND MEASURES.

Fox v. Allen, 14 Man. R. 358.

—Illegality — Action involving indecent matter—Striking out objectionable causes of action.]—On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaging in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs":—Held, by the Full Court, that the order dismissing the action would have precluded the plaintiff from suing in respect of any of the

causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. Judgment of Irving, J., set aside.

Guilbault v. Brothier, 10 B.C.R. 449 (Full Court).

—Of insurance.]—See INSURANCE.

—Consideration — Public exhibition—Competition for medal.]—Three proprietors of blends of tea exhibiting their teas at a public exhibition held by the defendant society allowed their teas to be judged by a committee appointed by the society, in competition for a gold medal offered by the society. During the exhibition each of the competitors served the public gratuitously with samples of made tea, and tea was served by them to the committee in the same way that it was served to the public. The committee having awarded the medal to the plaintiff, a competitor:—Held, that there was consideration of the offer, entitling the plaintiff to the medal. Where the executive of the above society adopted a resolution to award medals to all displays of merit or excellence of goods on exhibition, the awards to be made by regularly appointed judges; and the general manager of the exhibition, who was vice-president of the executive, and a member of a committee of three to appoint judges, thereupon arranged the above competition, and with a co-member of the committee to select judges, named the judges for the competition, it was held that the competition must be taken to have been instituted by the society.

Peters v. Agricultural Society, 3 N.B. Eq. 127.

—Illegal consideration—Contract in restraint of marriage.]—Plaintiff, who for several years had been housekeeper for a widower with a young daughter, and being about to be married, he promised her, if she would continue in his service as housekeeper so long as he needed her and abandon her contemplated marriage, he would either pay her $1,000 in cash, give her a promissory note for $1,500, or remember her in his will. The plaintiff thereupon abandoned her marriage and continued her service until her employer's death, which occurred four years afterwards, he, in the meantime, having given her a note for $1,500. In an action against his administrator on the note:—Held, that the primary object of the agreement was the continuing in the intestate's service, the restraint of marriage being merely an incident thereto, and that, under all the circumstances, the restraint was not such an unreasonable one as could be said to be contrary to the policy of the law. Judgment of Street, J., 6 O.L.R. 708, reversed.

Crowder-Jones v. Sullivan, 9 O.L.R. 27, C.A.

—Promise to devise interest in land—Consideration.]—See WILL.

—Contract — Cancellation by new verbal agreement—Statute of Frauds.]—(1) If the parties to a written contract enter verbally into a new agreement to be substituted for it, such new agreement, although, by reason of the Statute of Frauds, it cannot be enforced, will have the effect of discharging and cancelling the written contract. (2) In such case neither party can enforce the new agreement or recover damages as for a breach of the written contract. (3) Any money or other consideration, however, that may have been paid or given under the substituted agreement by one of the parties to the other may be recovered back or its value sued for by such party.

Clements v. The Fairchild Co., 15 Man. R. 478 (Perdue, J.).

—Of married woman.]—
See HUSBAND AND WIFE.

—Illegality—Non-recovery back of money paid.]—The Court will not intervene, at the instance of a party to an illegal contract, to enable him to obtain relief from the exigencies thereof. W., having been threatened with a criminal prosecution for having sexual intercourse with a young girl under sixteen years of age, affected a settlement whereby cash payments were made and promissory notes given by him. On his death, he having in no way repudiated the settlement during his lifetime, his administrator brought an action for the recovery of the money paid and the cancellation of the notes:—Held, that the action was not maintainable, but the notes having been filed in Court, it was ordered that they remain on the files until further order.

Wood v. Adams, 10 O.L.R. 631 (D.C.).

—Maintenance — Enforcement of agreement—Breach—Onus of proof.]—In a suit to enforce a lien upon land conveyed to the defendant by the plaintiffs, husband and wife, in consideration of an agreement, by defendant to support them, the onus of proving a breach of the agreement is upon the plaintiffs.

Ouilette v. LeBel, 3 N.B. Eq. 205.

—Of infant.]—See INFANT.

—Vagueness — Renewal — Price to be agreed on.]—A provision in a contract for the right to use space for advertising purposes for its renewal "at the end of three years at a price to be agreed upon but not less than $5,000 per annum," leaves the matter at large unless the price is agreed upon, and the person using the space cannot

insist on a renewal at the rate of $5,000 per annum.

Henning v. Toronto Railway Company, 11 O.L.R. 142 (C.A.).

—Corrupt or illegal consideration—Promise of benefit to employee—Fraud on company by its manager.]—L., being the manager and part owner of a mining company which was in financial difficulties and owing him some $1,600 on account of salary, agreed with H. that the latter should acquire the outstanding debts of the company, obtain judgment, sell the property at sheriff's sale and organize a new company in which H. was to have a controlling interest. L. was to refrain from taking any steps towards winding up the company, and in consideration therefor he was to be given in the new company a proportionate amount of fully paid-up and non-assessable shares to those held by him in the old company He also agreed not to reveal this understanding to certain of the shareholders:—Held, Morrison, J., dissenting, that if any consideration passed, it was an illegal consideration, a fraud on certain of the shareholders and a breach of trust. A man who occupies the position of superintendent or manager of a mining company is not engaged to facilitate the remedies of creditors, but to protect the interests of the company.

Lasell v. Thistle Gold Company, 11 B.C.R. 466.

Lasell v. Hannah, 37 Can. S.C.R. 324.

—Performance of, when no time stipulated.] —See TIME.

—Consideration — Withdrawal of criminal charge—Illegality.]—A charge laid before a magistrate against a person for procuring from the plaintiff, by false pretences, the sum of $10, was, by direction of the magistrate, withdrawn, in consideration of an agreement entered into between the plaintiff and the defendants, whereby the plaintiff was to withdraw from a certain syndicate and forfeit the $10 paid, the defendants indemnifying him against all liabilities of the syndicate. Judgment having been recovered against the plaintiff for a liability of the syndicate, he brought an action against the defendants for indemnity:—Held, that the agreement for the withdrawal of the criminal charge was void and could not be enforced, and that the plaintiff's action was not maintainable.

Morgan v. McFee, 18 O.L.R. 30, 14 Can. Cr. Cas. 308.

CONTRIBUTION.

See PARTIES.

CONTRIBUTORY.

See COMPANY (WINDING-UP).

CONVERSION.

Sale and conversion of unlisted shares—Measure of damages.]—The damages for the sale and conversion by the defendant of 20,000 shares of the capital stock of a mining company, unlisted and having no market value, to which the plaintiff was entitled under a contract with the defendant, were assessed by a referee upon a reference at 40 cents a share, which was the highest price at which shares of the company had been sold. It appeared that the circumstances in regard to that sale were exceptional. Upon the defendant's appeal to a Judge, the damages were reduced to 26 cents a share, the price obtained by the defendant. Upon the plaintiff's appeal to a Divisional Court, the damages as reduced by the Judge were increased by the sum of $1,500; the Court holding that it should act as a jury, and assess the damages at a fair sum, taking into consideration the fact of a sale at a higher price than that obtained by the defendant. Per Clute, J.:—The plaintiff never recognized the sale by the defendant, and only consented to take damages in lieu of the shares, because, the shares being sold, he had no other remedy. The shares on the day of action was brought had no market value; and a jury would have to say what was a reasonable compensation for the loss of the shares. Per Middleton, J.:—The defendant cannot escape liability beyond the amount received by him in a case of this kind, merely because he acted in good faith so far as the sale was concerned. Nor should he be held to account for the full price realized by another in exceptional circumstances. The value of the shares was left in doubt; and the Court should, as a jury, make a fair assessment. Order of Meredith, C.J.C.P., varied.

Goodall v. Clarke, 21 O.L.R. 614.

—Conversion—Seizure—Delivery.]—

Union Bank of Canada v. Blackwood, 2 W.L.R. 574 (Man.).

—Trespass—Horse used in common—Exchange by person not its owner—Owner's right to substituted horse.]—

Dillmann v. Simpson, 2 E.L.R. 105 (N.S.).

Defect in plaintiff's title—Statute of Frauds.]—In an action claiming damages for the conversion of goods the plaintiff must prove an unquestionable title in himself and if it appears that such title is based on a contract the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded. It is only where the action is between the parties to the contract which one of them seeks to enforce against the other, that the defendant must plead the Statute of Frauds, if he wishes to avail himself of it. Judgment of the Supreme

Court of Nova Scotia (32 N.S.R. 549), affirmed.

Kent v. Ellis, 31 Can. S.C.R. 110.

—Small debt procedure—Conversion—Tort waived—Goods sold—Debt.]—A claim for the value of goods converted by the defendant, the plaintiff expressly waiving the tort and suing as for goods sold and delivered, may be sued under the small debt procedure. The plaintiff in his statement of claim under the small debt procedure, alleged that the defendant had wrongfully taken possession of a horse and converted it to his own use, and expressly waived the tort and sued for goods sold and delivered, claiming $75, the value of the horse. An application to set aside the writ and service upon the ground that the claim was not one for debt within the meaning of Rule 602, which brings "all claims and demands for debts whether payable in money or otherwise, where the amount claimed does not exceed $100," within the small debt procedure, was refused. The word "debt" is not restricted to "a sum certain or capable of being reduced to a certainty by calculation," but includes claim for value of goods sold where no price is mentioned.

Henry v. Mageau, 5 Terr. L.R. 512, Scott, J.

—Personal action—Abatement of—Trespass by testator—Suggestion of death—Liability of executors — Amendment.]—Where one converts to his own use, and sells the goods of the plaintiff and dies after writ issued, but before declaration, the action may be continued against his executors, and they are liable on a count for money had and received. In the above case the declaration was in trespass and for conversion, and upon the argument of the motion for a new trial, application was made to add a count for money had and received:—Held, that as the only fact in dispute, namely, the existence of a tenancy between the parties had been passed upon by the jury in favour of the plaintiff, and as no possible injustice could be done to the defendants, the amendment should be allowed.

Frederick v. Gibson, 37 N.B.R. 126.

—Trover—Stay of proceedings on return of goods—Dispute as to identity of article offered to be returned.—After the commencement of an action of trover for the conversion of a threshing engine, the defendants shipped to the plaintiffs an engine which the defendants alleged, but the plaintiffs denied, to be the one in question. The plaintiffs also claimed that if it was the same it was of very much less value than when converted:—Held, that the defendants were entitled on motion to an order permitting them to return the engine in question upon paying the costs of the action to date and of the motion within two weeks, and providing that if thereafter the plaintiffs proceed to trial and do not recover more than nominal damages they should pay the costs subsequently incurred.

Brown v. Canada Port Huron Co., 15 Man. R. 638.

—Permission to store goods with knowledge of dispute as to title.]—Mere permission by the defendant to store goods in defendant's barn, with knowledge of a dispute as to the title of the goods, but without intent to exercise dominion over the same, does not constitute conversion. Where a cause is tried by a Judge without a jury, and the facts in evidence are not disputed, the Court may reconsider the evidence in the case and overrule the judgment of the trial Judge, if they think it wrong. Here, in the opinion of the majority of the Court, the evidence did not prove any intent on the part of the defendant to convert the goods in dispute and the finding of the trial Judge that there had been a conversion was reversed.

Donald v. Fulton, 39 N.B.R. 9.

CONVICTION.

See CRIMINAL LAW; SUMMARY TRIAL; SPEEDY TRIAL; SUMMARY CONVICTION.

COPYRIGHT.

Infringement—5 and 6 Vict. c. 45 (Imp.) —Application to colonies—Importation of foreign reprints—Assignment of proprietorship—Necessity for registration—Status to maintain action.]—Upon a motion for an interim injunction restraining the defendants from importing into Canada for sale, and from exposing and offering for sale, copies of a book written by Francis Parkman, known as "A Half Century of Conflict," in infringement of the plaintiffs' copyright in such book, it appeared that at the time of the author's death he was the owner of and entitled to the copyright in such book for the British dominions, including Canada, and that after his death such copyright and ownership had been assigned and transferred to the plaintiffs by those upon whom they devolved; that the defendants had imported copies of the book from the United States of America and were offering them for sale in Canada:—Held, that s. 17 of the Imperial Act to amend the Copyright Act, 5 & 6 Vict., c. 45, prohibiting the importation of foreign reprints by any person, not being the proprietor of the copyright or some person authorized by him, is now in force in Canada; and the plaintiffs were, therefore, entitled to prohibit the importation of foreign reprints into Canada. 2. But the plaintiffs had no right to maintain this action or proceeding, for, although they were the assignees of the proprietorship and ownership of the book, they had

not complied with s. 24 of 5 & 6 Vict., c. 45, by causing an entry of their proprietorship to be made in the book of registry of the Stationers Company, the word "proprietor" in s. 24 meaning the person who is the present owner of the work. Dictum of Cockburn, L.C.J., in Wood v. Boosey (1867), L.R. 2 Q.B. 340, not followed. Weldon v. Dicks (1878), 10 Ch. D. 247, and Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux, [1897] 2 Q.B. 1, followed.

George N. Morang & Co., Limited v. The Publishers' Syndicate, Limited, 32 Ont. R. 393.

—Infringement—Evidence—Textual copy.] —In an action for infringement of copyright in a dictionary the unrebutted evidence showed that the publication complained of treated of almost all its subjects in the exact words used in the dictionary first published and repeated a great number of errors that occurred in the plaintiff's work:—Held, affirming the judgment appealed from, 10 Que. K.B. 255, that the evidence made out a prima facie case of piracy against the defendants which justified the conclusion that they had infringed the copyright.

Cadieux v. Beauchemin, 31 Can. S.C.R. 370.

—Dramatic rights—Acquisition by foreigner—Defence denying title—Striking out pleading.]—

Liebler v. Harkins, 1 E.L.R. 157 (N.S.).

—Registration — Infringement — Particulars.]—In an action for an infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, and further alleged that the defendants printed for sale a large number of copies of another book, a part whereof was an infringement of the plaintiffs' copyright:—Held, that the defendants were entitled to particulars showing the date of registration of the plaintiffs' copyright, and showing what part of the defendants' book infringed the plaintiffs' right. Sweet v. Maughan (1840), 11 Sim. 51, not followed. Mawman v. Tegg (1826), 2 Russ. 385, 390, and Page v. Wisden (1869), 20 L.T.N.S. 435, followed.

Liddell v. Copp-Clark Co., 19 O. Pr. 332.

—Sole right of dramatic representation — Infringement—Imperial Acts — Evidence—Examination for discovery—Admissibility thereof as evidence against co-defendants.] —S. 16 of the Imperial Copyright Act, 1842 (5 & 6 Vict., c. 45), provides that the defendant in pleading shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of the action. S. 26 allows the pleading of the general issue:—Held (Richardson, J.), that s. 16 is complied with if the objections intended to be relied on are taken in the statement of defence. Where under Rule 201 of the Judicature Ordinance, 1898, a party to the action has been orally examined before trial, Rule 224, which allows any party to use in evidence any part of the examination so taken of the opposite parties, does not limit the effect of such evidence, or provide that it may only be put in as against the party examined, and, therefore, any part of such examination is admissible as evidence against opposite parties other than the one actually examined, provided they had an opportunity to cross-examine the party actually examined. At the trial of an action against the officers and members of the committee of management of an unincorporated society for infringement of plaintiff's sole right of dramatic representation of an opera, plaintiff put in as evidence parts of the examination for discovery of B., one of the defendants, the secretary-treasurer of the society. All the defendants were represented by the same advocate, who had attended such examination on behalf of all the defendants and cross-examined the witness. Held, that the testimony given on such examination was admissible as evidence against all the defendants as well as against B. himself. Plaintiff proved that the opera in question, and an assignment to him of the sole right of dramatic representation thereof, had been duly registered at Stationers' Hall. On said examination B. testified that he knew the opera in question, and that the performances complained of were meant to be performances of this opera. He also identified one of the programmes used on the occasions in question, and what he thought to be a poster advertising the performances. Both programme and poster designated the opera by its registered name, and specified the author and composer thereof. L. also testified at the trial that he knew the opera in question, which he had seen and heard performed many times; that he had been present at one of the performances complained of, and that what had been performed on such occasion was the opera in question. Held, that this was sufficient proof of the identity of what was performed by the defendants with the opera in question, and consequently of the infringement. Per Wetmore, J.—Objection to secondary evidence of the contents of a written document must be distinctly stated when it is offered, and if not objected to it is received, and is entitled to its proper weight, and the weight to be attached to it will depend upon the circumstances of each case. Each programme of an entertainment is an original document, not a mere copy. Per McGuire, J.—The rule excluding oral testimony of a witness of the contents of a written document which he had read was not applicable to the present case. What was sought to be proved was not the contents of any book or document, but the resemblance or

identity of two performances, partly verbal, partly musical, and partly made up of dramatic action, gesture and facial expression. Sufficiency and admissibility of evidence of resemblance or identity of the performance or of copy with original discussed. Judgment of Richardson, J., reversed.

Carte v. Dennis, 5 Terr. L.R. 30.

—Imperial Fine Arts Copyright Act, 1862—Canada Copyright Act, 1875.]—The Imperial Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside the United Kingdom. Tuck & Sons v. Priester, (1887) 19 Q.B.D. 629, approved. There is nothing in the Canada Copyright Act, 1875, or in the International Copyright Acts, which conflicts with this view.

Graves v. Gorrie, [1903] A.C. 496, 2 C.L.R. 186 (affirming 3 O.L.R. 697.

—Infringement — Musical composition — Authorship.]—A company alleging itself to be the registered owner and proprietor of certain Canadian copyrights, covering certain musical compositions, may answer allegations going on to say that it is not the author, or legal representative of the authors of the musical compositions, by saying that the British proprietors of the copyrights assigned the same to it, plaintiff, and that it gave legal notice of such assignment to the Minister of Agriculture before registration in Canada.

Anglo-Canadian Music Publishing Association v. Dupuis, 5 Que. P.R. 351, 2 Commercial L.R. 325 (Sir M. Tait, A.C.J.).

—Uncopyrighted work—Reproduction without permission of author—Change of title.]—(1) The author of a work not protected by registration as provided by law has no exclusive right of republication; and is not entitled to an injunction to restrain the republication and sale of the work by another without the author's consent, or to recover damages for such republication. (2) The fact that in republishing the work the title was changed to one which was disagreeable to the author and wounded his susceptibilities, does not give him the right to restrain the sale of such republication—particularly where both the original work and the republication appeared under a pseudonym and it was not proved that the author was known to the public under such pseudonym.

Angers v. Leprohon, 22 Que. S.C. 170, Doherty, J.

—Foreign reprints—Notice to English commissioners of customs—Entry at Stationers' Hall—Copyright in encyclopaedia — Prima facie evidence of copyright—Imperial Acts in force in Canada.]—Held, that s. 152 of the Imperial Customs Law Consolidation Act, 1876, 39-40 Vict., c. 36, requiring notice to be given to the commissioners of customs of copyright and of the date of its expiration, is not in force in this country, notwithstanding the expression of opinion in Part IV. of the Appendix to Volume 3 of the Revised Statutes of Ontario, 1897, to the contrary effect; and that the plaintiffs had established their right to an injunction perpetually restraining the defendants, the Imperial Book Company, Limited, from importing into Canada any copies of the 9th edition of the Encyclopædia Britannica, and for delivery up thereof for cancellation, and for an account:—Semble, if in such notice to the commissioners a wrong date is given as that of the expiry of the copyright, this will invalidate the notice. Held, also, that a certified copy of the entry at Stationers' Hall is prima facie evidence of proprietorship of copyright of an Encyclopædia under ss. 18 and 19 of the Imperial Copyright Act, 1842, and it is not necessary for such prima facie case to prove the facts which by those two sections are made conditions precedent to the vesting of the copyright in one who is not the author. The plaintiffs by agreement in writing in consideration of a large sum of money gave certain other persons the exclusive right to print and sell the edition of the work in question at not less than certain fixed prices, for the remainder of the duration of their copyright except the last four years thereof and delivered over to them the plates used in printing which with all unsold copies were to be re-delivered on the expiry of the agreement and agreed not to announce the publication of another edition before such last mentioned period, but expressly reserved the copyright to themselves. Held, that the agreement was a license and not an assignment, and so did not require registration under s. 19 of 5-6 Vict., c. 45 (Imp.).

Black v. Imperial Book Co., Ltd., 5 O.L.R. 184, 1 C.L.R. 417, Street, J.

—Infringement — Newspaper—"First publication."]—A newspaper printed and issued at a place in the United States, copies of which are deposited in the post office there addressed to subscribers both in that country and England, cannot be considered to be first published, or even simultaneously published, in England, so as to come within the provisions of the Imperial Act 5 and 6 Vict. c. 45, requiring first publication in the United Kingdom to entitle the publishers to British copyright.

Grossman v. Canada Cycle Co., 5 O.L.R. 55, 2 Commercial L.R. 307 (Britton, J.).

—Infringement of—Prescription—Damages—Costs of experts—Arts. 2261, 2198, 2268 C.C.]—(1) The infringement of copyright duly registered, by the publication of a counterfeit book of a similar character,

largely composed of material taken from the copyrighted work, and the sale of copies thereof, constitutes an offence successive and continuous, and the short prescription of Art. 2261 C.C. does not apply. (2) The owner of the copyright is entitled, by way of damages, to all the profits realized by the counterfeiter on the sale of counterfeit copies, and also to the costs of expert witnesses who were engaged to establish infringement.

Beauchemin v. Cadieux, 22 Que. S.C. 482 (Curran, J.).

— Foreign reprints — Notice to English commissioners of customs—Entry at Stationers' Hall.]—S. 152 of the Imperial Customs Act, 1876, 39-40 Vict., c. 36, requiring notice to be given to the commissioners of customs of copyright, and of the date of its expiration, is not in force in this country, notwithstanding the statement to the contrary in the note to Table IV. of the appendix to vol. 3 of the R.S.O., 1897. That statement is no part of the enactment of the legislature, but is intended merely as a reference, so that the Imperial Copyright Act of 1842, 56 Vict., c. 45, is left to its full operation. Garrow and Maclaren, JJ. A., dissenting. Smiles v. Belford (1877), 1 A.R. 436, followed. A certified copy of the entry at Stationers' Hall of an encyclopædia is prima facie evidence of the proprietorship under ss. 18 and 19 of the Act of 1842, and it is not necessary for such prima facie case to prove the facts whereby such sections are made conditions precedent to the vesting of the copyright in one who is not the author. An agreement in writing, whereby the plaintiffs, for value, gave certain other persons the right to print and sell a work at not less than certain fixed prices for the remainder of the term of the copyright, except the last four years thereof, and under which the plates used in printing were delivered over, which, with all unsold copies, were to be redelivered on the expiry of the agreement, and in which it was agreed not to announce the publication of another edition before such last mentioned period, expressly reserving the copyright to the plaintiffs, was held to be a license, and not an assignment, and so not to require registration under s. 19 of the Imperial Act, 5-6 Vict., c. 45. Judgment of Street, J, affirmed, with variation.

Black v. The Imperial Book Co., 8 O.L.R. 9 (C.A.).

[Affirmed on different grounds Imperial v. Black, 35 Can. S.C.R. 488.]

—Infringement — Foreign reprints — Imperial copyright.]—1. Certificates of registration produced from the proper branch of the Department of Agriculture at Ottawa are prima facie evidence of due compliance with the requirements of the Copyright Act entitling the producing party to registration under the Act. 2. Unauthorized foreign circulation and publication is no bar to effectual copyright in Canada. 3. The importation of foreign reprints into Canada is illegal against the owner of the Imperial copyright in the imported works even though he has ineffectually attempted to secure Canadian copyright.

Anglo-Canadian v. Dupuis (No. 2), 2 Com. L.R. 503, Curran, J. (Que. S.C.).

—Assignment — Registration.]—S. 15 of the Copyright Act, R.S.C. 1886, c. 62, applies to the assignments of Canadian, not of foreign copyright.

Anglo-Canadian v. Dupuis (No. 2), 2 Com. L.R. 503, Curran, J. (Que. S.C.).

—Foreign reprints—Notice to English commissioner of customs—Entry at Stationers' Hall.]—The judgment appealed from (Black v. Imperial Book Co., 8 O.L.R. 9) was affirmed, the Court, however, declining to decide whether or not the doctrine laid down in Smiles v. Belford (1 Ont. App. R. 436) was rightly decided.

The Imperial Book Company v. Black, 35 Can. S.C.R. 488.

—British copyright—Assignment and registration.]—(1) The assignee of a copyright granted in England under the 5 & 6 Vict. (Imp.) c. 45, is entitled to copyright of the same work, etc., in Canada by having it registered at the Department of Agriculture, under the provisions of c. 62, R.S.C., s 6. (2) Upon suit brought for infringement of such a copyright, the certificate of its registration by the proper officer of the department together with proof of the assignment of the British copyright, is sufficient evidence of the plaintiff's title to the same. (3) Evidence in addition to the foregoing, that the work had been entered at Stationers' Hall, London, Eng., entitles the plaintiff to his remedy under the Imperial Act.

The Anglo-Canadian Music Publishers' Association v. Dupuis, 27 Que. S.C. 485 (Curran, J.).

—Drawings — Publication in newspapers — British copyright — "Book"—Foreign author.]—The plaintiffs claimed copyright in certain cartoon drawings and the accompanying titles and letter-press prepared for the plaintiffs by a celebrated artist, and first published simultaneously in the plaintiffs' newspaper in the United States and in another newspaper in England owned by one H., under agreements between H. and the plaintiffs, to which the artist was also a party. By the agreement H. was acknowledged to be the owner of the British copyright. H. granted a license to the artist to publish the drawings in book form in the United Kingdom. Entry was duly made at Stationers' Hall of H.'s ownership of the copyright of his newspaper. Subsequently this copyright was said to have been assigned by H. to H. & Sons, and before this action was brought H. & Sons reg-

istered eight copies of the newspaper containing the eight drawings and letter-press in question, and assignments thereof to the plaintiffs. Before this registration the defendants had, without the consent of the plaintiffs or their predecessors, printed in Canada for the purpose of sale a quantity of pictorial postcards, on which were reproduced copies of the eight drawings, taken from books published by the artist under the license mentioned, but not registered at Stationers' Hall. The artist was not a British subject, and was not, at the time of the preparation or publication of the material in England, within any part of the British dominions. None of the material was protected by a Canadian copyright:—Held, that the effect of the agreements referred to was to vest in the plaintiffs the common law right to copyright in the drawings, and this right was validly transferred to H., who was an "assign" of the artist or author, within the meaning of s. 3 of the Imperial Copyright Act, 4 & 5 Vict., c. 45; and the English newspaper was a book within the meaning of that section, and H. became entitled thereunder to statutory copyright in the drawings as part of his book, for when drawings form part of a book they come within the provisions of that Act, and are protected not only as part of the book, but as drawings. Held, also, that the evidence sufficiently established the plaintiffs' title to the copyright by re-assignment. Held, also, that the present Copyright Act protects the productions of foreign authors wheresoever resident, where there is a first or contemporaneous publication within the empire. Held, therefore, that the plaintiffs were entitled to an injunction, and to delivery up of the infringing copies.

Life Publishing Co. v. Rose Publishing Co., 12 O.L.R. 368 (D.C.).

—International copyright—Literary work produced in a foreign country.]—(1) Under the International Copyright Act, 1886, Eng., s. 4, compliance with the conditions and formalities of the country where a literary work is first published gives the author a copyright in Canada without his having to conform to the Copyright Act, c. 62, R.S.C. (2) The International Copyright Act, 1886, Eng., extends to the whole of the British dominions and is therefore in force in Canada. (3) The words "exclusive legislative authority," in s. 91 and "may exclusively make laws" in s. 92 of the B.N.A. 1867, mean, "to the exclusion of provincial legislatures" in the former, and "to the exclusion of the Dominion Parliament" in the latter.—They cannot be construed to affect the power of the Imperial Parliament to legislate for Canada.

Mary v. Hubert, 29 Que. S. S. 334, affirmed; Hubert v. Mary, 15 Que. K.B. 381.

CORPORATION.

—Municipal.]—
See MUNICIPAL LAW; SCHOOL LAW.

—Trading and other corporations.]—
See COMPANY.

CORPSE.

Corpse—Property in—Right of custody, control and disposition—Exercise by executor or relative.]—The plaintiff, the mother and executrix of a deceased man, shipped his body by the defendants' railway from Revelstoke to Bawlf, and accompanied the body. By a mistake of the defendants' servants, the body was put off the train at Banff, and did not arrive at Bawlf until a day later than it should have arrived, occasioning expense by postponement of the funeral, etc. The plaintiff's luggage was also treated in the same way, and she was put to expense in consequence:—Held, that the proposition, accepted in English law, that there can be no property in a corpse, does not rest upon a sound foundation, and is not sustainable at least as a general proposition. The English decisions rest to a large extent upon ecclesiastical law, which has no application or effect in Alberta. The true rule is, that, inasmuch as there is a legal right of custody, control, and disposition, the law recognizes property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. The property in a corpse is subject, on the one hand, to the obligations of proper care and decent burial, and the restraints upon its voluntary or involuntary disposal and use provided by law, or arising out of the fact that the thing in question is a corpse; and, on the other hand, the nature and extent of the right or obligation of the person for the time being claiming property; and the Courts will give appropriate remedies against interference with the right of custody, possession, and control of a corpse awaiting burial, presupposing a right of property therein, subject to the obligations and restrictions indicated. Held, also, that the action was one of tort, for damages occasioned by the defendants' negligence; and the plaintiff was entitled to recover as damages not only the money loss occasioned by the mistake, but compensation for her mental anguish occasioned by the delay, and the decomposition of the corpse.

Miner v. Canadian Pacific Railway Co, 15 W.L.R. 161 (Alta.).

CORONER.

Jurisdiction—Issue of warrant to arrest witness disobeying summons.]—Certiorari

will not lie to remove a warrant issued by a coroner for the apprehension of a witness, upon default in obeying a summons to appear and testify, because the coroner in issuing the warrant is acting in a ministerial and not a judicial capacity: R.S.O. 1897, c. 97, s. 5. A coroner is a local officer who can act only within his own municipal jurisdiction; and a warrant to apprehend issued by him cannot be validly executed out of his county. The fact that a witness at an inquest has already been questioned at great length is not a ground for prohibiting the coroner from subjecting her to further examination; the Court assumes that the coroner will not permit the witness to be unduly harassed.

Re Anderson and Kinrade, 18 O.L.R. 362; 14 Can. Cr. Cas. 448.

COSTS.

I. GIVING OR WITHHOLDING.
II. SOLICITOR AND CLIENT.
III. SCALE OF COSTS.
IV. TAXATION.
V. MODE OF RECOVERY.
VI. SECURITY FOR COSTS.

I. GIVING OR WITHHOLDING.

Jury case—Damages claimed exceeding $1,000—Verdict less than $400.]—In an action tried by Judge and jury, for damages for breach of contract, where the plaintiff claims more than $1,000, costs will follow the event if the plaintiff recovers substantial damages, although the amount of the verdict be less than $400, a sum recoverable in the District Court. The fact that the verdict is less than $400 is not itself "good cause," within the meaning of s. 170, justifying the Judge in ordering otherwise.

Potter v. Grierson, 2 Alta. R. 126.

—Workmen's Compensation Act—Costs of special case.]—In a memorandum handed down by a Judge of the Supreme Court on a special case under the Workmen's Compensation Act, 1902, no mention was made of costs. The memorandum was duly recorded under the Act and Rules, which makes it enforceable as a County Court judgment. On an application for an order to tax the costs:—Held, that the Judge had jurisdiction to deal with the costs of the special case under Rule 42.

Darnley v. Canadian Pacific Railway Co., 17 B.C.R. 324.

—Salaried solicitor—Right of successful litigant.]—The city of Calgary employs a solicitor at a fixed annual salary, which by the terms of his appointment is to be received by him "in lieu of all fees and taxed costs payable in respect of any cause or matter," which costs are by by-law to form part of the general revenue of the city. An action against the city, defended by the city solicitor, was dismissed, and plaintiff applied for a review of the taxation of costs, claiming that as the defendant was not obliged to pay costs to its solicitor in respect of the action the plaintiff could not be required to pay any costs:—Held, that in the absence of evidence that the costs of this action as ordinarily allowable would more than indemnify the city against the salary paid to the city solicitor, the city was entitled to the usual costs.

Stephens v. City of Calgary, 2 Alta. R. 331.

—Of abandoned appeal—Demand.] — An application for costs of an abandoned appeal will not be allowed to the respondent unless he has made a previous demand for payment.

Macbeth v. Vandall, 15 B.C.R. 377 (C.A.).

—Payment by successful party.]—Wide as is the power of the Court over costs, it has not jurisdiction to require a successful defendant to pay the costs of his unsuccessful adversary. Re Foster and Great Western R. W. Co., 8 Q.B.D. 575; Lambton v. Parkinson, 35 W. R. 545, and Andrew v. Gore, [1902] 1 K. B. 625, followed.

Clisdell v. Lovell, 1 O.W.N. 648 (D.C.).

—Foreign commission—Bona fides.]—

United States Savings & Loan Co. v. Rutledge, 5 W.L.R. 585 (Y.T.).

—Motion to set aside judgment—Disposition of costs.]—

Canadian Bank of Commerce v. Syndicat Lyonnais du Klondike, 6 W.L.R. 716 (Y.T.).

—Action dismissed with costs—Successful appeal by plaintiff—Subsequent further appeal by one defendant and original judgment restored.]—

Fairweather v. Lloyd, 1 E.L.R. 154 (N.B.).

—"Good cause" for depriving plaintiffs of full costs.]—

Fox v. Peters, 5 W.L.R. 505 (B.C.).

—Partnership action—Account — Misconduct of partner.]—

Merice v. Hubbard, 10 W.L.R. 705 (Man.).

—Action by Attorney-General — Dismissal —Payment of costs by relator or Attorney-General.]—

Attorney-General v. Ruffner, 3 W.L.R. 272 (B.C.).

—Depriving of costs—Class action—Plaintiff held not entitled to sue.]—

Hart v. City of Halifax, 2 E.L.R. 158 (N.S.).

—Plaintiff party successful in action—Apportionment of costs—Reference—Discretion.]—
Bowcher v. Clark, 6 W.L.R. 436 (Y.T.).

—Discontinuance of action before appearance—Right of defendant to tax costs.]—
McLorg v. Johnston, 6 W.L.R. 369 (N.W.T.).

—Jury trial—Damages for breach of contract—Discretion of trial Judge.]—
Potter v. Grierson, 10 W.L.R. 610 (Alta.).

—Contest as to surplus proceeds of mortgage sale.]—
Smith v. Wambolt, 2 E.L.R. 343 (N.S.).

—Mortgage action—Depriving mortgagee of costs—Reference.]—
Bank of Hamilton v. Leslie, 3 W.L.R. 401 (Terr.).

—Foreclosure—Unnecessary party—Prior encumbrancer.]—
Union Trust Co. v. Duplat, 7 W.L.R. 459 (Sask.).

—Summary disposition—Master in Chambers—Jurisdiction.]—On the 16th May, 1910, the plaintiff began this action, to compel the defendant to convey certain land and for general relief. The statement of claim was delivered on the 9th June and the statement of defence on the 18th June, after which the defendant was examined for discovery. On the 26th August the solicitors for the defendant sent to the plaintiff's solicitor a conveyance of the property referred to. A conveyance of the property had been made by the defendant's testatrix to the plaintiff, but the making of the affidavit of execution had been, at the plaintiff's request, delayed, and the witness was absent in Europe when the action was begun. The witness returned in August and made the affidavit of execution, whereupon the conveyance was at once sent to the plaintiff's solicitor. Subsequently, on the 1st September, the plaintiff gave notice of a motion to be made before the Master in Chambers "for an order that judgment be entered for the plaintiff for the claims set out in the plaintiff's statement of claim, and for delivery of the papers therein mentioned, and for the costs of this action." The Master, upon this motion, made an order "that the motion herein made by the plaintiff is allowed, and the defendant is hereby ordered to pay to the above-named plaintiff the costs of this action." Upon appeal, an order was made by a Judge in Chambers rescinding the order of the Master, staying the action forever, and providing that there should be no costs to either party. Upon appeal by the plaintiff from that order:—Held, by a Divisional Court, that the order of the Master in Chambers was not "an order made by the consent of parties," within the meaning of s. 72 of the Judicature Act, which does not apply to an order made in invitum where jurisdiction is given by consent. Semble, that, if the order had been one made by consent, there would have been no appeal from it, the Master in Chambers coming within the words "High Court or any Judge thereof," in s. 72: Re Justin, a solicitor (1898), 18 P.R. 125. But it was immaterial whether the Master had or had not jurisdiction: he made an order not "as to costs only," and such an order is appealable under Con. Rule 767 (1), no other rule or statute taking away the right of appeal; and, therefore, the appeal was properly heard by the Judge in Chambers. Held, also, that the substantive order made by the Judge (that is, staying the action forever) not being complained of, and being manifestly right, the Court would not interfere with the disposition of the costs made by that order; and, if the merits were considered, the plaintiff, at least, could not complain of the order.
Davis v. Winn, 22 O.L.R. 111.

Review—Reduction of damages.] —The party who succeeds in varying the judgment at first instance by obtaining a reduction from the amount for which he is condemned of even five dollars only, is entitled to his costs on review.
Gamache v. Dechene, 3 Que. P.R. 399 (Ct. Rev.).

—Improper joinder of parties—New trial—Costs.]—The defendant M. brought an action against each of three Marine Insurance Companies on three policies of insurance, two being policies on the hull of defendant's vessel, and the third a policy on freight. Two of the actions were defended by one solicitor and the third by another solicitor. Before the trial an agreement in writing, headed in the three causes, was entered into between the solicitors for the respective parties, by which it was agreed that the three causes, so far as the trial before the jury was concerned, should be tried together, but that evidence relevant to the issues in either of said actions should be considered as taken in that action, etc. At the conclusion of the trial a separate order was taken in each action for judgment for plaintiff with costs. Notices of motion for a new trial headed in each of the three causes was given. The appeals were heard together, and M. having succeeded, a separate order was made in each case dismissing the application with costs. Three notices of appeal to the Supreme Court of Canada were then given—one in each action. No consolidation of the appeals was ordered in that Court, but all were heard together and judgment was given allowing the appeal on payment by the plaintiff companies

of costs of the former trial within thirty days after taxation, the appeals, otherwise, to stand dismissed with costs. There being some uncertainty as to the exact terms of the judgment in the Supreme Court of Canada, as to what was decided as to costs and as to the time for payment, plaintiffs' solicitors paid to B. the amount claimed by M.'s solicitors as payable under the judgment, but did so under protest and reserving the right to require payment of any part of the amount paid, on the ground that they had already paid more than they were required to do. In an action brought on behalf of the three companies jointly to recover back the money paid, as having been paid by mistake:—Held, per Graham, E.J., McDonald, C.J., and Townshend, J., concurring, that the claims made against the three companies and their supposed liability being several, and the money to pay the claims having been contributed severally and paid on their account severally in mistake as to part the implied promise to pay back that part to the companies was several and the title to the moneys in the possession of defendants was several and they could not be joined as plaintiffs, and that for these reasons the judgment appealed from must be reversed. Held, that if plaintiffs elected to have a new trial and amended by striking out all of the plaintiffs except one to be selected, and to retax the costs of the trial severally against each company they ought to have leave to do so on payment of the costs of appeal and trial and consequent on the amendment; otherwise the action to be dismissed with costs.

Insurance Co. of North America v. Borden, 37 C.L.J. 319 (S.C.N.S.).

—Dismissal of action—Warranty — Exception declinatoire.]—The plaintiff whose action has been dismissed with costs "excepting, however, the costs occasioned by the appeal in warranty," is, nevertheless, liable for the costs of the declinatory exception, made by the principal defendant whose action in warranty has also been dismissed, to put his warrantor (garant) en cause.

Robert v. Rocheleau, 4 Que. P.R. 39 (S.C.).

—Will—Action to construe — Originating summons—Costs.]—In an action for the construction of a will, if there are no disputed facts and no question that could not have been raised under Ont. Rule 938, costs only of a motion under that rule will be allowed.

Re Brown, Brown v. Brown, 32 O.R. 323.

—Dominion Lands Act—Charge on land—Costs—Real Property Act (Man.).]—Under Rule 277 of the Queen's Bench Act, 1895, costs will be given against the Crown when it fails in proceedings taken by way of caveat and petition under The Manitoba Real Property Act.

Regina v. Fawcett, 13 Man. R. 205 (Bain, J.).

—Effect of allowing appeal—Non-appealing party.]—Action to restrain a township corporation and a contractor from constructing a drain authorized by by-law of the township. The judgment of the High Court granted an injunction against and ordered costs to be paid by both defendants, and ordered the corporation to indemnify the contractor if he paid them. The corporation appealed to the Court of Appeal, making the contractor a respondent; the latter appeared at the hearing of that appeal, but did not himself appeal. The appeal was allowed with costs:—Held, that the result of allowing the corporation's appeal was that, as the plaintiff's right to recover against the contractor depended upon his right to recover against the corporation, the action must be dismissed as against both defendants, but the contractor could have no costs of the appeal. Semble, that he should have his costs below against the plaintiff.

Challoner v. Township of Lobo et al. (No. 2), 1 O.L.R. 292 (C.A.).

—Liability for costs—Revivor—Substituted plaintiff—Transfer of right pendant lite.]—It may, in rare cases, such as Chambers v. Kitchen (1894), 16 P.R. 219, be "necessary and desirable" under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs. Under the circumstances of this case, the fact that F. had become pendente lite the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action. But the original plaintiff could not be allowed to prosecute the action further, because he had no longer any interest in it, and F. could not be allowed to do so because he had not caused himself to be substituted as a plaintiff, nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore, be stayed, but without costs.

Murray v. Wurtele, 19 Ont. Pr. 288.

—Judgment for admitted part of claim.]—Where the defendant, by his plea, offers judgment for part of the sum claimed, and the plaintiff does not accept such offer, but proceeds to proof and is unsuccessful in establishing any greater sum than that admitted, he is entitled only to costs up to plea filed, and will be condemned to pay the defendant's costs of contestation after plea filed.

Poulin and Prevost, summarized in Bertrand v. Hinerth, 24 L.C.J., p. 168, followed; Gilman v. Cockshutt, 18 Que. S.C. 552.

—Application for summary judgment—Dismissal of summons—Costs.]—On a summons for judgment under Order XIV., if the case is not within the order, or there are circumstances which render it improper to grant the application, or the plaintiff knew the defendant relied on a contention which would entitle him to unconditional leave to defend, the summons will be dismissed with costs in any event, but not payable forthwith. Where leave to defend is given, costs, as a general rule, will be in the cause. It is only in exceptional circumstances that costs will be ordered to be paid forthwith. In chamber applications generally, costs are made payable by the unsuccessful party in any event, but not forthwith.

Victoria v. Bowes, 8 B.C.R. 15 (Martin, J.).

—Offer to suffer judgment by default—Effect on costs.]—In an action for false imprisonment defendants, seven days before trial made an offer to suffer judgment by default for $75.00. Plaintiff went down to trial and recovered verdict for precisely the amount of offer:—Held, on motion to review taxation of plaintiff's costs, Gregory, J., dissenting, that the offer, not having been filed in time to give the plaintiff ten days before the trial in which to make her option, the defendants were not entitled under s. 184 of the Supreme Court Act, to judgment against the plaintiff for costs incurred by them after the date of such offer, but, on the contrary, the plaintiff was entitled to full costs of suit. Rule discharged.

Sharpe v. School Trustees, 37 C.L.J. 82 (S.C.N.B.).

—Contested collocation.]—The costs of opposing the report of distribution of an insolvent's estate will be imposed on defendant when the circumstances of the case show that the contest was occasioned more by his fault than by errors of others.

Belgarde v. Carrier, 3 Que. P.R. 513 (S.C.).

—Offer of settlement pending appeal.]—When a judgment is reduced on an appeal pending which the respondent had offered to accept in settlement an amount smaller than the original judgment but greater than the reduced judgment, the appellant will be allowed the costs of the appeal.

Dallin v. Weaver, 8 B.C.R. 241.

—Of examination for discovery— Parties to action.]—A fiat will not be granted under Rule 932 of The King's Bench Act to tax to a plaintiff the costs of the examination of a defendant who was not a necessary or proper party to the action, although no objection on that ground was taken prior to the application for the fiat. An insolvent debtor who has made an assignment for the benefit of his creditors is neither a necessary nor a proper party to an action by the assignee to set aside a fraudulent preference given by him.

Schwartz v. Winkler, 14 Man. R. 197.

—On appeal.]—Plaintiff having appealed from the whole of the order or decision, and having been successful only as to costs, held that neither party should have costs of the argument.

Bauld v. Fraser, 34 N.S.R. 178.

—Summons for judgment under B. C. Order XIV.—Practice.]—A plaintiff who obtains judgment on a summons under Order XIV., issued after the expiration of the time for filing defence, is entitled to the costs of the summons and not only to such costs as he would have been entitled to had he taken judgment in default of defence.

Diamond Glass Co. v. Okell Morris Co., 9 B.C.R. 48.

—Solicitor — Payment by salary — Costs against opposite party.]—By arrangement between the defendants and their solicitor he was to receive a salary of $1,800 a year, for all services, including the costs of litigation in which the defendants should be engaged. The present action against the defendants was dismissed with costs on September 14th, 1901. The defendants brought in their bill for taxation:—Held, following Jarvis v. The Great Western Ry. (1889), 6 C.P. 280, and Stevenson v. The Corporation of the City of Kingston (1880), 31 C.P. 333, in preference to Galloway v. The Corporation of London (1887), L.R. 4 Eq. 90, and Henderson v. Merthyr Tydfil Urban District Council, [1900] 1 Q.B. 434, that in view of the above agreement with their solicitor, the defendants could not tax their costs against the plaintiff. Judgment of Street, J., reversed. Leave to appeal to the Court of Appeal was afterwards refused by Moss, J.A.

Ottawa Gas Co. v. City of Ottawa, 4 O. L.R. 656 (Div. Ct.).

—Offer to suffer judgment by default — Costs of trial.]—The plaintiff, notwithstanding that she had received notice of an offer to suffer judgment by default within the ten days allowed to her by the statute for its acceptance carried the cause down to trial and obtained a verdict therein for a sum exactly equal to the amount mentioned in the offer. On a motion to review the taxation of the plaintiff's costs:—Held (per Tuck, C.J., Hanington, Landry and McLeod, JJ.), that the making of the offer in no way operated as a stay of proceedings, and the taking of the cause down to trial by the plaintiff was not equivalent to a rejection thereof; and that she was, therefore, entitled to have the costs of the trial allowed to her on taxation.

Sharp v. School Trustees, 35 N.B.R. 243.

—Creditors' action to preserve fund—Costs out of fund.]—Costs incurred in a creditor's action in preserving for creditors property which had been fraudulently transferred, are a first lien upon the fund recovered, and are allowed as between solicitor and client.

In re the Judgments Acts: Hood, Aldridge & Co. v. Tyson, 9 B.C.R. 233, Hunter, C.J.

—Interlocutory appeal.] — In interlocutory appeals when a party is allowed costs of the appeal, the costs are payable forthwith.

Star Mining Co. v. White Co., 9 B.C.R. 9.

—Examination unnecessarily long.] — Semble, that where an examination is unnecessarily long, the costs of it should be entirely disallowed.

Evans v. Jaffray, 3 O.L.R. 327 (Div. Ct.).

—Libel action—Nominal damages.]— When the jury in an action for libel finds a verdict for plaintiff with only $1 damages, the defendant should not be ordered to pay costs.

Manitoba Farmers' Hedge and Wire Fence Co. v. Stovel Co., 14 Man. R. 55, Dubuc, J.

—"No order as to costs"—Meaning of.]— The statement "no order as to costs," means that each party must pay his own costs.

McCune v. Botsford and Macquilan, 9 B. C.R. 129.

—Construction of will.]—See WILL.

(Travers v. R. C. Bishop, 2 N.B. Eq. 372.)

—Refusal of costs — Discretion of trial Judge.]—In an action claiming damages for an alleged interference with a fishing berth, judgment was given in favour of defendant, but he was deprived of costs, it appearing that both defendant and plaintiff acted throughout as if they thought the fishing berth in controversy was in Lunenburg county; that it had, up to the time of action, been under the charge and control of Lunenburg officers; that defendant attempted to take it up according to the custom of fishermen followed in that county; that he attended before the fishery officers of that county when they attempted to settle the dispute between himself and plaintiff, and did not question their jurisdiction; and that the defence that the berth was not in Lunenburg but in Queens county was not pleaded, nor the objection taken until the trial:—Held, dismissing defendant's appeal with costs, that this was not a case in which the discretion of the trial Judge should be reviewed.

Selig v. Nowe, 36 N.S.R. 99.

—Payment into Court—Appeal as to costs—Amendment of pleadings — Moulding pleadings to accord with evidence.]—The trial Judge having reserved judgment came to the conclusion that the plaintiffs were entitled to the moneys paid into Court by the defendant. He held, however, that they were not so entitled under the form of the statement of claim (4 Terr. L.R. p. 498), but only under a claim for conversion, and accordingly in his reasons for judgment—the formal order had not been taken out before the appeal—he stated that under the authority of Rule 189 of the Judicature Ordinance, C.O. 1898, c. 21, he "amended the statement of claim so as to determine the real question at issue according to the evidence adduced," and thereupon directed judgment to be entered for the plaintiffs for the amount paid into Court, without costs. On appeal to the Court en banc:—Held (1), that no amendment was necessary; that if, as in this case, the facts alleged showed a wrongful conversion that was sufficient, although the specific words were not used, and that so far as the relief claimed was concerned the Court was entitled under English O. 20, Rule 6 (introduced by J. O. 1898, s. 21), and J. O. 1898, s. 8, sub-s. 5, to give, and ought to give, any appropriate relief to which the plaintiffs were entitled, though it was not specifically claimed. (2) That where money is paid into Court (though with a denial of liability) it is to be taken to be pleaded as an alternative defence going to the whole cause of action, and if the plaintiff fails to show himself entitled to a greater sum the defendant is entitled to judgment on this defence, and that the proper judgment as to costs is:—The plaintiff to have the costs of the action up to the time of payment into Court; the defendant to have the general costs of the action from that time and the plaintiff to have the costs of the issues found in his favour. (3) That although by Rule 500 of the J.O.C.O. 1898, c. 21, no appeal lies without leave from any judgment or order as to costs only which by law are left to the discretion of the Court or Judge making the judgment or order; and although the Court will not as a rule interfere with such discretion unless it has been exercised on a wrongful principle, nevertheless when the judgment or order dealing with the question of costs is appealed from on other grounds, the Court has power under Rule 507 to make any order which ought to have been made by the Court or Judge, and this rule authorizes the Court in banc to deal with the question of the costs below in any way which may appear necessary or expedient by reason of its varying or reversing the judgment or order appealed from. (4) That there were therefore two grounds on which to vary the trial Judge's direction as to costs: (a) That the trial Judge acted on a wrong principle, and (b) That his direction amending the plaintiff's statement of claim was unnecessary and improper. The trial Judge's direction as to costs was therefore varied.

Imperial Bank v. Hull, 5 Terr. L.R. 313.

—**Married woman — Action against as widow.**]—A person whose action has been dismissed because the party sued as a widow was still married cannot claim from such party, by way of damages, the costs of the action so dismissed, and this although said party permitted herself to be regarded as a widow.

O'Malley v. Ryan, Q.R. 23, S.C. 417 (Sup. Ct.).

—**Third party—Ont. Rule 214—Discretion—Appeal.**]—Rule 214 gives power to the Court or a Judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the defendant. Such an order is in the discretion of the Court or Judge, and there is no appeal from it, unless by leave, as provided by the Judicature Act, R.S.O. 1897, c. 51, s. 72. Tomlinson v. Northern Ry. Co. (1886), 11 P.R. 419, 526, is not applicable since Rule 214.

Russell v. Eddy, 5 O.L.R. 379 (D.C.).

—**Municipal Act, R.S.O. 1897, c. 223, s. 470—Trespass — Compensation — Powers of trial Judge.**]—S. 470 of the Municipal Act, R.S.O. 1897, c. 223, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality." In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work:—Held, that s. 470 did not apply as the plaintiff's claim was for trespass and not for negligence, and that the trial Judge had full power over costs.

Lawrence v. Town of Owen Sound, 5 O.L.R. 369 (D.C.).

—**Mortgage — Excessive Demand — Effect on right to costs.**]—Demanding much more than is afterwards found to have been due is not such misconduct on the part of a mortgagee as will deprive him of his costs. To relieve the mortgagor from liability to costs he must make an unconditional tender of the amount actually due.

Daigneau v. Dagenais, 5 O.L.R. 265, MacMahon, J.

—**Demand for costs — Contestation on same.**]—A party who prays that the costs of an application be borne by another party, who is under no obligation to him, thereby forcing the latter to appear and contest, will be condemned to pay the costs of such contestation.

Gingras v. Boon, 6 Que. P.R. 37, Davidson, J.

—**Attachment — Disclaimer — Discharge.**]—If the attaching creditor desists from an attachment without mentioning that the seizure was made without costs and without notice of such disclaimer to the attorneys ad litem of the garnishee, the latter may be discharged from the attachment upon motion to that effect, with costs of the motion.

Levy v. Arkbulatoff, 5 Que. P.R. 338.

—**Agent—Ratification.**]—A piano belonging to defendant having been seized while in possession of one Hallé, the plaintiffs, attorneys of Montreal, upon instructions from Hallé (who represented that he was authorized by defendant), by opposition in the latter's name demanded that the piano be withdrawn from the seizure so made. Defendant's agent having learned that the opposition had been filed, went to plaintiffs' office and told them that defendant would not pay the costs but without ordering the proceedings to be discontinued, and the opposition having been maintained he took away the piano:—Held, that under the circumstances the defendant was obliged to pay to plaintiffs the costs of the opposition. Semble, that the defendant if he wished to escape payment of the costs should have disavowed the proceedings taken in his name.

Delisle v Lindsay, Q.R. 23 S.C. 313 (Cir. Ct.).

—**Mise en demeure—Demand of payment—Lawyer's letter.**]—When a debt is payable at the debtor's domicile a demand for payment by a lawyer's letter is not a mise en demeure which will make the debtor liable for costs if he is afterwards sued by his creditor. Presentment at the debtor's office of a draft of the creditor for the amount of such debt constitutes a mise en demeure which will charge him with liability for costs of an action against him.

Lay v. Cantin, Q.R. 23 S.C. 405 (Cir. Ct.).

—**Controverted elections.**]—
See Election Law.

—**For or against the Crown.**]—
See Crown.

—**Application to vary decree—Rehearing.**]—In a suit to restrain the sale of property by K., an auctioneer, at the instance of M., and for a declaration of the plaintiff's title, K. appeared and jointly answered with M. M. thereafter undertook the conduct of the suit and alone appeared at the hearing, K. holding himself to be but a nominal party. Judgment with costs having been given against both defendants, an application by K. to have the suit reheard for the purpose of varying so much of the decree as ordered him to pay costs, was refused.

Robertson v. Miller, 2 N.B. Eq. 494.

—**Convictions under Ontario statutes.**]—The Court upon a certiorari application has jurisdiction by virtue of s. 119 of the Ontario Judicature Act to award costs against either the justice or the informant on quashing a summary conviction under an Ontario statute.

Rex v. Mancion, 8 O.L.R. 24, 8 Can. Cr. Cas. 218.

—Seizure of tools—Opposition—Costs.]—The workman who demands the withdrawal of a seizure of necessary tools should not ask for costs against the seizing creditor as the bailiff making the seizure could not distinguish between tools which the debtor was entitled to reclaim and other tools.

Cunningham v. Guilbault, 6 Que. P.R. 75 (Lavergne, J.).

—Appeal on point not stated in notice.]—Where an appeal from the dismissal of action is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, no costs of the appeal will be allowed; but as the appellant should have succeeded at the trial, he will be allowed the costs of it.

White v. Sandon, 10 B.C.R. 361.

—Mis-en-cause.]—Costs can only be given against a mis-en-cause if he has joined issue with the plaintiff and asked that the whole or a part of plaintiff's conclusions be rejected.

Paquet v. Corp. of St. Nicholas (Huot, mis-en-cause), Q.R. 13 K.B. 1.

—Of appeal partially successful.]—The fact that a respondent is successful in some parts of an appeal is not sufficient to deprive an appellant who has substantially succeeded, of his costs of the appeal.

Centre Star v. Rossland, 9 B.C.R. 531.

—Stat. 43 Eli. c. 6—Certificate to deprive plaintiff of costs—County Courts.]—The Imperial Statute, 43 Eliz. c. 6, authorizing a judge to certify to deprive a plaintiff of costs, is in force in New Brunswick, and is made applicable to County Courts by s. 68 of the County Court Act, 1897.

Warman v. Crystal, 35 N.B.R. 562.

—Discontinuing action—Good cause for depriving defendant of costs.]—Plaintiff claiming that she was entitled to $1,500—part of the monies secured by two policies of $500 and $2,000 on her deceased husband's life—such amount being alleged to have been made over to her by her husband's dying declaration, her solicitor wrote to a brother of the deceased, the supposed holder of the policies, notifying him of the plaintiff's claim, whereupon a solicitor replied that his instructions were that the two policies were "originally and always payable" to the deceased mother, and so formed no part of the deceased's estate. The plaintiff's solicitor then wrote to the mother, to which the same solicitor replied that he could not understand the ground of the plaintiff's claim, but if she desired to commence an action he would accept service. The plaintiff thereupon commenced an action which was defended by the said solicitor, but on the plaintiff subsequently discovering that the brother who had been first written to actually did hold the policies under an assignment from the mother, he wrote to the solicitor for his consent to discontinue the action without costs, and on this being refused, a motion therefor was made under Rule 430 (4):—Held, that an order could properly be made for the discontinuance on the terms asked for. Construction of Rule 430 (4) and difference in the corresponding English Rule pointed out. Order of the Master in Chambers affirmed.

Armstrong v. Armstrong, 9 O.L.R. 14 (Anglin, J.).

—Nominal damages—Discretion of trial Judge refusing costs.]—In an action brought by plaintiff claiming damages for breaking and entering plaintiff's close, and destroying and injuring his grass and crops, and permitting cattle, calves and other animals to break and enter, etc., the trial Judge found that the trespass committed was a very trifling one, that the action was the result of ill-feeling and of previous litigation, and that no substantial injury to plaintiff's property was suffered. He found that plaintiff was entitled to recover, but, in view of all the circumstances, he fixed the damages at the sum of $5, and refused plaintiff his costs of action:—Held, dismissing plaintiff's appeal with costs, that there was no reason for interfering with the discretion of the trial Judge in refusing costs.

Meisner v. Meisner, 37 N.S.R. 20.

—Of all parties out of estate—Will.]—In an action to establish a will, in which the defendants set up an unsuccessful defence of fraud and undue influence:—Held, considering the mode in which the testator had executed the will, and the conduct of the beneficiaries under it, that all parties should have their costs out of the estate.

Gilbert v. Ireland, 9 O.L.R. 124 (Britton, J.).

—Tariff—Lawyer's letter.]—Since the passing of the Act 3 Edw. VII., c. 34, s. 9, the debtor who receives a letter from an attorney is liable for the fee therefor and a tender afterwards made by him to the creditor of the amount of the debt only is insufficient.

Rozer v. Bélanger Q.R. 27 S.C. 95 (Cir. Ct.).

—Action by infant—Dismissal.]—Where an action is dismissed on the ground that the plaintiff is a minor he may be ordered to pay the costs.

St. Laurent v. Fortier, Q.R. 26 S.C. 463 (Sup. Ct.).

—Discretion—Court of Review.]—The Court of Review cannot alter the adjudication of the costs made by the Judge at first instance unless the latter has exercised in

an unreasonable manner the discretion given him by law.

In re Hurtubise, Q.R. 26 S.C. 137 (Ct. Rev.).

—**Judge's discretion—Question of costs—Depriving plaintiff of costs—Review.**]—In an action brought by plaintiff against defendant for the conversion of a two-masted schooner, the "Mayflower," the trial Judge found that the property claimed was that of plaintiff, when taken by defendant, but he deprived the plaintiff of costs on the ground of fraudulent proceedings in connection with the prosecution of his claim. It appeared that, some time previously, defendant recovered judgment against plaintiff, and issued execution under which the property in question was levied upon, and that, at the instance of plaintiff, an action was brought by his wife to recover the property alleging it to be hers. Afterwards, the judgment recovered by defendant against plaintiff having been set aside, plaintiff brought this action in his own name:—Held, that the Judge's discretion was properly exercised, and that, on a question of fact, and especially on a question of costs, it should not be reviewed,

Jenkins v. McAdam, 38 N.S.R. 124.

—**New trial—Contradictory findings of jury—Costs.**]—Where it was held that both parties to the action were entitled to a new trial because of the contradictory findings of the jury and a new trial was ordered, no costs of the appeal or of the application for a new trial were allowed, and the costs of the former trial were made costs in the cause.

Kirk v. Chisholm, 39 N.S.R. 98.

—**Costs — "Event," what constitutes.**]—By s. 100 of the B. C. Supreme Court Act, 1904, the Legislature expressly intended to provide an automatic code for the disposition of the costs of all trials, hearings and appeals in the Supreme Court, and to sweep away all discretion save in relation to the specific exceptions set out in the said s. 100.

Hopper v. Dunsmuir, 12 B.C.R. 18.

—**Costs — Witnesses — Cross-action — Discretion of the Court.**]—A party, who lost as defendant, and as plaintiff in a cross-action, when the issues could have been determined by means of one action, must pay the costs of both issues. When a party does not prove the greater part of his allegations he must bear the expenses of the days of trial occupied by his useless enquete.

North American Life Ass. Co. v. Lamothe, 7 Que. P.R. 439 (Doherty, J.).

—**"Event" read distributively—"Issue" as distinguished from "event"—Costs of and incidental to arbitration.**]—Sam Kee, having obtained an award from arbitrators appointed under the Railway Act, 1903 (Dominion), which award, by reason of s. 162 of the Railway Act, 1903, entitled him to the costs of the arbitration, the railway company appealed to the Full Court, advancing several distinct grounds of appeal, on all of which, with the exception of the rate of interest allowed by the arbitrators, they failed, the interest being reduced to the statutory rate, from six per cent. to five per cent.:—Held, (Irving, J., dissenting). (1) That the word "event" in s. 100 of the Supreme Court Act, 1904, may be read distributively. (2) That s. 162 of the Railway Act, 1903 (Dominion), does not apply to costs of appeals to the Full Court from the award of arbitrators, but that such appeal is an independent proceeding, and is therefore governed by s. 100 of the Supreme Court Act, 1904. (3) That the success of the appellant company on the question of interest was merely an "issue" arising on the appeal, and not an "event" on which it was taken.

Vancouver, Westminster and Yukon Railway Company v. Sam Kee, 12 B.C.R. 1.

—**Agreement — Settlement of a judgment debt — Costs — Interpretation.**]—The term "costs" in an agreement to accept a specified sum, and costs in settlement of a judgment, means the taxed costs in the suit, and does not include other charges due by the creditor to his solicitors in connection with the debt.

Blackwood v. Percival, 14 Que. K.B. 445.

—**Costs reserved to be disposed of at trial—Not considered at trial—Jurisdiction of trial Court after appeal taken.**]—Where on an interlocutory motion costs are reserved to be disposed of at the trial, and the trial is had without any reference to these costs, if an appeal from such judgment be taken and the judgment affirmed, the jurisdiction of the appellate Court attaches, and the trial Court on the further application has no power to render any further decision unless remanded, and even then the Court will deal with such application only under special circumstances.

Tucker v. The Ship Tecumseh, 10 Can. Exch. R. 153.

—**Revising minutes of judgment—Mistake—Costs of abandoned defences.**]—The plaintiffs' action was maintained with costs in the Courts below, but on appeal, it was dismissed with costs by the Supreme Court of Canada (37 Can. S.C.R. 546), no reference being made to certain costs incurred by the plaintiffs in respect of several defences which the defendant had abandoned in the trial Court. On motion to vary the minutes, the matter was referred to the Judge of the trial Court to dispose of the question of the costs on the abandoned defences.

Rutledge v. United States Savings and Loan Company, 38 Can. S.C.R. 103.

—**Costs of the day—Default in proceeding to trial.**]—On refusing a rule for judgment as in case of a nonsuit for not proceeding to trial according to notice, on giving a peremptory undertaking, costs of the day may be imposed as a condition.

Jones v. Miller, 37 N.B.R. 585.

—**Privilege — Insolvency.**]—A third party who claims, by petition, a privilege or droit de gage on certain effects of an insolvent in possession of his curator is entitled to the costs of an action for the amount of his lien.

In re Maller, 8 Que. P.R. 152 (Lafontaine, J.).

—**Hypothecary action against third party —Assignment by attorney.**]—The costs of an action to recover a privileged debt on an immovable are themselves privileged by the same title as the debt to which they are accessory. The creditor has, in such case, an hypothecary action to recover the costs from a third party who has acquired the immovable affected by the privilege. A judgment against the plaintiff in an action to recover the costs on the ground that they belong to the attorney ad litem by reason of distraction of costs is not chose jugée in a second action by the same plaintiff to recover the same costs under an assignment made to him by his attorney ad litem. When an action brought in a Court incompetent ratione materiæ is evoked by such Court to a competent tribunal the deposit of the amount claimed made before the evocation took place does not relieve him from the obligation to pay the costs.

General Hospital v. Dufresne, Q.R. 30 S.C. 530 (Sup. Ct.).

—**Joint defendants—Appeal by one defendant only—Reversal of judgment.**]—If one of two defendants acquiesced in the judgment rendered in favour of the plaintiff by the Superior Court, and the case is taken to appeal by the other defendant, who succeeds in obtaining the dismissal of the action, he can only tax against the plaintiff one-half of the Superior Court costs, plus the costs of judgment, bill and taxation.

Marsan et al. v. Guay, 8 Que. P.R. 162.

—**Payment out of Court—Accountant's office—Issue of cheque—Refusal to accept—Delay in second application.**]—The High Court receives money primarily for the protection of infants and others not competent to deal with their own property, and those who cannot be found; the machinery of the Court not being intended as a convenience for those who are sui juris and know their rights, it is the duty of those entitled to receive money out of Court to apply for it at the earliest moment reasonably possible. A person so entitled, who had refused to accept a Court cheque on the ground that the solicitor who obtained it had no authority to do so, and delayed seventeen years in applying for payment of the money was ordered to pay the costs of an application to the Court for the issue of a duplicate cheque, the former cheque not having been accounted for, and interest was allowed at the rate of 3 per cent. only, while the money was in Court.

Re Sturgis, Sturgis v. Van Every, 14 O.L.R. 77.

—**Mis en cause who has no interest in the case—C.P. 549.**]—The mis en cause, who has no interest in the case, has the right to recover from the plaintiff his costs of appearance and declaration, and the plaintiff who succeeds against the defendant may in turn have them taxed against him.

Jacobs v. E. Hagerman Company, 8 Que. P.R. 281 (Davidson, J.).

—**District Court—Action beyond jurisdiction of County Court—Scale of costs.**]—Where, in an action tried before a District Court Judge, without a jury, there is a recovery for an amount beyond the jurisdiction of the County Courts the Judge is not compelled, under s. 11 of the District Courts Act, R.S.O. 1897, c. 109, read in the light of the Rules of Court applicable thereto, either to withhold costs altogether or to grant a certificate therefor on the High Court scale. He has a discretionary power, and may certify for costs on the County Court scale only.

Schaeffer v. Armstrong, 13 O.L.R. 40 (D.C.).

— **Wrongful detention — Amendment — Counterclaim.**]—On the trial of an action claiming damages for the wrongful detention and conversion of plaintiff's horse, judgment was given in favour of plaintif for detention, but defendant's pleadings were amended to enable him to counterclaim for amounts paid to and on account of plaintiff, and judgment was given in his favour for this amount with costs and the costs were offset:—Held, allowing plaintiff's appeal, that plaintiff should not have been made to pay costs of an amendment required by defendant, and that defendant should not have been allowed costs of a counterclaim put on the record to enable him to get the benefit of payments not put forward to a claim against plaintiff. There was no evidence to warrant the damages awarded to plaintiff for detention of the horse, but it was held that, in the absence of an appeal, the judgment could not be disturbed.

Cox v. McLean, 41 N.S.R. 238.

—**Successful party—Power to deprive him of costs—"Good cause."**]—In an action for libel between newspapers, arising out of statements as to their respective circulation, the trial Judge found on the facts that the statement made by the defendant

newspaper was not established; but he came to the conclusion that there had been no special damage suffered by the plaintiff newspaper in consequence of the statement, and gave judgment dismissing the action without costs:—Held, that under the rule governing costs in British Columbia, as distinguished from that in force in England, the trial Judge must find good cause for depriving a successful party of his costs; and here there was not such good cause.

World Printing and Publishing Co. v. The Vancouver Printing and Publishing Co., 13 B.C.R. 220.

—Appeal to Privy Council—Execution—Stay.]—When costs of appeal to the Judicial Committee of the Privy Council have been awarded by the judgment of that tribunal, they are not subject to the rules of practice of the lower Courts; there is no right to set-off, and no right to modify the direction to pay, which means forthwith after the amount is fixed, unless by application made to the Committee before final judgment is completed. Russell v. Russell, [1898] A.C. 307, applied and followed. The plaintiffs, having been ordered by the Judicial Committee to pay the costs of the defendants' appeal to that tribunal, were held not entitled to a stay of execution for such costs in the Court below (the High Court), with a view to a set-off of other costs or of damages to be recovered upon a new trial ordered by the Judicial Committee.

Metallic Roofing Co. v. Jose, 17 O.L.R. 237.

—Reprise d'instance.]—The costs of the order directing a party to take up the instance will be reserved to be disposed of with the merits of the cause.

Lecompte v. Lanctot, 9 Que. P.R. 164 (Sup. Ct.).

—Discretion.]—The rule that the unsuccessful litigant must bear the costs of the action is imperative and the Court can only exercise its discretion of relieving him in whole or in part from such burden for special reasons which should be set forth in the judgment.

Croteau v. Arthabaska Water & Power Co., Q.R. 31 S.C. 516 (Ct. Rev.).

—Denial of allegations of facts—Discretion of Court.]—In an action against a municipality for damages for death of a horse caused by the bad state of a public road the defendant denied that the road was out of repair. The Court of first instance held that the allegation as to the state of the road was true, but that the accident occurred in another place as to which the municipality was not in fault:—Held, that as the denial of the allegation by defendant caused an expensive and useless enquête it was a special cause for which the Court could, by application of Art. 549 C.C.P., refuse to give costs.

Lauzon v. Township of La Minerva, Q.R. 32 S.C. 214 (Ct. Rev.).

—Mis en cause—Contested action.]—The plaintiff who calls in a party as mis en cause and demands costs against him in case he contests the action cannot, if he does not contest it, maintain an action against him for the costs.

Michaud v. Roy, Q.R. 34 S.C. 352.

—Dismissal of action—Failure of defendant to prove plea.]—The fact that the defendant who succeeds on the trial of an action has not proved one of his grounds of defence when the same did not cause any expense at the enquête is no reason against giving costs to the defendant.

Daigle v. Noel, Q.R. 35 S.C. 341.

—Action for damages—Amount of verdict.]—In an action for damages whatever may be the extent of the injury suffered and the appreciation of the Court as to the same if it does not see fit to award damages for a sum exceeding $8 it cannot impose costs on a higher scale than the amount of the verdict would carry. Therefore a judgment against the defendant for $5 damages with the costs of an action for $60 to $100 and stenographer's fees should be set aside, the Court having no power to impose more than $5 for costs (Art. 550 C.P.Q.).

Donville v. Ouellette, Q.R. 34 S.C. 385.

—Dismissal of action—Actions in warranty.]—Where an action is dismissed with costs for failure by the plaintiff to furnish security judicatum solvi he should be condemned to pay the costs of actions en garantie et en arrière-garantie though the same have not been tried as they depend on the result of the main action.

Houle v. Hébert, Q.R. 36 S.C. 21.

—Third party.]—The question of allowing a third party his costs is purely one of discretion, dependent upon the circumstances of the case.

Baker v. Atkins, 14 B.C.R. 320.

—Set-off—Set-off exceeding plaintiff's claim—Judgment for defendant for balance.]—Where the claims of the respective parties to the action consist of mutual debts, they are subject to the statutory provisions relating to set-off, now found in R.S.O. 1897, c. 324, ss. 5, 6, 7. History of s. 7, which provides that if upon a defence of set-off a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant shall be entitled to judgment for the balance. Set-off and counterclaim, in our practice, remain in their nature different. The latter is in strictness a cross-action or claim for relief which cannot be obtained by the defendant in the

action, and the costs of the action and counterclaim are usually dealt with as if the claims of the respective parties were the subjects of separate actions; while a set-off, when proved, is not only a statutory defence to the action, but where the defendant's claim over-tops that of the plaintiff he is also by s. 7 entitled to judgment for the excess, the latter not being, as in England, necessarily or properly the subject of counterclaim, but rather an incident of the defence. The proper judgment, therefore, when the defendant proves a set-off equalling the plaintiff's claim, is a dismissal of the action, and, if exceeding it, also a judgment for the excess. Where the defendant, in asserting a set-off or other claim which is merely a matter of defence, pleads it as a counterclaim, the practice is to disregard the form of the pleading, and to dispose of the action and costs in accordance with the real character of the defence. Judgment directed to be entered for the defendant dismissing the action and for the excess of the amount found due to him over that found due to the plaintiff, with costs. Costs are by statute and Rule of Court in the discretion of the Court or Judge; but when such discretion has been exercised upon an erroneous principle or upon a misapprehension of the facts—in other words, where there has been no real exercise of judicial discretion—an appeal lies without leave.

Gates v. Seagram, 19 O.L.R. 216 (C.A.).

II. SOLICITOR AND CLIENT.

See SOLICITOR.

III. SCALE OF COSTS.

—Taxation—"Value in contest."]—Neither interest nor costs can be added to the amount in litigation to determine the class of action for the purpose of taxation of costs.

Barber Ellis Co. v. Burland, 10 Que. K.B. 218 (Hall, J.).

—Opposition—Dismissal on motion—Class of action.]—If an opposition is dismissed on motion, the attorney of the plaintiff who has not filed an appearance in writing on the opposition is not entitled to a fee for appearing. The fee on an opposition dismissed on motion is that of an action dismissed on preliminary exceptions. The class of action of an opposition is governed by the value of the effects claimed by the opposition and, in the absence of other proof, the amount claimed by the opposition as representing the value of the effects revendicated by it should be deemed to be the exact value.

Rector and Churchwardens of Laprairie v. Proulx, 4 Que. P.R. 33 (S.C.).

—Scale of—Jurisdiction—Balance due on contract signed by defendant—Extrinsic evidence.]—In an action in the County Court for $37.50, balance due on a building contract of $475, signed by the defendant, where extrinsic evidence was required to show performance of the contract by the plaintiff, and for an open account for $27.35, and in which the defendant was allowed $25.00 for defective work and material:—Held, that the Division Court had no jurisdiction, and that the plaintiff was entitled to his costs on the County Court scale. Kinsey v. Roche (1881), 8 P.R. 515, approved of; McDermid v. McDermid (1888), 15 A.R. 287, followed; re Graham v. Tomlinson (1888), 12 P.R. 367, not followed.

Kreutziger v. Brox, 32 Ont. R 418.

—Appeal from judgment of drainage referee.]—The costs of an appeal to the Court of Appeal from the decision of the drainage referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice. Decision of a Divisional Court, 19 P.R. 188, 1900 C.A. Dig. 76, reversed.

Re Township of Metcalfe and Townships of Adelaide and Warwick; re Township of Colchester North and Township of Gosfield North, 2 O.L.R. 103 (C.A.).

—Attachment after judgment — Amount seized—Class of action.]—Upon the contestation as to the validity of a seizure en mains tierces, the class of action depends upon the amount seized, and the taxation of the bill according to the class of the original action will be revised accordingly.

Jones v. Moodie, 3 Que. P.R. 354.

—Action to have foreign administrator recognized—Class of action.]—An action whereby the plaintiff, appointed by a foreign tribunal administrator to a decedent estate, seeks to have his quality recognized in this country, against a sequestrator appointed by our Courts to the property situate in this country, will be considered a first class action for taxation purposes, if it comes up that the property situated in this country amounts to more than $1.000.

Lavoignat v. Mackay and Boudreau, 3 Que. P.R. 479 (Archibald, J.).

—Action to have foreign administrator recognized—Class of action.]—An action to have the plaintiff's title of administrator to a decedent estate recognized in Quebec, is a second class action, no matter what the amount of the estate may be. Per Hall, J., Court of K.B., appeal side.

Lavoignat v. Mackay, 3 Que. P.R. 478.

—Class of action—Interest—Taxation.]—The costs of an appeal from a judgment for $200 with interest and costs, which is reversed, the action being dismissed by the

Court of Appeal, are costs of an action of the fourth, and not of the third class.

Sauriol v. Clermont, 3 Que. P.R. 477.

—Taxation—Amount of condemnation in the judgment appealed from.]—In determining the class to which a case belongs for the purpose of taxation of costs, only the amount of the condemnation in the judgment appealed from, irrespective of costs, is to be taken into consideration.

Sauriol v. Clermont, 10 Que. K.B. 219 (Hall, J.).

—Taxation—"Value in contest."]—Where the judgment appealed from was against the appellant for a specific amount, and the respondent did not take a cross appeal, the "value in contest," for the purpose of determining the class for taxation of costs, is the amount for which judgment was rendered against the appellant by the Court below.

McGarvey v. Dougall, 10 Que. K.B. 217 (Würtele, J.).

—Costs—Tiers-saisi—Contestation of declaration.]—When the contestation of the declaration of a tiers-saisi is maintained without enquête, on default of the tiers-saisi to reply to such contestation, the attorney of the contestant is entitled, as against the tiers-saisi to the fee provided by Art. 4 of the Superior Court tariff, and the class of actions is determined by the amount of the judgment given against the tiers-saisi.

Ettenburg v. Kelly, 19 Que. S.C. 143 (S.C.).

—Sale of immovable—Opposition a fin de distraire.]—When an immovable has been sold in an action for partition and licitation for a price exceeding $4,000 the costs of an opposition à fin de distraire and of its contestation should be taxed as in an action of the first class with the additional fee of $30 granted by the tariff in actions for more than $4,000.

Latour v. Latour, 19 Que. S.C. 159 (S.C.).

—Scale of.]—The costs of an action in the Supreme Court of British Columbia which might have been brought in the County Court are not necessarily taxable on the County Court scale.

Royal Bank v. Harris, 8 B.C.R. 368 (Irving, J.).

—Writ of execution — Quebec tariff.]—When a writ of execution is issued from the Superior Court the costs should be according to the amount for which it is issued, but if the amount is less than $100 then it is the tariff of the fourth class of the Superior Court which should be applied; but when the execution of the writ is not by an opposition taken to have it set aside on the ground that the amount due has been paid, and which opposition is maintained with costs, the fees of the attorney should be according to the sum claimed by the writ.

Morinville v. Baril, 20 Que. S.C. 327 (Sup. Ct.).

—Scale — Retraxit — Witnesses — Art. 557 C.C.P.]—The fact that the plaintiff—who had sued to recover $1,165.28, namely, $776.82, the value of goods sent to the defendant to be forwarded, but which were not delivered, and $388.46 for damages caused by failure to deliver, has filed a retraxit pending the instance for $388.73 for certain goods sent since the action, does not take away the right of taxing the costs as in an action of the first class. There may be a review of the taxation of witnesses summoned from outside of the jurisdiction, even though no objection was made thereto on the taxation if the total amount of the costs taxed exceeds the cost of a commission rogatoire.

Rothchild v. Canadian Pacific Railway Co., 21 Que. S.C. 318 (Sup. Ct.).

—Saisie-arret—Costs—Scale.]—The saisie-arrêt is a new proceeding, and the costs of a judgment maintaining the disavowal of the attorney who had procured the seizure to be made are determined by the amount for which the writ of saisie-arrêt was issued.

Lafrance v. Parent, 21 Que. S.C. 415 (Sup. Ct.).

—Costs—Action against curator of insolvent —Scale—Art. 876 C.C.P.—Tariff Arts. 45, 112.]—The fees of counsel on a petition for recovery of property from the curator under Art. 876 C.C.P., when there was a contestation by writing, inscription, enquête and hearing, are those of an action of the second class in the Superior Court but without a fee on the hearing.

Moreau v. Gélina, 4 Que. P.R. 380 (Sup. Ct.).

—Scale—Declaration of tiers-saisi—Tariff Act. 44.]—The fees due on a contestation of the declaration of a tiers-saisi in proceedings to annul a donation of an immovable of $800 and to condemn the tiers-saisi each to pay $122 are those of an action of the second class.

Brunet v. Bergeron, 4 Que. P.R.

—Petition to remove liquidator—Winding-up Act—Class of action—Tariff of fees.]—The fees in appeals on a petition to remove a liquidator appointed to a joint stock company are the fees of a second class and not of a first class action.

Stimson v. Northwest Cattle Company, 5 Que. P.R. 239 (Hall, J.).

—Attachment after judgment—Amount attached—Costs.]—The costs on an attachment after judgment must be taxed according to the amount sought to be recovered

from the garnishee, and do not follow the costs of the principal action.

Latour v. Latour, 5 Que. P.R. 306 (Doherty, J.).

—Tariff—Class of action.]—The allowance of costs, being a matter of statutory declaration and not of right, cannot exceed the limits defined by the text of the statute. Therefore sub-division 7 of the second class of the Quebec tariff must apply to the allowance of costs in an action praying for the rescission of a winding-up order and appointment of a liquidator to a company, although financial interests may be involved in the suit, which, if they formed the subject of the conclusons of the action, would bring it within the first class for purposes of taxation.

Stimson v. The Northwest Cattle Co., 12 Que. K.B. 365 (Hall, J.).

—Certificate for costs.]—The Court has jurisdiction to review the discretion exercised by a Judge in certifying for costs under 60 Vict. (N.B.) c. 28 that there was good cause for bringing the action in the Supreme Court.

Cormier v. Boudreau, 36 N.B.R. 6.

—Scale of costs—Trespass to land—Payment of $1.00 into Court—Acceptance by plaintiff.]—In an action in the High Court of Justice for trespass to land valued at over $200, in which the plaintiff claimed $2,000 damages, no question of title to land being raised, the defendant paid $1.00 into Court and the plaintiff accepted it:—Held, that the plaintiff was entitled to his costs on the High Court scale. Babcock v. Standish (1900), 19 P.R. 195, followed.

McKelvey v. Chilman, 5 O.L.R. 263 (Britton, J.).

—Certiorari — Advocates' fees.]—(1) The advocates' fees in a case of certiorari should be taxed as of a second class case in the Superior Court. (2) There is no fee upon the order for the issue of the writ of certiorari.

Arcand v. Montreal Harbour Commissioners, 5 Que. P.R. 410.

—Appeal—Dismissal as to one party—Advocates' fees.]—If an appeal is dismissed upon motion as to one of the parties only, the advocates' fee will be taxed for the full amount allowed by the sheriff and not for half that sum only.

Leduc v. Corporation of St. Louis de Gonzague, 5 Que. P.R. 448.

—Attachment after judgment—Seizure of salary—Class of action.]—If a contestation of the declaration of a garnishee be dismissed the class of action will depend upon the amount of the judgment which the contestant might have recovered against the garnishee if he had been declared to have been indebted and this is so even if part of the amount may have been exempt from seizure.

Sieyes v. Painchaud, 5 Que. P.R. 363.

—Revendication of insurance policies—Class of action.]—In an action in revendication for the recovery of insurance policies where the company appears and s'en rapporte a justice, costs should be granted according to the face value of the policies and not according to the actual value of the policies as title deeds.

McDuff v. Metropolitan Life Ins. Co., 6 Que. P.R. 133 (Fortin, J.).

—Trespass—Flooding land—Title to land.]—Where an action for damages for flooding and other trespasses to the plaintiff's lands situated in the Parry Sound District was brought in the High Court, and the title thereto was brought in question, and, though no evidence was given as to its value, it could not reasonably be contended that it did not exceed $200, and clause (d) of sub-s. 2[1] of s. 9 of the R.S.O., c. 109, giving jurisdiction to inferior Courts, where the land is under such value, not applying to such district, and the Judge at the trial having found for the plaintiff and directed judgment to be entered for him for $100 damages with the costs of the Court having jurisdiction to such amount without any set-off, the plaintiff was held entitled to tax his costs on the High Court scale.

Neely v. Parry Sound River Improvement Company, 8 O.L.R. 128 (D.C.).

—On County Court scale—Jurisdiction to order.]—In a Supreme Court action, the Judge has no jurisdiction to order costs on the County Court scale on the ground that the action might or should have been brought in the County Court.

Russell v. Black, 10 B.C.R. 326.

—Attachment after judgment—Class of action.]—(1) On a contestation of a garnishee's declaration, the class of action is fixed by the amount claimed by the contestant. (2) The fact that the contestation seeks to have the seizure declared holding does not change the class of action. (3) Even if the amount claimed by the contestation is below $100, if the same is tried before the Superior Court, the winning party is entitled to charge stamps and depositions as in Superior Court cases. (4) The debtor and the manager of the company garnishee cannot be taxed against the contestant.

De Sieyes v. Painchaud, 6 Que. P.R. 369, Davidson, J.

—Scale of costs — Interpretation of judgment.]—If an action or an incidental demand is maintained for a certain amount only, with costs, and the judgment declares that the amount granted would have been larger but for plaintiff's consent, the costs of such action will, nevertheless, in the ab-

sence of any adjudication to the contrary, be taxed as in an action for the amount of the condemnation.

Collins v. Clare, 6 Que. P.R. 381 (Archibald, J.).

—Class of action—Tutor.]—If a tutor brings an action, in his representative capacity, for damages which is dismissed with costs against him personally, and on appeal the personal condemnation is set aside with costs, the amount in dispute on the appeal is the amount of the costs awarded against him, and not the sum claimed by the action.

Garnier v. Armand, 6 Que. P.R. 45 (Würtele, J.).

—Class of action—Prerogative writs.]—An action praying "that the defendants be ordered to cause the immediate cessation of the emanation of unhealthy odors and smoke from their said establishments, and that on failure to do so that the plaintiff be authorized to cause the same to cease at the defendant's expense, by employing the means necessary for the purpose; and that the defendants be condemned to pay the said sum of one hundred dollars with costs," is similar as regards costs in the Court of King's Bench, to proceedings by writs of prerogative, and is, consequently, an action of the first class.

Town of St. Paul v. Cooke, 6 Que. P.R. 48 (Würtele, J.).

—Alimentary allowance—Reduction.]—The scale of costs in an action for reduction of an alimentary allowance is governed by the amount of the monthly payments of the allowance.

Lavigne v. Pouliot, 6 Que. P.R. 138 (Pagnuelo, J.).

—Class of action—Nature of judgment.]—When an appeal is taken by the plaintiff from a judgment dismissing his action, which was one of the first class, but ordering the defendant to return him some effects claimed, the class of action is determined by the amount for which the action was brought.

Armstrong v. Beauchemin, 6 Que. P.R. 51 (Würtele, J.).

—Trespass to land — Title — Pleading — Amendment.]—In an action in the High Court for trespass to land, of greater value than $200, the plaintiff alleged his tenancy and occupation; the defendant, in his statement of defence, denied both, and asserted title and right to possession in himself, and also pleaded leave and license. About two weeks before the trial the defendant gave notice of motion for leave to amend by withdrawing his denial of the defendant's tenancy and occupation, and expressly admitted both, and withdrawing his own claim to right of possession. Leave to so amend was granted at the trial, terms as to costs being reserved. The jury found against the defence of leave and license, and assessed the plaintiff's damages at $1, for which a verdict was entered:—Held, that the original defence raised an issue of title, and it not having been amended until the trial, the plaintiff was obliged to go to trial in the High Court, and was entitled to his costs on the scale of that Court. Semble, also, that as a matter of discretion under Rule 1130, and perhaps also as a term of allowing the amendment, the same disposition of the costs would be made.

Black v. Wheeler, 7 O.L.R. 545 (Anglin, J.).

—Scale of—Contested municipal election (Que.).]—Contestations of municipal elections in cities and towns constitute actions of the third class.

Marson v. Hébert, 6 Que. P.R. 342.

—Judicature ordinance—Counterclaim for large debt.]—In an action under the small debt procedure, the defendant may under Rule 612, set up a counterclaim, the amount of which exceeds the small debt jurisdiction. Where such a counterclaim is dismissed with costs, the plaintiff is entitled to tax a fee of ten per cent. on the amount under Rule 617 which extends to counterclaims.

Cox v. Christie, 5 Terr. L.R. 475 (Scott, J.).

—County Court scale—Unsuccessful counterclaim for amount beyond County Court jurisdiction.]—Under a contract to tow logs the tug is entitled to be paid only for the logs delivered, and, where the special term that the tug is entitled to be paid only for the logs lost is relied on, it must be proved specifically. Where the defendant in a Supreme Court action counterclaims for an amount beyond the jurisdiction of the County Court, costs on the County Court scale only will not be awarded to a successful plaintiff, even though the action should have been brought in the County Court.

Pacific Towing Company v. Morris, 11 B.C.R. 173 (Hunter, C.J.).

—Damages — Remainderman — County Court jurisdiction.]—In an action by remainderman against a life tenant of a farm and the purchaser of the timber for selling the latter, the trial Judge found for the plaintiff and assessed the damages at $400, to be paid into Court, to be paid out to the plaintiffs on the death of the life tenant, who was to have the interest in the meantime. On an appeal to a Divisional Court the judgment was affirmed as to the amount of damages, but varied by directing that instead of the $400 being paid into Court and the life tenant receiving the interest, the present value of the plaintiff's interest should be paid to them fixed at $180. Held, that although the formal judg-

ment "is hereby varied by reducing the sum payable by defendant to the plaintiffs for damages from $400 to $180, which latter sum shall be paid forthwith by defendants to the plaintiffs," the plaintiffs were entitled to costs on the High Court scale. Held, also, that the effect of a defence by the life tenant, that payments had been made by her on an existing mortgage to the amount of $1,600, and claiming that she should be subrogated to the mortgagee's rights; and by the purchaser, that he had bought the timber for value without notice raised the question of title to an interest in land to a greater value than $200 and the County Court had no jurisdiction.

Whitesell v. Reece, 9 O.L.R. 182 (Teetzel, J.).

—Petition for interlocutory injunction—Class of action.]—The fees upon a petition for interlocutory injunction in an action to set aside a municipal by-law, are fees of second, not of first class actions.

Corporation de Belœil v. Cie d'Aqueduc, 7 Que. P.R. 77 (Hall, J.).

—Scale — Interim injunction.]—For an interlocutory injunction granted under Art. 4389 R.S.Q., in proceedings by petition to quash a by-law, the Court will allow a gross fee of $50 with no supplementary fee for the hearing.—An interim injunction in an action of this kind partakes of the character of the action itself, and the costs should be taxed as of the second class.—The fee payable to the prothonotary for the reply to a petition for an interim injunction is the $1 fixed by Art. 24 of the tariff and not the amount due on a plea to the merits.—The Court cannot, on taxation, refuse the fee for each affidavit filed in support of, or against, the petition.

Cameron v. Town of Westmount, 7 Que. P.R. 58 (Sup. Ct.).

—Scale of—Payment of money into Court with defence—Acceptance in satisfaction—Amount within jurisdiction of inferior Court.]—Where money is paid into Court by the defendant with his defence, and taken out by the plaintiff in satisfaction of all the causes of action, the plaintiff is entitled to tax his costs on the scale of the Court in which the action is brought, even where the amount paid in and accepted is within the competence of an inferior Court. Babcock v. Standish (1900), 19 P.R. 195, and McSheffrey v. Lanagan (1887), 20 L.R. Ir. 528, approved.

Stephens v. Toronto R.W. Co., 13 O.L.R. 363 (C.A.).

—Class of action—Value in contest.]—(1) On an opposition to the sale of personal and real property, the fees, in the Court of King's Bench, will be the same as on the original action, that being the limit of plaintiff's interest, and consequently, the value in contest. (2) On an intervention against a demand of abandonment, based upon the fact that a prior abandonment has already been made and a curator appointed thereto, the value in contest is the value of the insolvent estate.

Henderson v. Harbec, 8 Que. P.R. 126.

—Review of taxation—Scales "over $10 to $25" and "over $250 to $500."]—Plaintiff claimed $333.19 for certain cattle sold to defendant, who pleaded tender of $300 and payment into Court, and not indebted as to the remainder of the claim. Judgment for plaintiff was given for $320. The taxing officer allowed costs on the scale "over $250 to $500":—Held, on review of the taxing officer's ruling, that the amount recovered by means of the action being only $20, the costs should have been taxed on the scale "over $10 to $25."

McLean v. Dove, 13 B.C.R. 292.

—Tariff—Possessory action.]—(1) Possessory actions are second-class actions, although the value of the immovable is over $1,000, specially when plaintiff only seeks to be relieved of the disturbance in the enjoyment of his property, which defendant commits in cutting wood on a part of it. (2) The application for the revision of the taxation of a witness must be made by the witness himself and not by one of the parties, through his attorney; this application must be made before final judgment. (3) The prothonotary has not the discretionary power to strike the cost of a surveyor's plan from the bill, when the Judge who rendered the final judgment did not do so.

Lefrancois v. Morel, 10 Que. P.R. 80.

—Scale—Resiliation of lease—Damages.]—In an action for resiliation of a lease at the yearly rent of $300 accompanied by a claim for damages to the amount of $1,100 the costs of the plaintiff will be those of the first class if he succeeds in setting the lease aside even when the claim for damages is dismissed.

Fecteau v. Vanier, 9 Que. P.R. 223 (Sup. Ct.).

—Scale—Quashing by-law—Intervention.]—The costs on proceedings to quash a municipal by-law are the same as those of an action of the third class even when the constitutionality of the by-law is attacked. If the defendant submits his case to the Court and the issue is tried out between the plaintiff and the intervenant the latter if successful is entitled to full costs of the intervention as in an ordinary case but not to double costs as if there had been two issues between the parties.

Paul v. City of Sorel, 9 Que. P.R. 284 (Sup. Ct.).

— Tariff — Scale — Intervention.] — The scale of fees for an intervention which has been dismissed is determined by the amount

in dispute in the principal action and not that of the intervenant's claim.

Gariépy v. Chartrand, 10 Que. P.R. 155.

—**Increase of jurisdiction of lower Court after commencement of action in higher.**]—A statute increasing the amount that may be sued for in a County Court is one relating to procedure and applies to pending litigation, so that a plaintiff who has recovered a verdict in a King's Bench action for an amount then within the jurisdiction of the County Court is not entitled to tax King's Bench costs without getting from the Judge a certificate under Rule 933 of the King's Bench Act, although the amount of the verdict exceeds the amount that could have been sued for in the County Court when the action was commenced. Under such circumstances, however, such certificate should be given preventing, also, any set-off of costs by the defendant.

Rosenberg v. Tymchorak, 18 Man. R. 319.

IV. TAXATION.

—**Costs of sheriff on interpleader issue—Counsel fee—Special matters.**]—On the taxation of the sheriff's costs of an interpleader, the local registrar taxed to him costs of obtaining a copy of the claimant's examination, and a special counsel fee of $5 on the argument on the summons. The sheriff's position was not assailed by either party. On review:—Held, that the sheriff not being interested in the determination of the rights of the respective parties there was no necessity for the obtaining by him of a copy of the examination and he was not entitled to tax a fee in respect thereof. 2. That the taxing officer should allow a special counsel fee on Chamber applications under the tariff only in cases where it appears that circumstances rendered the application, in so far as the party affected was concerned, a special one by reason of it being opposed, or upon other substantial grounds, and here the sheriff, being protected in any event, the application did not concern him specially, and he should only be allowed the minimum fee.

Cross v. Cross, 3 Sask. R. 1.

—**Defamation — Jurisdiction of County Court.**]—Plaintiff brought action for $1,000 damages for defamation. He only recovered $100. Britton, J., held, that plaintiff's costs should be taxed on County Court scale, under Con. Rule 1132, as affected by 9 Edw. VII., c. 28, but directed that no set-off of costs be allowed defendant.

Striker v. Rosebush, 17 O.W.R. 205, 2 O.W.N. 160.

—**Judgment debtor—Second judgment summons—Motion to set aside.**]—The costs of a motion upon summons to test the validity of a second summons for the examination of a judgment debtor (2 W.L.R. 216) were held, taxable on the scale of costs applicable to any other motion in the original action, and not within the provisions of ss. 11 and 13 of the Ordinance respecting the collection of debts, c. 6 of 1904.

Brownlee v. Eads, 14 W.L.R. 539 (Y.T.).

—**Ejectment—Summary proceedings.**] — The costs ordered under s. 19 of the Landlord and Tenant Act, R.S.M. 1902, c. 93 are taxable on the same scale as an action in the King's Bench.

Re West Winnipeg Co. and Smith, 15 W.L.R. 343 (Man.).

—**New trial—Costs of both trials—One-third scale.**]—

McCallum v. International Harvester Co., 8 E.L.R. 74 (P.E.I.).

—**Action for wrongful seizure of goods—Verdict for $200 damages—Jurisdiction of County Court.**]—In an action in the King's Bench against a County Court bailiff and an execution creditor for a wrongful seizure and sale of the plaintiff's goods under execution against another, the plaintiff recovered a verdict for $200 damages:—Held, that s. 43 of the County Courts Act, which, with immaterial changes, has been in every County Courts Act since the first (1879), is not affected by the granting to the County Courts of jurisdiction in claims against bailiffs; and the effect is, that an action of this kind, against a bailiff, is one that can be brought in the King's Bench, or that may properly be brought in the King's Bench irrespective of the amount of damages recovered, subject only to the provision as to costs where the damages are less than $10. In all actions tried by a jury, costs are in the discretion of the trial Judge (Shillinglaw v. Whillier, 18 Man. L. R. 149, 12 W.L.R. 128), and, therefore, irrespective of the County Courts Act, the trial Judge has power to grant or refuse costs to either party as he thinks proper; but in deciding whether the plaintiff in this action should have costs on the King's Bench scale, it was proper to take into consideration the fact that, under s. 43, the action could properly be brought in the King's Bench, irrespective of the amount recovered, so long as that amount exceeded $10, and, in the absence of some good reason to the contrary, to allow the plaintiff costs on the higher scale. Held, therefore, that the plaintiff should have costs on the King's Bench scale. The defendant L., who was the holder of a promissory note made by the plaintiff, after action brought, assigned a half interest therein to his co-defendant, the bailiff, and both defendants counterclaimed upon the note. There was no consideration for the assignment, and the plaintiff disputed the legality of it. Held, that it was not necessary to decide whether the assignment was good, for, if

it was not, an amendment should be allowed so as to make the counterclaim by the defendant L. alone; and judgment should be given on the counterclaim for the amount of the note and interest, with costs of pleading it only; the amount of the note, interest, and such costs to be set off pro tanto against the $200 damages and costs of action on the King's Bench scale. Leave to the defendants to appeal to the Court of Appeal on the question of the scale of costs.

Campbell v. Joyce, 15 W.L.R. 29, affirmed 15 W.L.R. 291 (Man.).

—Amount adjudged within County Court jurisdiction.]—Plaintiff having brought his action in the Supreme Court for $2,010, and recovering only $160:—Held, that, notwithstanding the modification of s. 100 of the Supreme Court Act by marginal rule 976, the amount recovered being more than $100, costs must follow the event and be allowed on the Supreme Court scale; but Semble, the action here should have been brought in the County Court.

Young Hong v. Macdonald, 15 B.C.R. 303.

—Railway expropriation—Costs—Counsel fees.]—The costs of a successful attorney in a railway expropriation over $10,000 include the sum of $25 for the first sitting at enquete, instead of $10; $70 as attorney's fee, $15 hearing fee, $20 for filing factums and an additional fee of $50, the amount of the case being over $10,000; but the sum of $25 for the special enquete fee will not be allowed.

Canadian Pacific Railway Co. v. Oligny, 12 Que. P.R. 11.

—Counsel fee on view before trial—Affidavit of counsel.]—Plaintiff having obtained a review of the taxation of the defendant's costs, an affidavit by counsel who attended the taxation, and was at the trial and on appeal, was submitted and allowed to be read. The affidavit having shown that the applicant informed the taxing officer that a view by counsel before the trial was necessary and had been had, the Judge refused to disallow the counsel fee, or interfere with the discretion of the registrar. The onus is on a party seeking to tax fees for a witness not called at the trial, to show by affidavit, the relevancy and nature of his evidence, the necessity for it, that he was in attendance and the reason why he was not called.

Eastern Townships Bank v. Vaughan, 15 B.C.R. 299.

—Taxation of costs.]—Principles applicable to taxation of costs discussed and explained.

Newstead v. Rowe, 3 Sask. R. 205.

—Costs—Scale—Art. 554 C. P. Q.]—An action is of the first class when it asks for resiliation of a contract, the consideration of which exceeds $2,000 per year; the fact that, by supplementary conclusions, the plaintiff could have claimed damages which could have been determined by the judgment to be the sum of $300, does not change the class of such action.

Lucenti v. Montreal Brewing Co., 11 Que. P.R. 300.

—Taxation—Interest on costs.]—Where the formal judgment decreed that "the defendants . . . do pay forthwith after taxation thereof to the plaintiffs . . . . the costs . . . .:—Held, that there was a judgment debt prior to the taxation upon which interest could be computed.

Star Mining & Milling Co. v. White, 15 B.C.R. 161, reversing 15 B.C.R. 11.

—Contestation of abandonment.]—The fees upon a contestation of statement upon an abandonment of property are those of a second class action.

McManamy v. Glascott, 11 Que. P.R. 162.

—Quashing by-law—Scale.]—The costs of an action to quash a municipal by-law brought under the authority of Art. 50 C. P.Q., are of the second class as are also those of an intervention in the same action.

Bernier v. St. Michel, 11 Que. P.R. 326.

Dismissal of action—Exception to form.]—When an action has been dismissed on exception to the form after enquête and hearing the defendant is entitled to the fees for enquête and hearing over and above the fee given by Art. 7 of the tariff.

Lapointe v. St. Onge, 3 Que. P.R. 314 (S.C.).

—Exception to form—Dismissal.]—The fees of the attorney on an exception to the form which was dismissed, are those mentioned in item 23 of the Superior Court tariff and not the fees of a simple motion.

In re Drummondville Foundry, 3 Que. P.R. 378 (S.C.).

—Costs of affidavits—Irregular filing.]—The costs of affidavits for use on a motion in the Weekly Court filed with the Clerk in Chambers, instead of in the Registrar's office, as required by Rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the Court on the motion, and are recited in the order made thereon.

Sturgeon Falls Electric Light and Power Co. v. Town of Sturgeon Falls, 19 O.Pr. 286.

—Witness fees—False affidavit of increase—Affidavit of information and belief.]—The English practice requiring proof of actual payment of witness fees as a condition precedent to their being allowed on taxation of costs should be followed. Where on an affidavit that witness fees have been actually paid they are allowed on taxation without objection to the falsity of the affidavit, the proper mode of attacking the al-

lowance is by an application by way of motion to the Court and not by way of review of the taxation. On such an application, an affidavit of information and belief, stating the grounds thereof, is sufficient foundation for a motion to set aside the certificate of taxation and refer it back to the taxing officer to ascertain whether or not at the time of the taxation the witness fees in question had in fact been paid. There is authority under Rule 267 of the Judicature Ordinance (C.O. 1898, c. 21) to order a person who has refused to make an affidavit to attend for examination under oath.

Grindle v. Gillman, 4 Terr. L.R. 180 (Wetmore, J.).

—Amendment of pleas.]—A defendant who amends his pleas after the filing of an inscription for enquête and hearing should pay the difference between items 7 and 8 of the tariff.

Union Bank of Halifax v. Vipond, 3 Que. P.R. 490 (S.C.).

—Taxation — Review — Severing defences —Setting aside judgment—Fi. fa. lands.]—Where an action is tried against two or more defendants and any defendant separates in his defence, and the judgment is against all the defendants, the law is that each of them is liable for the damages awarded by the judgment; and each of them is liable to the plaintiff, for all costs taxed by him as properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is and can be a defence for that defendant only as distinguished from the other defendants. The foregoing rule laid down in Stumm v. Dixon, 22 Q.B.D. 99, 529, an action for tort was held applicable to an action on a contract. In an action against two joint makers of a promissory note, who, though they set up substantially the same defence, severed in their defences:—Held, that on the taxation of the plaintiff's costs, the following items should be allowed as against both defendants: (1) Costs of a concurrent writ of summons against one of the defendants; (2) costs occasioned by the separate defences of each defendant; (3) costs of the examination for discovery of one of the defendants, although as the other defendant had not been notified of the intention to hold the examination the depositions were not admissible in evidence against him. Where a judgment by default was set aside, and the defendant was given leave to defend on payment of costs. Held, that the defendant was liable to pay the costs of a fi fa. lands issued concurrently with a fi. fa. goods.

Lougheed v. Parrish, 4 Terr. L.R. 54.

—Arbitration—Taxation—Review of judgment.]—There is no review of a judgment by a Judge of the Superior Court taxing and settling the costs of an arbitration in virtue of par. 26 of Art. 5164 R.S.Q.

Richelieu East Valley Railway Co. v. Jetté, 17 Que. S.C. 493 (C.R.).

—Expert fees—Taxation.]—The cost of a report of experts appointed to assess the plaintiff's damages for loss of land taken by the city cannot be taxed with the costs in the cause; such experts may be taxed for as ordinary witnesses with right to plaintiff to claim the special fees he has paid them with his damages.

Crawford v. City of Montreal, 19 Que. S.C. 323 (S.C.).

—Witness fees—Taxation.]—The fees of a witness served, but not examined, by the party calling him, cannot be taxed against the opposite party without his consent. A party heard as a witness is considered an ordinary witness and should be taxed for as such.

Royal Electric Co. v. Dupéré, 19 Que. S.C. 29 (S.C.).

—Copy of judgment—Registry—Pleas.]—A party who obtains judgment is entitled to a copy of it and to have it registered and the cost made costs in the cause to be recovered from the opposite party if the judgment is confirmed or not appealed from. Defendant met the action by a defense en droit and a special plea; plaintiff replied en droit to part of the pleading, and, after hearing on the two issues en droit, that of defendant was dismissed with costs and the reply maintained with costs. The prothonotary allowed plaintiff under Art. 24 of the tariff, a fee for each:—Held, that the taxation should be maintained as there were two issues in different rights and plaintiff was entitled to two fees.

Luneau v. Luneau, 19 Que. S.C. 146 (S.C.).

—Inscription for hearing—Withdrawal.]—When a cause inscribed for hearing on the merits is, during the sitting of the Court, withdrawn by the plaintiff, defendant is entitled to the same costs as if the action had been decided in his favour (item 9 tariff c.c.), but without costs of enquête (item 10 and 11 c.c.) if no witness is present in Court, defendant having been notified that the action would be withdrawn.

Goselin v. Giroux, 19 Que. S.C. 145 (C.C.).

—Declinatory exception—Quebec tariff.]—See EXCEPTION.

(Canadian Mutual v. Tanguay, 3 Que. P.R. 436.)

—Taxation — Solicitor and client.]—A charge in a bill of costs although not justified by the item under which it is framed may nevertheless be allowed if it can be sustained under any other item of the tariff.

In re Cowan, 7 B.C.R. 353.

—Costs of some issues to plaintiff, of others to defendant—Action for slander—Apportionment.]—Where in an action for damages for four alleged slanders, the judgment was that "the plaintiff do recover against the defendant in respect to the matters set forth in the 3rd and 5th paragraphs of the statement of claim the sum of $1 and costs to be taxed," and that "the defendant do recover from the plaintiff in respect of the matters set forth in the 4th and 6th paragraphs of the statement of claim his costs to be taxed:"—Held, that the plaintiff was entitled to the general costs of the cause, except such as were occasioned by the causes of action upon which he failed, and the defendant to the costs of the issues upon which he succeeded, the latter being set off. Sparrow v. Hill (1881), 7 Q.B.D. set off. Sparrow v. Hill (1881), 7 Q.B.D. 362, 8 Q.B.D. 479, followed Leave to appeal was afterwards refused.

—Of abandoned appeal.]—The production of the notice of the abandonment of an appeal will be sufficient authority for the taxing officer to tax the respondents' costs of the appeal, and it is now necessary in British Columbia to apply for an order for the costs.

Fry v. Botsford, 9 B.C.R. 165.

—Abandoned appeal—Briefs—Counsel fee—Rules 583 and 790.]—On 20th May, the plaintiffs gave notice of appeal, to come on at the November sittings of the Full Court, from an order requiring them to give security for the costs of the action. On 3rd June, the appeal was abandoned:—Held, per Martin, J., on a review of taxation, that respondents were entitled to tax briefs and a counsel fee. Counsel fee under the circumstances fixed at $10,000. A taxation may be reviewed under R. 583 as well as under R. 790.

Fry v. Botsford, 9 B.C.R. 207.

—Taxation of costs—Appeal.]—There is no appeal to the Court of King's Bench from a decision of a Superior Court Judge in Chambers reviewing the taxation by the prothonotary of costs allowed to one of the parties unless the payment of the costs is an essential part of the final judgment in the cause.

East Valley Richelieu Railway Co. v. Menard, 11 Que. K.B. 1.

—Solidarity — Costs — Commercial Matter.]—That there may be solidarity among several defendants condemned to pay costs, even in commercial matters, where the solidarity exists de plein droit, and notwithstanding that costs are, in general, accessory to the action, it is necessary that there should be a conclusion for solidarity; in the absence of such a conclusion, and that even in commercial matters, there is no solidarity as to costs among several defendants condemned to pay them by the judgment in the action.

Beaubien v. Rioux, 11 Que. K.B, 232.

—Witness—Taxation of—Art. 336 C.C.P.]—The taxation of a witness being under said article equivalent to a judgment on which he is entitled to sue out execution, the Court has no authority on motion to revise or reduce such taxation as excessive.

Lessard v. Meunier, 20 Que. S.C. 337, Davidson, J.

—Allowed by Supreme Court of Canada—No power to stay taxation.]—The Full Court allowed plaintiff's appeal. On appeal the Supreme Court of Canada allowed the appeal of the defendant Ward and ordered plaintiff to pay him the costs of that appeal, and also all costs in the Court below, except in so far as Ward was to be regarded as the representative of the mortgagor in an action to realize a mortgage security which costs were reserved until final decree. Held, reversing Irving, J., who made an order staying the taxation of Ward's costs of appeal to the Full Court until final decree, that there was no jurisdiction to make the order staying taxation. The application should have been made to a Judge of the Supreme Court of Canada instead.

Merchants' Bank of Halifax v. Houston and Ward, 9 B.C.R. 158.

—Art. 336 C.C.P.—Witness fees — Counsel fees for attendance before a rogatory commission.]—1. An item in a taxed bill of costs, representing the amount allowed a witness on taxation in open Court, being equivalent to a judgment enforceable by execution (Art. 336, C.C.P.), such taxation cannot be disturbed by the Court on a motion to revise the taxation of costs. (See also Lessard v. Meunier dit Lagacé, R.J.Q., 20 C.S., p. 337.) 2. Where a rogatory commission is issued to another province, or to a foreign country, and the parties do not annex interrogatories and cross-interrogatories thereto, but consent that the commission shall be an open one, and that the witnesses shall be examined directly before the commission, such consent does not justify the taxation against the losing party of counsel fees, for attendance before the commission,—the tariff not making any provision for such case.—Young v. Accident Insurance Co. of N.A., M.L.R., 5 S.C., p. 222, approved.

Magann v. Grand Trunk Railway Company, 21 Que. S.C. 72, Davidson, J.

—Witness fees—Taxation.]—(1) The taxation in respect of a witness who is heard in open Court takes place in the presence of the Court and constitutes a judgment which may be executed in the manner and after the delay prescribed by the Court (335, 336, 370 C.C.P.). (2) Even if such taxation were considered a judgment by the

prothonotary and not by the Court, the time for objection is while the taxation is being effected.

Campeau v. Ottawa Fire Ins. Co., 20 Que. S.C. 239 (Davidson, J.).

—Taxation of witness—Open rogatory commission—Costs—C.P. 335, 336, 370, 385, 557, 687 C.P.]—(1) The taxation of a witness constitutes a judgment in his favour which entitles him to execution against either of the parties; it is copied in the bill of costs, but not taxed with it, and cannot be revised on a motion for the taxation of the bill without notice to the witness (Campeau v. Ottawa Fire Ins. Co., 4 Que. P.R. 197, followed.). (2) The tariff provides for no fee on an open rogatory commission, when that mode of examining witnesses is selected.

Magann v. Grand Trunk Railway Co. of Canada, 4 Que. P.R. 348 (Davidson, J.).

—Solidarity—Arts. 553, 645 C.C.P.]—In case of costs the solidarité to exist must have been pronounced by the judgment.

Beaubien v. Rioux, 4 Que. P.R. 214 (K. B.).

—Taxation of costs—Tariff—Saisie-conser-C.P.]—1. The taxation of a witness is a **Arts. 47, 60 of tariff.]**—In a saisie-conservatoire where the plaintiff claims to be owner of the effects seized and has caused them to be placed in custody of the law to insure the exercise of his rights over them the costs of the intervention by the curator of the insolvent estate of the defendants who contests only the plaintiff's title to the effects seized will be taxed according to Art. 60 of the tariff and not as in proceedings to set aside the saisie-conservatoire. Taxation of the bill of costs may be made in the absence of the attorney of the unsuccessful party and without notice to him if notice of the taxation had already been given for an earlier date and the attorney had presented his objections to the prothonotary in writing.

Auger v. Montambault, 4 Que. P.R. 457 (Sup. Ct.).

—Review of taxation—Effect—Art. 554 C.P. —Rules of practice R. 88.]—A motion, supported by affidavit, of a witness who was summoned as an expert and not an ordinary witness, and whose evidence was not contradicted by on the contrary, established by acquiescence of the opposing counsel, will be granted and the taxation of his fees will be reviewed. Semble (1) The taxation of witness fees should be assimilated to the taxation of bills of costs by the prothonotary. (2) The Court, on application therefor, may review the taxation of witness fees as it may the taxation of a bill of costs.

Guinea v. Campbell, 4 Que. P.R. 479 (Sup. Ct.).

—Taxation of costs—Attendance—Saisie-conservatoire—Curator's costs—Scale—Tariff Arts. 47, 60.]—If a party who has received notice of taxation of costs does not appear on the day named but merely presents his contentions in a letter addressed to the prothonotary, the party who gave the notice but did not tax the costs on the day fixed may tax them afterwards at his pleasure, in the absence of his opponent. On intervention by the curator to defendant's insolvent estate to a saisie conservatoire, or when the curators contests, not the debt of the plaintiff but only his right to the effects seized, the costs of the curator whose intervention has been maintained will be taxed according to Art. 60 of the tariff and not as if he had proceeded by petition to annul the seizure. Semble. The costs of the curator on taking up the instance in the bankrupt's name are payable by the losing party and not by the insolvent estate except on default of the losing party paying them.

Auger v. Montambault, 5 Que. P.R. 21 (Sup. Ct.).

—Taxation of a witness—Revision—Art. 336 C.P.]—1. The taxation of a witness is a judgment in his favour on which he is entitled to sue out execution. 2. The Court has no authority to determine whether the taxation of a witness is excessive or not or to name any other particular amount in lieu thereof.

Lessard v. Meunier, 5 Que. P.R. 443, Davidson, J.

—Counterclaim—Taxation of costs.]—In an action brought by plaintiff to which defendant pleaded a counterclaim, plaintiff was held entitled to the costs of the action and defendant to the costs of the counterclaim: —Held, that defendant, as part of her costs, was entitled to tax a counsel fee, and that the fact that there was no reply to the counterclaim was not material, it being the existence of the defence to the action which determined whether it was a case for a counsel fee or not. Held, for the reasons given by Lindley, J., in Atlas Metal Co. v. Miller, (1898) 2 Q.B., 506, that defendant was not entitled to tax "instructions to sue," but was entitled to tax "instructions for counterclaim." Held, further, with respect to the amount of "brief" and "counsel fee" taxed, that the taxing master's judgment ought not to be disturbed, especially after it had been affirmed by a Judge on appeal. Held, also, that the "one-sixth rule" (O. 63, R. 23) is imperative, and that there being in this case no reason for departure from it, the appeal of each party should have been and should now be dismissed with costs.

Bauld v. Fraser, 36 N.S.R. 21.

—Stated case—Art. 509 C.P. (Que.).]—The fee to be allowed attorneys upon questions

of law submitted to the Court under Art. 509 C.P. is in the discretion of the Court.

Paré v. County of Shefford, 24 Que. S.C. 50, Lynch, J.

—Taxation—Change in tariff.]—Plaintiff taxed, in 1896, his costs of recovering judgment and on appeal it was ordered that there should be a new trial and that the costs of the first trial should follow the event. Plaintiff finally, in 1901, recovered judgment with costs:—Held, that the costs of the first trial were not now taxable under the new tariff, which came in force in 1897, but that the old taxation must stand. Semble, costs incurred before the new tariff came into force are still taxable under the old tariff.

Harris v. Dunsmuir (No. 2), 9 B.C.R. 317, Drake, J.

—"Actual disbursements"—R. S. O. 1897, c. 153, s. 42.]—The "actual disbursements" which, by s. 42 of the Mechanics' Lien Act, R.S.O. 1897, c. 153, may be allowed as against an unsuccessful claimant in addition to an amount equal to twenty-five per cent. of the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and a fortiori not counsel fees charged by the solicitor himself when acting as counsel. Judgment of Falconbridge, C.J., affirmed.

Cobban Manufacturing Company v. Lake Simcoe Hotel Company, 5 O.L.R. 447 (D. C.).

—Lunatic's estate—Committee's duty as to taxation of costs—Local master—Jurisdiction.]—In two cases where Local Masters had reported schemes for the maintenance of lunatics and made provision for the moneys of the estates being collected by the respective committees and thereafter for their investment by the committees on securities of different kinds at their discretion, and in one case had taxed the costs and inserted the amount in the report:—Held, that it is imperative that the costs in lunacy matters be taxed by the proper officer in Toronto as the Local Master has no authority to tax them. And held, that the moneys in the hands of the committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court.

Re Norris; and re Drope, 5 O.L.R. 99 (Boyd, C.).

—Lawyer's letter—Recovery of fee—Tariff of advocates' fee.]—A debtor who receives a lawyer's letter is not obliged to pay a fee therefor either to the advocate or to the creditor.

Robson v. Smith, 5 Que. P.R. 252.

—Contestation of declaration of garnishee—Judgment maintaining contestation.]—The fees of an execution creditor upon contestation of the declaration of a garnishee which has been maintained without answer by the garnishee are those of a non-contested action and not of a contested action, and should be taxed according to the amount which the garnishee has been condemned to pay.

Etenberg v. Kelly, 5 Que. P.R. 428.

—Prothonotaries' tariff—Art. 867 C.P.Q.]—Under Art. 44 of the Prothonotaries' tariff the prothonotary has a right to charge a fee for every claim sworn to and filed in his office authorizing the creditor who files it to vote at the meeting held for appointment of the curator, etc., pursuant to Art. 867 C.P.Q.

In re Beaudoin; McLimont & Lefaivre, Q.R. 23 S.C. 179 (Sup. Ct.).

—Appeal—Case submitted on factum—Fee to second counsel.]—When a case in appeal has been submitted upon the factum with the consent of the parties, a second counsel fee will not be allowed, even when at the time such consent was made both the attorney of record and the counsel were present and robed in Court.

Société des Artisans Canadiens Francais v. Hébert, 5 Que. P.R. 372.

—Cost of exhibits—Taxation.]—The cost of an exhibit, which is part of the muniments of title of the party producing it, should not be included in the costs taxed unless it be specially shown that it was ordered and obtained with the view of filing it in the suit.

Lovignat v. MacKay, 5 Que. P.R. 40.

—Advocates' fees—Re-hearing of motion—Copy of judgment.]—In the district of Montreal the practice is to place in the record a copy of every judgment rendered during the course of a case and the cost of such judgments should be allowed upon taxation. (2) When a motion asks a condemnation in case the adverse party does not conform to an order of the Court, and that such order is made, the motion may be again presented in case of the non-execution of the order, and, consequently, a fee for re-hearing may be claimed.

DeWerthemer v. Boulanger, 5 Que. P.R. 293.

—Payment under protest—Reductions—Acquiescence.]—A party who pays a bill of costs under protest after having contested the amount and obtained a reduction is presumed to have acquiesced in it and is estopped from afterwards insisting upon having it taxed.

Re Beaudoin, insolvent, 5 Que. P.R. 358.

—Application for interlocutory injunction—Requete civile—Fees.]—The advocate's fees on a requete civile to set aside a judgment granting an interlocutory injunction, before the issue of the writ were treated by Ma-

thieu, J., as governed by items 12, 45 and 62 of the tariff of fees and were fixed by him at $14.80, the application being granted, each party paying his own costs.

Ozone Company of Toronto v. Massicotte, 5 Que. P.R. 176.

—Application for injunction—Dismissal after enquete—Costs fixed.]—The fees of attorneys for the respondent on a judgment dismissing an application for a writ of injunction after enquéte were, upon application, fixed by the Judge at $50.00.

National Typographic Co. v. Dougall & Smith, 5 Que. P.R. 162.

—Taxation of witness—Quebec practice.]—See WITNESS.

—Appeal stood over for settlement at suggestion of the Court—Costs of negotiations.]—After an appeal was opened, it was stood over at the suggestion of the Court in order to give the parties an opportunity to settle; the negotiations for settlement were unsuccessful, and the appeal was ultimately dismissed with costs:—Held, that the successful party was entitled (1) to a counsel fee (under item 224 of the Tariff of Costs) on the first day's hearing, and (2) to an allowance for costs of the negotiations for settlement under item 81 of Schedule No. 4.

Milton v. District of Surrey (No. 2), 10 B.C.R. 325 (Irving, J.).

—Of adjournment.]—No costs of an adjournment of trial will be allowed to the successful party where the adjournment was caused by reason of there being no Court room available.

Macdonell v. Perry, 10 B.C.R. 326.

— Taxation between party and party — Counsel fees paid to partner of litigant—Affidavit of payment made by counsel — Costs of brief.]—Where counsel fees were paid by a member of a firm of barristers and solicitors to his partner for the latter's services as counsel in an action in which the former was defendant, under a prior agreement to pay such fees as would be payable to counsel outside the firm:—Held, that such counsel fees should be taxed to the defendant against the plaintiff under a judgment dismissing the action with costs. Henderson v. Comer (1856), 3 U.C. L.J.O.S. 29, followed. Upon the taxation the defendant made an affidavit of payment of fees to his partner, and the latter also made an affidavit, upon which he was cross-examined:—Held, that the defendant was not entitled to tax the costs of or occasioned by the latter affidavit. Held, also, per Britton, J., that the discretion of the taxing officer in allowing the defendant the costs of briefing correspondence between the parties should not be interfered with on appeal, although the correspondence was not used at the trial.

Johnston v. Ryckman, 7 O.L.R. 511 (D. C.).

—Circuit Court — Peremption — Dismissal.]—Where an action is dismissed on motion for peremption d'instance after the filing of a plea to the merits, it is Art. 8 of the Tariff of Costs to attorneys in the Circuit Court which governs the taxation of the bill of costs and not Art. 9 of the tariff.

Moody v. Lachance, 6 Que. P.R. 99 (Pelletier, J.).

—Joinder of actions—Counsel fees—Absent defendant—Bailiff's fees.]—Upon the joinder of actions for the purpose of enquete and hearing, the counsel receive fees of enquete and hearing for each cause, but the amount of stenographer's charge and witness fees is reduced. If a defendant is designated in the writ of summons as being absent from the district, the fees that the bailiff would have been entitled to for searching for him to effect service can not be taxed against him.

Henry v. Sanderson, 6 Que. P.R. 191 (Desmarais, J.).

—Of appeal to Privy Council—Costs incurred in Canada—Taxation.]—Rule 1256, providing that when the costs incurred in Canada of an appeal to the Privy Council have been awarded, and have not been taxed by the Registrar of the Privy Council, they may be taxed by the senior taxing officer, and the taxation shall be according to the scale of the Privy Council, is not to be construed as applying to a case in which the judgment entitling a party to costs was entered before the rule was made. The quantum of costs, as well as the right to them, is ascertained at the time of judgment, and the quantum cannot, without the clearest words, be altered by a subsequent change in the tariff or by the creation of a tariff which had no existence until after the judgment.

Earle v. Burland, 8 O.L.R. 174 (Street, J.).

—Attorneys' fees—United issues—C.P. 291.]—When several issues are united for trial, and there is only one enquete and examination of witnesses, one argument and one judgment on the several issues, the attorney is not entitled to fees of enquete and argument as if there had been separate trials.

Demers v. Sanche, 6 Que. P.R. 241 (Davidson, J.).

—Petition for interim injunction—Affidavits—Taxation.]—That in the absence of any objection of the adverse party or of any remark of the Judge to the number of affidavits filed in support of or against a petition for interim injunction, the successful party is entitled to a fee upon each affidavit.

Brault v. Lambert, 6 Que. P.R. 402 (Davidson, J.).

—Motion to dismiss opposition.]—The fee on a motion to dismiss an opposition is the fee of an ordinary motion and not of a preliminary exception.

Giguère v. Payette, 6 Que. P.R. 178.

—Witness fees — Plaintiff travelling from abroad—Expenses.]—Upon a taxation between party and party of the plaintiff's costs and disbursements, she was allowed travelling expenses in coming from England to Ontario to give evidence on her own behalf at the trial of the action and in returning to England, and a per diem allowance for the time necessarily occupied in doing so, but was not allowed "subsistence money" for a period after the trial during which she remained in Ontario awaiting the result of an application for a new trial in order to be in readiness to testify if one should have been directed.

Tattersall v. People's Life Insurance Co., 10 O.L.R. 537 (Meredith, C.J.).

—Extra-judicial seizure — Chattel mortgage.]—Under the provisions of s. 2 of c. 31 of the Revised Ordinances of the Yukon Territory, the defendant company are only entitled to charge the plaintiffs such costs as are provided for under that Act. The mortgagors are entitled to recover against the mortgagee the excess but the penalty provided under s. 3 of c. 31, is optional with the Judge.

Yukon Hardware Co. v. McLennan, 2 W. L.R. 294, Macaulay, J.

—Counsel fee before Court en banc—Application to fix—Travelling expenses.]—It is not proper to make a formal application to the Court en banc to fix a counsel fee in a case argued before it. If the marking of the fee is overlooked by the Court, it would be proper for counsel to draw attention either in open Court or otherwise to the omission, and as a matter of courtesy only to notify counsel on the other side of his intention. No allowance can be made to counsel for travelling expenses.

Hull v. Donohue (No. 2), 2 Terr. L.R. 351.

—Appeal to full Court—Costs not specifically awarded—Statutory provision.]—The costs of an appeal may be taxed to the successful party although not specifically awarded by the judgment.

Kickbush v. Cawley, 11 B.C.R. 151 (Morrison, J.).

—Special fee—Taxation of costs.] — The Judge will not take cognizance of a bill of costs and allow a special fee, until the said bill has been taxed by the prothonotary.

Campbell v. Montreal Street Railway Co., 7 Que. P.R. 79 (Davidson, J.).

—Objections—Appeal from local taxing officer—Reference to taxing officer at Toronto.]—As a foundation for an appeal from a taxation of costs between party and party objections must be filed with the officer taxing and these objections must be directed to specific items; or, semble, at the least if a general objection is relied on it must be expressly stated to be directed to each and every item in the bill. A general objection that the bill is exorbitant is not sufficient. Upon a mere general objection of this kind or even upon specific objections to specific items the Judge before whom an appeal from the taxation of a bill by a local taxing officer comes for hearing, has no right to refer the bill to one of the taxing officers at Toronto for revision or re-taxation. He may ask the opinion of one or both of these officers as to any question arising, but he must himself decide the points involved. Quay v. Quay (1886), 11 P.R. 258, explained. Judgment of Falconbridge, C.J.K.B., reversed.

Campbell v. Baker, 9 O.L.R. 291, D.C.

—Security in appeal—Rejection of bond—Attendances.]—If a judgment permits an appellant to complete a security bond which has been declared illegal, the costs of the respondent comprise the attendance when the security was given, unless the judgment specifies that costs of motion only are granted.

Gelinas v. Magasin du Peuple, 7 Que. P.R. 98 (Davidson, J.).

—Counsel fees for settling pleadings.]—On receipt of a pleading from the opposite party the fee allowed by item 230 for settling and revising refers to a party's own pleadings and not to the pleadings received from the opposite party.

Blair v. B. C. Express Co., 11 B.C.R. 153 (Martin, J.).

—Abortive and irregular proceedings—Several subpoenas.]—It is not open to a party on taxation of costs to take objections which could or should have been taken by application to set aside the proceedings, or by way of appeal. On this principle costs were allowed as follows: (1) The costs of an order de bene esse, irregularly obtained were allowed to defendant where no application had been made to set it aside, and and plaintiff's advocate had attended on the examination; (2) the costs of an insufficient affidavit on production where an application for a better affidavit had been dismissed and no appeal taken; (3) the costs of an order to examine plaintiff issued ex parte and without notice, where an application to set it aside had been refused and the grounds of the refusal were not shown on the review. A subpœna for each of several witnesses may be allowed where they reside in different parts of the country, and the same original cannot be conveniently produced to them all.

Craig v. New Oxley Ranche Co., 2 Terr. L.R. 277, Scott, J.

—Action for detention of goods—Judgment for return.]—Plaintiff in an action for detention of a horse alleged to be of the value of $1,000, recovered judgment for its return and $10 for damages:—Held, against the contention of the defendant that costs should be taxed as in an action under $100, or in the lower scale of the tariff, that in the absence of evidence to the contrary the value alleged in the statement of claim should be treated as the real value for the purposes of taxation. The following items were allowed to plaintiff against the contention of the defendant: 1. Instructions for affidavit of writ of replevin. 2. Two separate affidavits on production by co-plaintiffs where they resided in different parts of the country. 3. An order postponing trial on application of defendant on terms of payment of costs taken out by plaintiff where defendant had neglected to take out order. An application by the defendant to have deducted from the bill certain costs of the day, claimed to have been improperly allowed on a previous taxation not appealed from, was not entertained.

Allison v. Christie, 2 Terr. L.R. 279 (Scott, J.).

—Counsel fee—"Costs of the day."]—Except as otherwise specially provided, only one counsel fee can be taxed in an action. Such fee must be taxed on the completion of the action and cannot be taxed before that event is reached. Where on a motion for a continuance, based upon the absence through illness of defendant, who was alleged to be a necessary and material witness in his own behalf, the continuance prayed for was granted on payment by defendant of costs of the day; held, that a counsel fee was improperly allowed as part of such costs, and that the appeal from the judgment of the Judge at Chambers reviewing the taxation and striking out such item must be dismissed with costs.

Acadia Loan Corporation v. Wentworth, 37 N.S.R. 316.

—Of appeal to Privy Council—Costs incurred in Canada—Ascertainment.]—On an appeal from an order granted to the defendants upon a petition, pursuant to the suggestion in the judgment herein, reported (1904), 8 O.L.R. 174, at p. 176:—Held, that Rule 1255 (818a) gives effect to R.S.O. 1897, c. 48, s. 7, and Rule 818, and does not carry the procedure beyond what is therein provided for, and that by applying it, or even without it, the defendants are entitled under the Act and Rule 818 to have the costs ascertained "as if the decision had been given in the Courts below" and the appeal was dismissed with costs.

Earle v. Burland, 9 O.L.R. 663, D.C.

—Affidavit of default of defence.] — The costs of an affidavit of non-delivery of a statement of defence cannot be allowed on a taxation of the plaintiffs' costs under a judgment in default of pleading, except when a defence has been filed and not served. Delivery including filing and service, there is default if no pleading is filed, which does not require proof.

Massey-Harris Co. v. Hutchings (N.W.T.), 3 W.L.R. 252.

—Action to set aside resolutions—Fees — Art. 107, Tariff.]—When a direct action is taken to set aside a resolution of a municipal corporation, the costs should be taxed as in a contested action of the third class, although the disbursements are those of an action of the fourth class of the Superior Court.

Ledoux v. Corporation of St. Edwidge, 7 Que. P.R. 353.

—Opposition afin d'annuler — Contestation — Costs — Taxation.]—The fees on a contestation of an opposition afin d'annuler are to be taxed on the scale which applies to the original action, whether the contestation be made by the plaintiff, another party, or a third person.

Sun Life Assurance Co. v. Palliser, 7 Que. P.R. 455 (Fortin, J.).

—Inscription in review—Deposit—Right to withdraw deposit.]—Where a solicitor has been granted distraction of costs in his favour by judgment in the Court of Review, he may forthwith withdraw the amount deposited by the party who has inscribed the cause in review. (2) He may retain this amount even when the judgment of the Court of Review is reversed on further appeal. (3) The party who made such deposit cannot set off in compensation against the solicitor who has withdrawn the amount, upon execution issued against such party, certain costs whereof distraction in his favour has been specially granted by the Court of Appeal.

Delisle v. McCrea, 7 Que. P.R. 309 (Lemieux, J.).

—Objections—Solicitor's slip—Setting aside certificate.]—Notwithstanding the provision of Rule 774 that the taxing officer's certificate of the result of a taxation of costs shall be final and conclusive as to all matters not objected to in the manner provided by Rules 1182 and 1183, the certificate may, in a proper case, be set aside in order to allow objections to be carried in, and the certificate resigned as of a later date; and this was ordered in a case where the solicitor for the party objecting had himself taken out the certificate, intending to appeal from it, but at the moment not remembering that it was necessary to carry in objections in writing, and had promptly applied for relief. In re Furber, [1898] 2 Ch. 538, followed.

Robinson v. England, 11 O.L.R. 385 (D.C.).

—Costs on amendment—Apportionment — Setting off.]—In an action brought in the name of a married woman claiming damages for various acts of trespass to land, it became necessary to amend by adding plaintiff's husband as a party, and an order was granted by the trial Judge allowing the amendment and allowing plaintiffs to enter final judgment for damages and costs to be taxed. On appeal from the latter part of the order, the order was amended so as to give defendant the costs of the trial up to the time of the amendment and of the amendment, if any, and plaintiff the costs of the action not including the costs of trial, costs to be set off.

Hart v. Simpson, 39 N.S.R. 105.

—Ruling of taxing officer—Costs of interlocutory examinations.]—Semble, that no appeal lies from the decision of the senior taxing officer at Toronto, under Con. Rule 1136, as amended by Con. Rule 1267, as to the allowance of the costs of interlocutory examinations:—Held, that if an appeal lies, it must be either under Con. Rule 774 or 767—probably the latter—and, under either, notice of appeal must be given within four days and made returnable within ten days after the decision complained of; and notice in this case not having been given in time, an extension should not be granted, having regard to the character of the decision complained of—a ruling against allowing the costs of examining more than one of the plaintiffs for discovery.

Mann v. Crittenden, 11 O.L.R. 46 (Anglin, J.).

—Costs—Order of King in council — Construction.]—In a suit against L. and R. the bill was dismissed by the Judge in equity, with costs. An appeal to the Supreme Court was allowed with costs. On appeal by R. to the Judicial Committee of the Privy Council it was ordered that the decree of the Supreme Court should be discharged as against the appellant with costs, and that the decree in equity should be restored:—Held, that costs under the original decree should be taxed also to L.

Fairweather v. Robertson, 3 N.B. Eq. 276.

—Action and counterclaim—Set-off to prejudice of solicitor's lien.]—Con. Rule 1165 as to a set-off of damages and costs between parties not being allowed to the prejudice of the solicitors' lien for costs, does not fetter the discretion of the trial Judge as to costs under Con. Rule 1130. An action and counterclaim together constitute but one action for the purpose of ascertaining the ultimate balance for which execution is to issue. Per Street, J., Con. Rule 1164 is special authority for setting-off the costs taxable to the defendant against those taxable against him without any saving of the solicitors' lien.

Levi Blumenstiel & Co. v. Edwards, 11 O.L.R. 30 (D.C.).

—Witness fee — Briefing evidence — Witnesses not called.]—In an action for libel the defendant not having pleaded jurisdiction, before the trial gave at notice, under Rule 488, of his intention to adduce, in mitigation of damages, evidence of the circumstances under which the libel was published. To meet such evidence the plaintiff had brought a number of witnesess to the trial, but the evidence was not admitted, and the witnesses were not called in reply:—Held, that by implication from Con. Rule 1176 or by analogy to the practice therein prescribed, the costs of procuring the attendance of these witnesses and the briefing of their evidence, etc., should be allowed on taxation of the plaintiff's costs against the defendant.

Ludlow v. Irwin,, 12 O.L.R. 43 (Anglin, J.).

—Evidence in the case made available in another case.]—The consent that the evidence adduced in a case be made available in another case does not deprive a successful party to recover for the full expense of witnesses and depositions, chargeable by the witnesses and stenographers against him and for which he is liable.

Leclair v. Mayrand, 8 Que. P.R. 248.

—Counsel fee—Trial or assessment of damages.]—In an action for damages for personal injuries, the defendants entered no appearance and filed no statement of defence. Interlocutory judgment was not signed, and there was no admission of the liability of the defendants. Notice of assessment was served by the plaintiffs by posting it up in the office of the Court. Both the plaintiff and defendants issued commissions and took evidence abroad, and the defendants obtained an order for the examination of the plaintiff by medical practitioners. On the opening of the case at the trial (or assessment) counsel for the defendants admitted that they did not intend to contest liability, and the only matter tried out was the quantum of damages:—Held, that the plaintiff was not limited, in taxing costs against the defendants, to the counsel fee mentioned in item 152 of the tariff as appropriate upon a mere assessment of damages, but was entitled to a counsel fee as upon a trial, as provided in item 153; the assessment referred to in item 152 being that which follows upon an interlocutory judgment. Semble, per Meredith, C.J.C.P., that the paragraphs which follow items 152 and 153 in the tariff are intended to give the taxing officer a discretion to increase the fee for the brief both for the assessment of damages and for the trial.

Hamilton v. Hamilton, Grimsby and Beamsville Electric Ry. Co., 15 O.L.R. 50.

— Saisie-conservatoire — Intervention — Class of action.]—If after a saisie-conservatoire a third party intervenes claiming

part of the effects seized as his property and obtains possession thereof on giving security to the plaintiff, the class of action, on contestation of the intervention by the plaintiff, cannot be higher than that on the claim of the latter.

Boulet v. Heirs of M. F. St. John, 8 Que. P.R. 139 (Lafontaine, J.).

—Distraction — Prescription.]—Distraction of costs is a judgment in favour of the attorney and forms a title to said costs only prescribed by thirty years and which is valid as well against the party condemned as of him whose prête-nom only he is. The short prescription for professional services and expenses of the plaintiff's attorney runs from the date of the abandonment (désistement) of the action filed by the latter even if it is not followed by a judgment. The costs of an action are not due to the attorney except in so far as his authority ad litem is not ended by judgment or otherwise.

Bernard v. Carbouneau, Q.R. 15 K.B. 329.

— Separate bills — Taxable items — Final judgment.]—When costs have been incurred on two interlocutory proceedings, on a motion for particulars and on inscription en droit the attorney for the successful party may prepare separate bills of costs bearing the same date and presented for taxation on the same day. In such case the fees for drawing the bills and of an application to strike out duplicated items are taxable on each bill. It would be otherwise in the case of bills of costs in the cause after final judgment when it would be necessary to include the costs on these different proceedings in a single bill.

Baron v. Benoit, 8 Que. P.R. 303 (Hutchinson, J.).

—Sale proceedings on mortgage—Taxation —Local master.]—A local registrar is not one of "the taxing officers of the Supreme Court of Judicature" mentioned in R.S.O. 1897, c. 121, s. 30, and, if he is not a local master, has no jurisdiction, under that section, to tax mortgagee's costs of sale proceedings.

Re Drinkwater and Kerr, 15 O.L.R. 76.

—Preparing for trial—Searches for missing documents.]—In this action a certain contract and certain plans of material importance were lost, and the plaintiffs employed two of their former solicitors to try and find them, which they succeeded in doing, and they were put in evidence at the trial. For these services a sum of $350 was paid to them:—Held, that this expenditure was properly taxable among the plaintiffs' party and party costs, though not specially provided for in the tariff.

City of Toronto v. Grand Trunk Ry. Co., 13 O.L.R. 12 (D.C.).

—Record transferred to another Court.]—If a record is transmitted to another Court, the defendant's fee will be as on a dilatory exception maintained (Art. 25), plus a fee for the transferrence of the record.

Connolly v. McCarron, 8 Que. P.R. 192.

—Appeal from retaxation—Counsel fee.]—Defendant was convicted before the stipendiary magistrate of an incorporated town of a violation of one of the by-laws of the town. The magistrate having stated a case under the Summary Convictions Act, R.S. 1900, s. 73, an order was made by a Judge at Chambers setting aside the conviction and directing the informant to pay defendant the costs of the application and below, to be taxed. The bill, as taxed by the taxing master, included a counsel fee of $50 and an allowance of $30 for brief. On appeal to a Judge at Chambers the amount allowed for brief was reduced to $5, and the counsel fee struck out altogether:—Held, that defendant was entitled to a counsel fee for the attendance at Chambers, and that $7.50 would be a reasonable amount to allow under the circumstances, the question having been but a trivial one and having occupied but a short time, and that the appeal should be allowed to this extent but without costs. Quære, whether a Judge at Chambers, exercising jurisdiction under s. 73 (8), upon a stated case, can be regarded as a delegate of the Court or is sitting under a special authority independently of the Court and as a person designated by the statute to discharge the duties prescribed by it.

The King v. Dimmock, 39 N.S.R. 286.

—Taxation according to tariff—Allegation of payment of an item.]—The taxing officer is bound to tax a bill of costs on production thereof according to the tariffs in force, upon seeing that the opposite party has had notice, and without consideration of any collateral equities which may exist between the parties.

Ross v. Ross, 8 Que. P.R. 300.

—Taxation of a witness—Revision before a Judge in Chambers.]—The taxation of a witness being equivalent to a judgment on which he is entitled to sue out execution, the Judge in Chambers has no authority to revise or reduce such taxation after final judgment.

Jouvin v. Bonhomme, 8 Que. P.R. 349.

—Action for injury to land—Value of land—Easement—Disturbance of—Damages under $200.]—The defendant, in the course of severing his house from that of the plaintiff, which adjoined it, the two houses being built together as one building, by his negligence, damaged the plaintiff's house to the extent of $140, for which he recovered judgment, the property itself being worth over $200:—Held, that the value of the property, and not the amount of the damages sustained, was the factor in determining the question of jurisdiction, and that the ac-

tion was properly brought in the High Court, and the plaintiff entitled to tax his costs on the High Court scale.

Moffatt v. Carmichael, 14 O.L.R. 595.

—Covenant—Amount due under—Deduction by way of payment or set-off.]—In an action on a covenant in a deed to pay the plaintiff a specified yearly sum, the amount found to be due the plaintiff was the sum of $262.50, from which the trial Judge deducted $69, which the defendant, at the plaintiff's request, had paid to a creditor of the plaintiff, but which was in no way connected with the covenant, this reducing the amount to $193.50, for which judgment was entered:—Held, that the plaintiff was entitled to costs on the County Court scale, the claim being within the jurisdiction of the County Court, as the $69 was allowed the defendant, not by way of payment, but as a set-off.

Osterhout v. Fox, 14 O.L.R. 599.

—Witness fees—Foreign witness—Employee or party to action.]—$1,000, with $510 for expenses, allowed as witness fees for a Dominion land surveyor, a necessary foreign witness, who came from the Yukon to give evidence at the trial of this action at Sandwich, involving absence from home for 51 days. The Court refused to allow a similar sum to another witness from the Yukon who was in the employ of the party litigant calling him: only $630, inclusive of expenses, being allowed in his case. When a party to an action is a necessary and material witness on his own behalf, he is entitled, if the taxing officer is satisfied of such fact, to tax for himself the same witness fees as if he were not a party, but the taxing officer can take no notice of abortive attempts to bring the case to trial.

Boyle v. Rothschild, 16 O.L.R. 424.

—Attorney's fee on statement of facts in jury trial—Witnesses examined as experts —Stenographers' fees.]—(1) At a second trial by jury made necessary by reason of the disagreement of the first jury, no additional fee will be accorded to plaintiff's attorney for the statement of facts required under Art. 425 C.P. (2) Witnesses (mechanics) summoned to give expert evidence touching the working of a machine will be taxed at the rate of $4.00 per day. (3) No fee is allowed the stenographer for reading a disposition taken out of Court to the jury. (4) The case having been settled and withdrawn from the jury immediately after the re-assembling of the Court for the afternoon session, the sum of $10.00 for one day's session taxed in favour of the interpreter from French into English is reduced to $5.00.

Mills v. Royal Institution for the Advancement of Learning, 9 Que. P.R. 368.

—Printing of joint case in appeal.]—If it is proved that a joint case has been prepared, printed and paid by one party only, these costs shall be allowed to the attorneys of this party.

Glickman v. Stevenson, 9 Que. P.R. 224.

—Taxation of costs—Review—Evidence.]—Held, that an application for review of taxation by the taxing officer must be disposed of on the evidence adduced before the taxing officer, and no further evidence in support of the application will be received on review.

Martin v. Smith, 1 Sask. R. 141.

—Attorney—Fee for letter.]—The fee for an attorney's letter notifying the person to whom it is sent that if a movable which he detains is not restored to the owner an action for revendication will be brought against him cannot be recovered from such person. The action to recover the cost of an attorney's letter appertains to the client and not to the attorney who wrote it.

Davidson v. Drolet, 9 Que. P.R. 372 (Cir. Ct.). Demers v. Gendreau, 9 Que. P.R. 426. (Cir. Ct.).

—Old tariff—Art. 549 C.C.P.]—When an action is instituted under the operation of the old tariff it is that tariff which governs all the costs in the cause though the issue was joined after the new tariff came into force.

Goold, Shapley & Muir Co. v. Gervais, 9 Que. P.R. 290 (Sup. Ct.).

—Right of mortgagee to—Taxation as between party and party.]—Held, that a mortgagee is entitled, in a proceeding for foreclosure or sale under mortgage, to tax against the mortgagor and all subsequent encumbrancers all costs necessarily incident to a suit for foreclosure or sale, including costs as between solicitor and client; and unless such mortgagee has been guilty of inequitable conduct the Court has no jurisdiction in its discretion to deprive him of such costs or any part thereof properly taxable as between solicitor and client.

Confederation Life Association v. Leier, 1 Sask. R. 131.

—Taxing costs to the Crown—Fees to counsel and solicitor—Salaried officer representing the Crown.]—As the statutes of Canada defining the duties and salaries of the Attorney-General and his deputy deny additional compensation for services rendered by them in connection with litigation affecting the Crown, it is improper to allow counsel fees or solicitor's fees in respect of services rendered in such capacties by either of these officers on the taxation of costs awarded in favour of the Crown. Jarvis v. The Great Western Railway Company, 8 U.C.C.P. 280, and the Charlevoix Election Case, Cout. Dig. 388, followed.

Hamburg-American Packet Co. v. The King, 39 Can. S.C.R. 621.

— Revision.] — (1) If a jury's verdict awards a plaintiff a sum inferior to $400 (in this case, $140), and judgment is rendered according to verdict, with costs, such costs include the costs of the jury, of the translation of evidence, and the fees and disbursements, as in an action for the amount awarded, on the various motions and proceedings peculiar to jury trials. (2) No fee will be allowed on an examination on discovery which was dispensed with after the issuing of a subpœna. (3) When a party is examined on discovery, the adverse party has no right to charge in his bill of costs, the cost of a copy of such examination. (4) The taxation of a witness who has not been heard, made in the absence of the opposite party, will be annulled, when no evidence is adduced to show the possible usefulness of such witness. (5) The taxation of witnesses who have been heard, whether it has taken place ex parte or after objections by the adverse party, will not be revised by the Judge.

Clough v. De Fabre, 9 Que. P.R. 277.

—Redemption action—Taking mortgage accounts in master's office.]—The procuring of a copy of evidence taken in the master's office for use on the argument before the master may be taxed and allowed in proper cases. Re Robinson (1895), 16 P.R. 423, discussed. Per Riddell, J.:—The following items in a defendant's bill are taxable in reference to taking of mortgage accounts in the master's office: (1) Attendance by the other party's solicitor on inspection of productions; (2) Counsel fee advising on evidence; (3) Letter to client to call after service of notice of intention to cross-examine on affidavit; (4) Attending and copying entries in books of account produced; (5) Attendance of clients going over accounts and surcharge of plaintiff and considering and advising on; (6) Attendance of plaintiff's solicitor going over accounts and discussing and making list of such as can and cannot be agreed upon and admitted; (7) The issue of a new subpœna for witnesses to be examined upon a day subsequent to that for which they were originally subpœnaed and brought into the master's office; (8) Attendance by client and advising after arrangement made to proceed with case on a certain day; (9) Perusal of accounts and considering and taking instructions for supplemental accounts; (10) Counsel fee on reference.

Plenderleith v. Parsons, 15 O.L.R. 397.

—Revision of bill—Action in warranty.]—When a principal defendant, plaintiff in warranty, has paid the costs of the principal action, he can recover them from the defendant in warranty who has been condemned to pay, after these costs had been regularly taxed and the notice given to said defendant in warranty by principal plaintiff.

Malo v. Monette, 9 Que. P.R. 315.

—"Lawful costs"—Solicitor engaged on salary.]—S. 468 of the charter of the city of Winnipeg (1 & 2 Edw. VII. c. 77), provides that where the city solicitor is engaged at a stated salary, the city has the right, in law suits and proceedings, to recover and collect "lawful costs," in the same manner as if such solicitor were not receiving such salary. The corporation enacted a by-law appointing its solicitor at an annual salary, and, in addition thereto, that he should be entitled, for his own use, to such lawful costs as the corporation might recover in actions and proceedings, except disbursements paid by the city. Upon the taxation of the costs awarded to the respondent on an appeal to the Supreme Court of Canada (41 Can. S.C.R. 18):—Held, that the statute and contracts above recited applied to costs awarded on said appeal and that, on the taxation, the usual fees to counsel and solicitor should be allowed. Hamburg-American Packet Co. v. The King (39 Can. S.C. R. 621) distinguished.

Ponton v. City of Winnipeg, 41 Can. S. C.R. 366.

—Peremption—Attending taxation.]—When an action is dismissed for delay after a preliminary exception was filed and the plaintiff has paid the costs of the exception dismissed with costs against him the defendant is entitled to the fee for appearance only and not to the costs of attending the taxation.

Atkinson v. Cadieux, 10 Que. P.R. 100.

—Alimony.]—Art. 551 C.P.Q. applies to an action for reduction of alimony or discharge from the order to pay it. In such an action the provisions of the article apply as well to the plaintiff's costs when he succeeds as to those of the defendant if the action is dismissed or maintained for party only with costs against the plaintiff.

Moreau v. Micnaud, 10 Que. P.R. 184.

—Several preliminary exceptions filed concurrently.]—If several preliminary exceptions are filed concurrently, and the action is dismissed on one of them, the defendant is not entitled to the costs of the other exceptions, if these have not been urged to judgment. A motion by plaintiff to have defendant's bill of costs revised accordingly will be granted.

Bourbonnais v. Lortie, 11 Que. P.R. 17.

—Distraction—Creditor of attorney.]—The attorney of the party who has obtained a judgment with costs has a right to receive all the costs including fees of witnesses of his client. These costs are deemed paid to the attorney if paid to his creditor who has seized them in the hands of the party condemned to pay.

Bégin v. Breton, Q.R. 35 S.C. 380.

—Abortive trial—Successful party to action.]—The successful party to an action

is not entitled to recover costs of an action rendered abortive by disagreement of the jury. The Judicature Act has made no change in this practice by granting power to award costs where costs were not ordinarily given previous to its enactment.

Hacket v. Rorke, 42 N.S.R. 341.

—Cancellation of lease.]—(1) In an action for the cancellation of a lease, the consideration price of which is $252 a year, the fact that no rent is asked, but only $50 damages, does not prevent the class of the action to be regulated by the value of the rental for the year during which the action was taken, id est, in the present case, of the third class. (2) If Court fees have been paid as in a fourth class action, the winning party will be ordered to affix in the various proceedings filed by him such increase of stamps as the tariff requires.

Gilbert v. Bowen, 10 Que. P.R. 359.

—Increased counsel fee—Fiat for—Application to Judge.]—On an application for increased counsel fee, no formal summons is necessary; merely a letter notifying the other side of intention to apply at a time mutually convenient, and the applicant should have a certificate from the registrar, showing dates and extent of sittings and the highest fee taxable by the registrar. These facts should be submitted without any argument.

Bryce v. Canadian Pacific Ry. Co., 14 B. C.R. 155.

—Apportionment of costs when defendant succeeds on one issue.]—Action for damages for trespass on the plaintiff's land, or, in the alternative, for a mandamus directing the defendants to place matters in train to assess the compensation due to the plaintiff for the lands taken for the purposes of the defendants' railway. At the trial, the Judge held that there had been no trespass but that the plaintiff was entitled to the mandamus asked for:—Held, that the plaintiff was entitled to the general costs of the action, notwithstanding the finding against him on the issue of trespass.

Calvert v. Canadian Northern Ry., 18 Man. R. 307.

—Revision of taxation—Powers of Judge on petition to revise—Taxation of witnesses.]—When a final judgment has been rendered in a case condemning one of the parties to pay the costs, a Judge in Chambers has no power, on a petition to revise the taxation of one of the bills, to strike from it the tax of one of the witnesses, on the ground that his evidence was of no weight or value.

Cains v. Leeder, 34 Que. S.C. 368.

—Action dismissed on declinatory exception.]—An action dismissed on declinatory exception is a contested action for the purpose of taxation under the old tariff of advocates' fees which was in force at the time of the action.

Hodge v. Béique, 10 Que. P.R. 216.

— Appearance by separate solicitors — Severing in defences.]—Where an action brought against several defendants is dismissed with costs against the plaintiff, in party and party taxation:—(1) Several defendants who have, or may have, separate defences are entitled to separate bills of costs if they defend by separate solicitors. (2) If two or more appear by the same solicitor, it is within the discretion of the taxing officer to al'ow or disallow separate defences. Consequently where sixteen defendants were sued as joint and several makers of a promissory note:—Held, that on party and party taxation of their costs, the taxing officer had not improperly allowed three different sets of costs; nor two separate defences, where two or more defendants had appeared by the same solicitor. (3) A solicitor appearing for two or more defendants is entitled to charge for instructions to defend from each defendant; but can only be allowed for one perusal of statement of claim. (4) Instructions for pleadings can only be allowed for each separate set of pleadings. Where one party takes out an appointment for examination and discovery of the other party, who, having been served with a subpœna, is delayed by causes (e.g., snow-blockades, or interruption of train service) beyond his power, yet attends and presents himself for examination as soon after as possible, the examining party cannot by abandoning the examination, escape the liability to pay witness fees and mileage—and under such circumstances, such fees and mileage, if not paid, are properly taxable on party and party taxation against the examining party, as costs in the cause. The solicitor for the party being examined is entitled to attend on examination, and charges for his instructions and attendance are proper party and party taxation items. Costs of a third party notice are not taxable as between party and party, in the absence of an express order. Only one affidavit of disbursements, which may be made by the solicitor, is to be taxed in respect of each separate bill of costs.

Union Investment Co. v. Pullishy, 1 Alta. R. 489.

—Action in High Court—Jurisdiction of County Court—Title to land.]—In an action in the High Court to recover $500, the amount of a promissory note made by the defendant, payable to the order of W., and indorsed to the plaintiff, the defendant, by his statement of defence, denied that the plaintiff was the holder of the note in due course, and alleged that he was induced to make it by the fraud of the plaintiff and W., the latter pretending to have an interest in lands in a foreign State which he was to transfer to

the defendant in consideration of the note, but in reality having no interest and never having made a transfer to the defendant, all of which the plaintiff knew, etc.:—Held, that the title to land was not brought in question, within the meaning of s. 22 of the County Courts Act, the lands referred to not being in Ontario; but, even if that were not so, the defence did not necessarily bring into question the title to the foreign land, and in fact no question of title was raised at the trial. Leave to appeal from an order of Latchford, J., affirming a ruling of a local registrar that the costs of the action were taxable on the County Court scale, refused.

Dobner v. Hodgins, 1 O.W.N. 12.

—**Jurisdiction of County Courts—Trespass to land.**]—In an action in the High Court for $200 damages for obstructing the plaintiff's access from his land to a street and for a mandatory injunction requiring the defendant to remove the obstruction, the plaintiff obtained judgment restraining the defendant from continuing the obstruction, and ordering him to remove it and to pay the costs of the action:—Held, that the action came within clause 8 of s. 23 of the County Courts Act, and, as the plaintiff's land was shown to be of greater value than $200, the action was not within the jurisdiction of a County Court, and the plaintiff was entitled to his costs on the High Court scale.

Ross v. Vokes, 1 O.W.N. 261.

—**Review of taxation.**]—Held, on a review of taxation of costs that it is not necessary to set forth in the notice the grounds of the application, nor to lay objection in writing before the taxing officer.

Smithers v. Hutchings, 3 Terr. L.R. 251.

—**Costs—Service fees.**]—To effect service of a writ of summons, the sheriff's officer bona fide travelled from the sheriff's office, where the writ was received, to the defendant's residence, seven miles, and not finding the defendant at home, he travelled from there to the residence of C., which was four miles from the sheriff's office, and there the defendant was found and served. The clerk on taxation allowed mileage for the entire distance travelled:—Held, on review, that the sheriff was entitled to mileage for eight miles only, that is, the distance from the sheriff's office to the place where service was actually effected and return.

Wise v. Currie, 3 Terr. L.R. 149.

—**Counsel fee—Counsel appearing for himself.**]—Counsel fees are properly taxable to a defendant who is an advocate and appears in person.

Calvert v. Forbes (No. 2), 3 Terr. L.R. 285.

—**In Probate Court—Nova Scotia.**]—

In re McDonald Estate, 2 E.L.R. 215 (N.S.).

—**Scale of taxation — Set-off reducing Claim to lower scale.**]—

Starratt v. Benjamin, 2 E.L.R. 35 (N.S.).

—**Taxation—Set-off.**]—

Little v. Whiteley, 12 W.L.R. 211 (Alta.).

—**Taxation—Counterclaim—Witness fees—Counsel fees.**]—

Welwyn Farmers' Elevator Co. v. Byrne, 3 W.L.R. 365 (Terr.).

—**Action for money demand—Recovery of small part of money claimed—General costs—Witness fees.**]—

Vopni v. Stephenson, 7 W.L.R. 753 (Man.).

—**Taxation—Witness from abroad—Conduct money—Travelling expenses—Alternative of examination on commission.**]—

Hewitt v. Boulet, 10 W.L.R. 21 (Sask.).

—**Maps and plans—Sums paid to witnesses for expenses incurred in qualifying them to give evidence.**]—

Barry v. Sullivan, 10 W.L.R. 640 (Man.).

—**Apportionment of—Success of plaintiffs—Failure on allegations of misconduct.**]—

Emerson v. Wright, 6 W.L.R. 493 (Man.).

—**Summary disposition by consent—Costs of motion to set aside default judgment—Costs of action.**]—

Foley v. Hallett, 6 W.L.R. 259 (Man.).

—**Taxation—Deposition taken under foreign commission.**]—

Cramer v. Bell, 6 W.L.R. 382 (N.W.T.).

—**Defendants' costs—Items relating to security for costs—Claim and counterclaim—Judgment for defendants in counterclaim.**]—

Griffin v. Ruller, 4 W.L.R. 12 (N.W.T.).

—**Scale of—County Court action—Increased—counsel fees.**]—

Blundell v. Anglo-American Fire Insurance Co., 12 W.L.R. 164 (B.C.).

—**Scale of—Payment into Court—Excess recovered by plaintiff.**]—

Johansen v. Elliott, 7 W.L.R. 785 (B.C.).

—**Scale of—Local Improvement Ordinance—Taxation—Direction as to scale of costs.**]—

Re Clark, 4 W.L.R. 516 (N.W.Terr.).

V. MODE OF RECOVERY.

—Of County Court appeal in New Brunswick—Attachment.]—The Supreme Court of New Brunswick will not as a general rule grant an attachment to enforce the payment of the costs of a County Court appeal. The costs should be certified and application made to the Court below.

MacPherson v. Samet, 34 N.B.R. 559.

—Privilege—Saisie-arret after judgment — Prescription.]—The costs of an attorney on proceedings in a Court which was held, against the contention of both parties, to be without jurisdiction are not privileged. The rule in Art. 673 C.P.Q. applies, in case of alleged insolvency of the debtor, to the distribution of all monies not representing immovables and of which no account has been rendered en justice. When a saisie-arrêt has been declared binding a subsequent judgment ordering the tiers-saisie to pay the monies seized has no raison d'être the amount subject to the allegation of insolvency should be distributed according to Art. 697 C.P.Q. and especially if there exists a seizure after a prior judgment. A tierce-opposition is not prescribed, whatever is the date of the judgment attacked, if the tiers-opposant has only had knowledge of it during the year preceding it.

Royal Electric Co. v. Palliser, 3 Que. P.R. 340 S.C.).

—Lien for on discontinuance—Collusion.]—If a discontinuance is filed in a suit without notice thereof being given to plaintiff's attorneys, and evident collusion is shown against the latter by the plaintiff and defendant, the plaintiff's attorneys will be entitled to take judgment against the defendant for their costs. (2) Such costs do not comprise the costs of appointment of the plaintiff's as tutrix to minors, there being no lien de droit, in respect thereof between the defendant and the plaintiff's attorneys.

Skelly v. Thibault, 5 Que. P.R. 75.

—Alimentary debt—Opposition — Substitution—Unseizable property — Will.]—The defendant was owner of immovables par indivis with his mother. The undivided part of his interest had been bequeathed to him by his father for purposes of maintenance (a titre d'aliments) with a clause of non-seizability and charged with a substitution. River, an attorney for his mother, had brought an action for partition of these immovables against the defendant and the curator of the substitution, and by the judgment in said action the property was partitioned en nature, three-fourths of the costs being made payable by the defendant River for such costs had caused a seizure to be made of these undivisible parts of the immovables allotted en bloc to the defendant. The plaintiffs, as attorneys for the defendants in said action, made opposition to the seizure, claiming that the costs had been paid, and invoking the clause of non-seizability. River pleaded to the opposition that he had not been paid and that the clause against seizure did not apply to his claim, which had been incurred in preserving the property to the opposant, and in defining his interest in the undivided immovables. The opposition was dismissed with costs, and the three undivided portions of the immovables were sold. River's costs on the opposition were taxed at $125.57, but on review on motion by the plaintiffs were reduced to $54.57. Plaintiffs then sued defendant for their costs of the opposition and of the review of taxation, and obtained judgment for $147.80, under which they caused seizure to be made of the two undivided parts of the immovables which were not sold in River's proceedings. Defendant opposed the seizure invoking the clause against seizure. Plaintiffs pleaded to the opposition that the costs were incurred in good faith to protect defendant's property against the seizure by River; that this made their debt alimentary; that the fact that the opposition was dismissed was of no importance; and that their claim could be realized from all the alimentary property of the defendant: —Held, that River not having contested the clause against seizure, but only having claimed that it did not apply to his claim the opposition made to his seizure was of no benefit to the property seized by the plaintiffs any more than it was to that seized by River; that there was no relation between the claim of the plaintiffs for their costs and the immovables seized in these proceedings; and that, therefore, the claim of the plaintiffs had not become alimentary to be realized from the unseizable property.

Pouliot v. Michaud, 20 Que. S.C. 432 Sup. Ct.).

—Judge's order for costs—Direction for set-off—Service of allocatur—Issue of execution — Production of order.] — Where a Judge's order requires the defendant to pay interlocutory costs to the plaintiffs, and the Judge makes an oral direction that costs previously awarded to the defendant should be set-off pro tanto, the deduction should be made before execution issues on the Judge's order. It is not necessary to serve the certificate of taxation of the costs awarded by an order, where the party to pay has been represented upon the taxation, and has notice of the amount payable. When execution is issued upon a Judge's order, the order itself or an office copy should be produced to the officer issuing it; a mere copy is not sufficient, unless such officer is the one who has official custody of or access to the book in which the order is entered.

People's Building and Loan Association v. Stanley, 4 O.L.R. 644 Div. Ct.).

—Finding sureties to keep the peace—Costs ordered against defendant—Imprisonment for non-payment.]—Upon a proceeding under s. 959 of the Criminal Code to compel the giving of a recognizance to keep the peace, the recovery of costs ordered against the defendant is governed by Code s. 870 and imprisonment for non-payment is only authorized in default of distress.

The King v. Power, 6 Can. Cr. Cas. 378 (Weatherbe, J.).

—Interlocutory costs—Setting off against debt and costs finally recovered—Attorney's lien.]—A defendant is entitled to set off interlocutory costs in the same cause, payable to him by the plaintiff, against the damages and costs recovered against him in the final result of the cause; notwithstanding the objection of the plaintiff's attorney's lien, which only attaches on the general result of the action.

Anderson v. Shaw, 35 N.B.R. 280.

—Lower scale—Amount claimed reduced by trial Judge—Set-off.]—In an action in the High Court for $340, the balance of a $970 account for logs, $450 of which was paid before action, the trial Judge found the sale was made as contended by the plaintiff, but reduced the amount by $20 for some logs not received by defendant:—Held, that the plaintiff was only entitled to County Court costs and the defendant was entitled to a set-off. Brown v. Hose (1890), 14 P.R. 3, distinguished.

Lovel v. Phillips, 5 O.L.R. 235 (Britton, J.).

—Quebec procedure—"Distraction of costs" —Attorney's right to recover in Ontario.]—"Distraction of costs" as provided for in s. 553 of the Code of Civil Procedure in the province of Quebec is the diverting of costs from the client or party who in the ordinary course would be entitled to them and their ascription to his attorney or other person equitably entitled. Plaintiffs were the attorneys on the record for one R. against whom an action was brought in the province of Quebec by the defendant and an interlocutory motion therein had been dismissed with costs, taxed at $238.20 and judgment entered therefor in the Superior Court at Montreal. The defendant had recovered a judgment against R. in this province and sought to set it off pro tanto against the judgment for costs:—Held, that the plaintiffs were entitled to recover such costs from the defendant in their own names in Ontario without the intervention of their client.

Hutchinson v. McCurry, 5 O.L.R. 261 (Britton, J.).

— Petition for revision — Withdrawal of taxation — Disclaiming allocatur.] — The party who has, upon contestation, taxed a bill of costs, may, after a petition for revision of such taxation has been presented and taken into consideration, withdraw and disclaim the certificate of taxation obtained by him upon payment of costs of the petition in revision.

Bergeron v. Brunet, 5 Que. P.R. 429.

— Probate fees — B. C. Supreme Court Rules.] — By Rule 1065 the appendices to the Supreme Court Rules form part thereof, and by s. 94 of the Supreme Court Act, R.S.B.C. 1897, c. 56, the Rules are declared to be valid and binding, therefore probate fees as set out in Appendix M. of the Rules may be collected as being imposed by statutory enactment.

Re Porter Estate, 10 B.C.R. 275.

—Costs—Lien—Execution.] — On execution on the goods of a plaintiff, whose action has been dismissed with costs, the costs of the defence should be regarded as law costs (frais de justice) and collocated as such by privilege.

Roberge v. Loyer, Q.R. 27 S.C. 32 (Sup. Ct.). The contrary was decided by the Court of Review before the new Code of Procedure came into force. Langlois v. Corporation of Montmagny, 13 Q.L.R. 302; 11 L.N. 72.

—Joint condemnation—Execution—Opposition.]—A party condemned jointly with others to pay the costs of suit may oppose an execution against him for the total and his opposition, accompanied by deposit of his proportion of the costs, will not be dismissed on motion therefor.

Poplinger v. Muir, 6 Que. P.R. 445 (Sup Ct.).

VI. Security for Costs.

See Security for Costs.

COUNSEL.

Counsel fees—Right of action for—Failure of solicitor to pay counsel fees received by him from client.]—Counsel in the province of British Columbia have the right to maintain an action for their fees. Where a solicitor contrary to his client's expectation does not pay over to a counsel, fees received from his client, the client is still liable to the counsel.

British Columbia Land and Investment Agency, Ltd., v. Wilson, 9 B.C.R. 412 (Martin, J.).

COUNTERCLAIM.

See Set-off.

COUNTERFEITING.

Having in possession forged bank notes—Counterfeit token of value.]—The prisoner

was convicted in the County Court, under the Criminal Code, s. 430, on a charge of having unlawfully, and without lawful authority or excuse, had in his custody and possession two forged bank notes for the payment of $10 each, well knowing them to be forged. One of the witnesses called on behalf of the prosecution, H., testified that the prisoner one day showed him a bill or note something like those in evidence (proved to have come out of the prisoner's possession) and that he then told the prisoner it was no good. Another witness, P., stated that, the day before the arrest, he had gone shooting with the prisoner, who said he had something to show him when they got out of the woods, and that that evening he went to the prisoner's house and the prisoner there gave him two bills. Other evidence established that these bills, which were paid over by P. to G., and M., were both forgeries:—Held, that there was ample evidence in the dealings between the prisoner and P., and in the conversation between prisoner and H., to prove that prisoner's knowledge that the documents he was handling were not genuine, and to justify the Judge in finding the prisoner possessed of the guilty knowledge required by s. 430 of the Code. At the trial, evidence was given of a conversation with the prisoner in the presence of the chief of police, in which the prisoner said that he got the bills in question from S., and that he gave them to P.:—Held (obiter), that the onus was upon the prosecution to establish that the statement in question was entirely free and voluntary, and that it was not sufficient for this purpose that the officer should swear to it, but he should have negatived possible inducements by hope or fear which would have made the statement inadmissible. But that the reception of this evidence did not necessarily influence the Judge's decision in reference to the other evidence, the Judge having stated the evidence on which he based his judgment and that evidence being sufficient. A verdict by a Judge, in this particular, is different from the verdict of a jury. At the trial evidence was given in relation to one of the bills in question showing it to be a counterfeit or forgery, purporting to be a $10 bill of the Bank of Montreal. Held, that the document was a "forged note," and was such a document as is contemplated by s. 430 of the Code. Semble, it might also be a "counterfeit token of value" under s. 430.

The King v. Tutty, 38 N.S.R. 136, 9 Can. Cr. Cas. 544.

COUNTY COURT.

Transfer of action—Order for.]—An order of transfer from a County Court to the Supreme Court of British Columbia is effective from the day when pronounced.

Parrot v. Cheales, 13 B.C.R. 445.

COVENANT.

Charge on land for debt executed under seal—Implied covenant to pay debt.]—Defendant executed under seal an instrument creating a charge on land in favour of plaintiffs for the price of an engine bought from them and interest to be paid by specified instalments. The instrument further provided that if notes should be given by defendant for the several instalments, such notes should not be in satisfaction of the said lien and charge, but the same should continue until payment in full of such notes and any renewals thereof. It contained no covenant or promise to pay the debt:—Held, that a covenant or promise to pay the debt could not be impliel from the terms of the deed, and that plaintiffs could not have a personal order for payment of the debt based upon anything contained in it.

Abell Engine & Machine Works Co. v. Harms, 16 Man. R. 546.

—Construction—Dependent and independent covenants—Indemnity.]—

Twyford v. York, 3 W.L.R. 74 (Terr.).

—Dependent and independent covenants—Indemnity.]—

Twyford v. York, 2 W.L.R. 348 (Terr.).

CREDITORS' RELIEF ACT.

See BANKRUPTCY EXECUTION.

CREDITORS' TRUST DEEDS.

See BANKRUPTCY.

CRIMINAL CONVERSATION.

Damages—Statute of limitations.]—Criminal conversation is a continuing wrong, and where the wife is enticed away more than six years before, but the criminal conversation continues down to the time of, the bringing of the action, the husband may recover such damages as he has sustained within the period of six years next before the bringing of the action; recovery in respect of the enticing away and of anything else which happened prior to the six years being barred by the Statute of Limitations.

Bailey v. King, 27 Ont. App. 793.

—Statute of Limitations—Criminal conversation—Damages.]—The Statute of Limitations is not a bar to an acton for criminal conversation where the adulterous intercourse between defendant and plaintiff's wife has continued to a period within six years from the time the action is brought.

Bailey v. King, 27 O.A. 703, supra, affirmed. Quære.—Does the statute only be-

gin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within the six years preceding the action. King v. Bailey, 31 Can. S.C.R. 338.

—Foreign divorce—Invalidity — Hearsay evidence.]—The plaintiff's wife separated from him with, as found on the evidence, his consent, and after some years obtained in the United States a divorce from him not valid according to the law of this province. She then went through the ceremony of marriage with the defendant and lived with him as his wife for many years before this action, which was brought to recover damages for criminal conversation and alienation of affections. The latter branch was abandoned at the trial, but on the former the jury allowed $5,000 damages, and judgment was entered for this sum: —Held, MacMahon, J., dissenting, that notwithstanding the separation and the divorce the action lay, but that the damages were grossly excessive, and on this ground, and on the ground of improper reception of evidence of rumours of infidelity of the plaintiff's wife with the defendant long previous to going through the ceremony of marriage, a new trial was granted. Per MacMahon, J.: The separation and subsequent conduct amounted to an absolute abandonment of his wife by the plaintiff, and were a bar to the action. Judgment of Anglin, J., at the trial, reversed.

C. v. D., 8 O.L.R. 308 (D.C.).

—Criminal conversation—Death of plaintiff —Revivor.]—The provisions of s. 10 of the Trustee Act, R.S.O. 1897, c. 129, apply to an action for criminal conversation; and where the plaintiff dies pendente lite the action may be continued in the name of his personal representative. Where at the time of the abatement an appeal to the Court of Appeal is pending, an order of revivor may, nevertheless, issue from the High Court of Justice. The absence of the indorsement on the order of revivor required by Con. Rule 399, notifying the opposite party of the time within which to apply to discharge the order, will not be regarded as a ground for setting aside the order upon a motion for that purpose made within the proper time.

C. v. D., 10 O.L.R. 641 (M.C.).

—Abandonment of wife — Separation — Hearsay evidence.]—Appeal by the defendant from the judgment of a Divisional Court reported 8 O.L.R. 308, dismissed on the ground that the evidence did not show such abandonment by the plaintiff of his wife as deprived him of his right of action.

Patterson v. McGregor (1869), 28 U.C.R. 280, observed upon.

C. v. D., 12 O.L.R. 24 (C.A.).

CRIMINAL LAW.

I. EVIDENCE.
II. TRIAL PROCEDURE.
III. PROCEEDINGS IN APPEAL.
IV. OFFENCES.
V. CERTIORARI.
VI. HABEAS CORPUS.
VII. PRACTICE GENERALLY.
VIII. SPEEDY TRIAL.
IX. SUMMARY TRIAL.
X. SUMMARY CONVICTION.

I. EVIDENCE.

Evidence — Admission — Conviction for lesser offence.]—Upon an indictment for stealing from the person evidence was given upon which the defendant could have been convicted of simple theft, but the Judge charged the jury that they must either convict of theft from the person or acquit. No objection to the charge was made at the trial:—Held, the jury should have been instructed that they might convict of simple theft under the indictment, and a new trial was ordered accordingly. After imprisonment defendant was searched by a police officer and some money found on him. The officer said, "This looks bad, J," speaking to the defendant, whereupon the defendant made some admission of theft, which was evidence against him on the trial. He was under the influence of liquor at the time he made the statement. Held, the evidence was admissible.

The King v. Daley, 39 N.B.R. 411, 16 Can. Cr. Cas. 168.

—Arrest on minor charge—Interrogation of prisoner by police officer—Warning to accused.]—A confession obtained from a person under arrest for assault and robbery will be admitted in evidence on a charge of murder if the accused was warned that he need not answer and that what he said might be used against him, although he was not told that he would be charged with homicide.

The King v. Rossi, 8 E.L.R. 595.

—Evidence —Accomplice—Corroboration— Direction to jury.]—

Reynolds, Rex v., 9 W.L.R. 299 (Sask.).

—Attempt to commit incest—Evidence of children of tender years.]—The prisoner was tried upon a charge of having attempted to commit incest with his daughter, a child of seven years of age, and was found guilty:—Held, that, as the evidence showed that the prisoner had done what he could to commit the crime of incest, s. 570 of the Criminal Code applied to his case, and he was open to indictment under it. Held, also, that the evidence of the prisoner's child and of another child of four years of age was properly received, though not under oath, by virtue of the Canada Evidence Act, R.S.C. 1906, c. 145, s. 16; and that this evi-

dence was sufficiently corroborated by other evidence referred to below. Held, also, that a complaint or statement made by the prisoner's child to one B., in whose charge she had been placed by her mother, was properly admitted in evidence.

Rex v. Pailleur, 20 O.L.R. 207, 15 Can. Cr. Cas. 339.

—Depositions taken by magistrate—Parol evidence in addition.]—Where a deposition has been regularly taken down in writing by a magistrate at a preliminary hearing, and such deposition is available, that deposition is the best evidence of what the witness stated on that occasion, but where the deposition is produced and put in evidence, then parol evidence is admissible to prove statements made by the witness on the occasion of the taking of the deposition, and not appearing therein.

Rex v. Prasiloski (No. 2), 15 B.C.R. 29, 13 W.L.R. 298, 16 Can. Cr. Cas. 139.

—Attempt to have carnal knowledge of child—Evidence of child not on oath—Corroboration.]—The prisoner was charged with the indictable offence under s. 302 of the Code of having attempted to have unlawful carnal knowledge of a child under the age of fourteen years, to wit, of the age of seven or eight years. The trial Judge received the child's statement, without oath, under s. 1003 of the Code, and upon that and other evidence convicted the prisoner of the offence charged, but reserved for the opinion of the Court of Appeal the questions whether the child's statement was sufficiently corroborated to comply with the requirements of sub-s. 2 of s. 1003, and whether he was right in holding that there was sufficient evidence to justify his finding the prisoner guilty:—Held, that the evidence of the child was sufficiently corroborated by: (a) evidence of the statement made to her mother within an hour or two after the occurrence—a statement volunteered by her, and not extracted by interrogation or suggestion; (b) evidence of the condition of the child's clothing, as testified to by her mother and two other persons; (c) evidence of the fact of the child having been with the prisoner during the time testified to as that during which his improper conduct took place. 2. That there was reasonable evidence on which, if believed, the defendant might be found guilty of the offence charged.

Rex v. Bowes, 20 O.L.R. 111, 15 Can. Cr. Cas. 326.

—Statements of prisoner charged with murder to person in authority—Admissibility—Negativing threats or inducements.]—The prisoner, a foreigner charged with murder, was placed under arrest and taken to the police station, where the policeman in charge instructed an interpreter to tell the prisoner that, in view of any charge that might be brought against him, he need not answer anything unless he liked, but anything that he said would be used in evidence against him. This was all that the policeman told the interpreter to say to the prisoner, and the interpreter told the prisoner exactly what he had been told to tell him. At the trial of the prisoner evidence was given, without objection, of statements made by him in answer to questions put to him by the policeman, through the interpreter, after this warning. There was no negation in terms of the absence of threats or promises or inducements, but apparently all that actually took place was related. The trial Judge was satisfied that the statements were not made under the influence of threats or promises or inducements made or held out to the prisoner:—Held, that the evidence of the prisoner's statements was properly admitted; there was no necessity for a direct affirmation by the witnesses that no threats or promises or inducements were made or held out. The Queen v. Thompson, [1893] 2 Q.B. 12, 17 Cox C.C. 641, distinguished. Held, also, that it is not necessary in warning or cautioning a prisoner that a constable should say to him everything that is set forth in s. 684 (2) of the Criminal Code.

Rex v. Steffoff, 20 O.L.R. 103, 15 Can. Cr. Cas. 366.

—Permitting young girls to be on premises for the purposes of fornication—Criminal Code s. 217—"Unlawfully."]—The defendant invited or induced or knowingly suffered two girls, under the age of eighteen, to be upon his premises for the purpose of being, as they were, carnally known by him and another:—Held, that he was properly found guilty of an indictable offence under s. 217 of the Criminal Code. The word "unlawfully," in the expression "unlawfully and carnally known," in s. 217, does not import that the unlawful carnal connection must be something of a character elsewhere declared to be unlawful and penalized by the Code or by some other definite law or the general law of the land; the word is used, in describing the act penalized, in the sense of not sanctioned or permitted by law, and as distinguished from acts of sexual intercourse which are not regarded as immoral.

Rex v. Karn, 20 O.L.R. 91, 15 Can. Cr. Cas. 301.

—Evidence — Accomplice — Corroboration.]—An accomplice is a competent witness, and a conviction may be had on his uncorroborated evidence, if credit be given to it. Where the trial is by jury, the Court should call the attention of the jury to the character of the witness as an accomplice and the reasons why care should be taken in accepting the wholly unsupported evidence of such a witness; but the Court has no power to require the jury to reject such evidence. In this case there was no jury, and it was held, that the trial Judge, who was familiar with the common objections to

the evidence of accomplices, had power to convict the accused upon the uncorroborated evidence of an accomplice.

Rex v. Frank, 21 O.L.R. 196, 16 Can. Cr. Cas. 237.

Evidence—Confession.]—The prisoner being suspected of having been guilty of the murder of one John Gordon but not under arrest, detectives were employed who associated with him, worked themselves into his confidence, and, by representing to him that they were members of an organized gang of criminals engaged in profitable operations, induced him to seek for admission to their ranks. They then intimated to him that he must satisfy them that he was qualified for such admission by showing that he had committed some crime of a serious nature, whereupon, according to their evidence, he claimed that he had killed Gordon as the result of an altercation. The detectives were not peace officers, no charge was then pending against the prisoner, nor did he know that the detectives were such:—Held, that an inducement held out to an accused person in consequence of which he makes a confession must be one having relation to the charge against him and must be held out by a person in authority, in order to render evidence of the confession inadmissible; that both these grounds of objection were wanting in this case, and that, therefore, the evidence of the confession was rightly received.

Rex. v. Todd, 13 Man. R. 364, 4 Can. Cr. Cas. 514.

—Evidence—Answers tending to criminate —Claim of privilege.]—The prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to his branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods delivered to a customer of his branch, the prisoner stating that for certain business reasons beneficial to his employers he had merely postponed the charging of the goods:—Held, that if the Judge did not accept the prisoner's explanation, which he was not bound to do, there was evidence upon which he could legally find him guilty of theft as defined by the Criminal Code. If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, they are receivable against him (except in the case provided for by s. 5 of the Canada Evidence Act, 1893) as amended in any criminal proceeding against him thereafter, but if he does object he is protected. Judgment of the County Judge of the County of Wentworth affirmed.

Rex v. Clark, 3 O.L.R. 176, 5 Can. Cr. Cas. 235 (C.A.).

—Accused testifying on his own behalf — Cross-examination as to previous convictions.]—An accused person who, on his trial for an indictable offence, is examined as a witness on his own behalf, may be cross-examined as to previous convictions.

Rex v. D'Aoust, 3 O.L.R. 653, 5 Can. Cr. Cas. 407 (C.A.).

—Possession — Reasonable account.] — A Crown case was reserved to determine the question whether, when stolen goods are found in the possession of a prisoner, and he gives to those who find him a reasonable account of how he came by the goods, it is incumbent upon the prosecution at the trial to show that the prisoner's account is untrue:—Held, that, in the absence of any evidence to show that such account was in fact given, the Court was not in a position to determine the question reserved.

The Queen v. McKay, 34 N.S.R. 540, 6 Can. Cr. Cas. 151.

—Theft — Cattle stealing — Evidence of ownership—Brand — Earmark — Deposition taken at preliminary inquiry—Reading of, in evidence at trial—Evidence of absence of deponent from Canada.]—Held, Rouleau, J., dissenting, that the production of a steer's hide with the prosecutor's brand and earmarks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, was sufficient to justify the trial Judge in finding that the steer in question was the property of the prosecutor. (See now 63-64 Vict. (1900), c. 46, s. 707A, and 1 Edw. VII., c. 42, s. 707A:—Held, that the evidence that a witness at the preliminary inquiry was a corporal in the N.W.M. Police, and that he had been sworn in as a member of Strathcona's Horse, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of the deposition of such witness taken at the preliminary inquiry; and the question was one to be decided by the trial Judge.

The Queen v. Forsythe, 4 Terr. L.R. 398, 5 Can. Cr. Cas. 475.

—Trial—Evidence not translated to prisoner —Certified extracts from registers of civil status—Evidence of prisoner's bad character.]—1. A conviction for murder will not be set aside because the evidence of witnesses for the prosecution, given in a language of which the defendant was ignorant, was not translated to him, where he was defended by counsel speaking and thoroughly acquainted with the language of the witnesses, and where neither the defendant

nor his counsel asked that the evidence be translated. 2. Section 19 of "The Canada Evidence Act, 1893," which requires that ten days' notice shall be given to the prisoner before the trial, of the intention to produce certain documents, does not apply to certified extracts from the registers of acts of civil status, which were produced merely to explain the alias of the person killed. Such extracts are admissible without notice. 3. Evidence of bad character or of misconduct of the prisoner, not relevant to the issue before the Court, can only be introduced by the Crown in reply or rebuttal. The admission of such evidence as part of the case for the prosecution, before any evidence of good character has been adduced for the defence, is improper, irregular and illegal, and constitutes sufficient ground for setting aside the conviction. The illegality is not covered by the failure of the prisoner or his counsel to object to the evidence at the time, or by the fact that his counsel cross-examined the witnesses on their statements. 4. Even after evidence of the prisoner's good character has been made by the cross-examination of Crown witnesses, the prosecution is only entitled to prove his general reputation and not particular acts of misconduct.

The King v. William Long, 11 Que. K.B. 328, 5 Can. Cr. Cas. 493.

—Deposition of witness—Inability of witness to attend trial—Preliminary enquiry before magistrate—Opportunity to cross-examine—Criminal Code, s. 687.]—At the preliminary enquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, prisoner's counsel being present, but before conclusion of the cross-examination (in which the magistrate refused to allow some pertinent and necessary questions) proceedings were adjourned on account of witness' illness. Meanwhile the magistrate determined to send the case to trial, and telegraphed to prisoner's counsel so stating and asking whether he would come up or not. Counsel replied that if the case was to go to trial, it would be no use his coming, and accordingly did not further attend the proceedings. On lapse of the adjournment the magistrate went to the witness' residence and obtained her signature to her depositions as already taken, neither the prisoner nor his counsel being present, and afterwards resumed the inquiry, the prisoner being present but not the witness, and on the evidence already taken the prisoner was committed for trial. At the trial the witness was proved to be too ill to attend, and her depositions taken as above were tendered by the Crown and admitted. Held, that in view of s. 687 of the Criminal Code, as amended in 1900, the depositions were improperly received, prisoner's counsel not having had full opportunity to cross-examine.

Rex v. Trevane, 4 O.L.R. 475 (C.A.), 6 Can. Cr. Cas. 124.

—Indecent assault—Child's testimony—Evidence as to similar acts.]—The defendant was tried for indecent assault upon a child under the age of fourteen. The child was examined on the "voir dire" and not sworn. On refusing to answer the Crown prosecutor had the trial adjourned. On the re-opening of the trial on the second day the child still absolutely refused to speak. Counsel for the Crown, on being asked if he had any other evidence, offered two witnesses in corroboration of the child's evidence as told to them by the child, and also evidence of similar acts with others by the prisoner:—Held, following Queen v. Cole, 1 Phil. Ev. 508, that evidence not in support of the charges laid in the indictment, but referring to charges not laid, could not be received as corroborative evidence; and following Rex v. Kingham, 66 L.J.P. 393, evidence as to what the child told others could not be received. There being no other evidence for the prosecution the prisoner was acquitted.

Rex v. South, 39 Can. Law Jour. 639 (Bole, Co. J.).

—Evidence to show guilty knowledge.]—1. When, in the ordinary course, an indictment has been found for an offence with which a person who is either in custody or on bail, has been charged, and such indictment has been returned into Court and has filed of record, the Court is regularly and exclusively seized of the case, and the accused has no right then to ask for a speedy trial and to remove the case and the indictment and the other documents forming the record to the special Court for speedy trials. 2. On an indictment charging the accused with having obtained goods by false pretences from a company named, with intent to defraud, so soon as it has been proved that he did the act charged, evidence of false representations made to persons other than the president and general manager of such company, on other and distinct occasions, is admissible to show that the accused, at the time he made the false representations to the president and general manager of the company on whose information the prosecution was brought, was pursuing a course of similar acts, and to prove guilty knowledge of the falsity of the pretence charged in the indictment and the intention with which the act charged was done.

The King v. Komiensky, 12 Que. K.B. 463, 7 Can. Cr. Cas. 27 (Wurtele, J.).

—Contradicting one's own witness—Other relevant testimony admissible although inconsistent—Witness hostile or adverse—Refreshing the memory.]—(1) The party on whose behalf a witness is called is not debarred by Code s. 699 from proving by other witnesses any relevant facts inconsistent with or contradictory of such wit-

ness's testimony without a ruling that the witness is hostile to the party calling him. (2) The witness's deposition at the preliminary enquiry may be shown to him on his examination in chief at the trial for the purpose of refreshing his memory, but neither the examining counsel nor the witness may read the deposition aloud. (3) On the witness silently reading his previous deposition, a question, which had been put to the witness before he saw the deposition, and to which he had given an unexpected answer, may be re-put; and only in case the witness, after his memory has been so refreshed, persists in the same unexpected answer, can the question be repeated to him in a leading form from the depositions. (4) The opposite party is entitled to cross-examine not only upon the examination in chief but upon the previous depositions which had been so shown to the witness for the purpose of refreshing his memory.

The King v. Laurin (No. 5), 6 Can. Cr. Cas. 135 (Würtele, J.).

—Trial — Cross-examination—Right to re-examine.]—The right to re-examine follows necessarily upon cross-examination, even as to the matter elicited during the latter which is both inadmissible and volunteered. Such matters should be expunged at the instance of the cross-examiner if it be desired to avoid re-examination.

Rex v. Noel, 6 O.L.R. 385 (C.A.), 7 Can. Cr. Cas. 309.

—Evidence—Confession—Person in authority.]—The rector of a cathedral held an inquiry into the circumstances of an assault in which several of the choir boys were implicated:—Held, that the rector was a person in authority and that a statement made to him by one of the boys who was told to speak the truth and that the statement was for the purpose of that inquiry only, was not voluntary.

Rex v. Royds, 10 B.C.R. 407, 8 Can. Cr. Cas. 209 (Irving, J.).

—Statement of accused to police officer—Admissibility—Negativing possible inducements—Onus of proof.]—(1) The onus is upon the prosecution to establish that a statement or confession made by the prisoner to a police officer was made voluntarily. (2) The proper mode of proving that the prisoner's statement was voluntarily made is by negativing the possible inducements by way of hope or fear that would have made the statement inadmissible, and not by merely taking the affirmative answer of the officer under oath that the statement was made voluntarily. (3) Semble, whether or not a statement was voluntarily made involves questions of both law and fact. (4) The improper reception of evidence before a County Judge trying a case without a jury under the "speedy trials" clauses will not entitle a prisoner to a new trial upon a case reserved, if the County Judge certifies therein that apart from the evidence objected to there was sufficient evidence to compel him to find the prisoner guilty.

The King v. Tutty, 9 Can. Cr. Cas. 544, 38 N.S.R. 136.

—Confession — Caution.]—Where before making his confession the prisoner was duly cautioned, the confession is admissible in evidence although on an occasion previous to his making it an inducement may have been held out to him.

Rex v. Lai Ping, 11 B.C.R. 102, 8 Can. Cr. Cas. 467.

—Confession of accused—Admissibility—Absence of threat or inducement.]—(1) Unless the evidence before an extradition Judge, of an alleged confession by the accused, was clearly inadmissible, another Judge, hearing the case upon a habeas corpus after committal, should not discharge the prisoner upon the ground of its inadmissibility. (2) Semble, where a witness called to prove a confession alleged to have been made by the accused, purports to give a complete account of the interview, and no suspicious circumstances are brought out pointing to any threat or inducement relating thereto, the evidence should not be rejected, although the witness was not asked whether any threat or inducement had been held out.

Re Lewis, (N.W.T.), 9 Can. Cr. Cas. 233.

—Evidence to support conviction—Justice's finding of fact.]—Upon an application to quash a summary conviction made by a justice of the peace, the justice's finding of fact should be treated in the same manner as the verdict of a jury, and not interfered with unless it clearly appears that there was no evidence to jutsify the finding.

The King v. Canadian Pacific Railway Company, 9 Can. Cr. Cas., (N.W.T.), 328.

—Corpus delicti—Destruction of the remains of deceased—Circumstantial evidence of identity—Comment on failure of accused to testify.]—(1) On a trial for murder, if the fact of the death of a human being is established by direct proof and the remains of the dead man have been so destroyed by fire that direct identification is impossible, circumstantial evidence is admissible to prove the identity of the remains and also the identity of the person who caused the death. (2) While the fact of death must always be established by direct proof, the fact of the killing by the defendant as alleged may be proved by circumstantial evidence supporting the charge beyond a reasonable doubt. (3) A statement by the Crown counsel in his address to the jury that the prisoner's counsel "took the very best and wisest course in not having the prisoner go on the witness stand," and that he, the Crown counsel, thinks it was wise for the prisoner himself, is a comment

unfavourable to the accused on his failure to testify on his own behalf and is within the prohibition of s. 4 (2) of the Canada Evidence Act, 1893. (4) Where comment has been made in contravention of the Canada Evidence Act, upon the failure of the accused to testify, the same is a substantial wrong to the prisoner (Cr. Code s. 746), and entitles him to a new trial.

The King v. Charles King, (N.W.T.), 9 Can. Cr. Cas. 426.

—Prisoner's statement — Comment on prisoner's failure to testify.]—A prisoner at his trial has the option of making a statement, not under oath, or of giving evidence under oath. A direction to the jury that an accused has failed to account for a particular occurrence, when the onus has been cast upon him to do so, does not amount to a comment on his failure to testify within the meaning of s. 4, sub-s. 2 of the Canada Evidence Act, 1893.

Rex v. Aho, 11 B.C.R. 114, 8 Can. Cr. Cas. 453.

—Admissions — Statements made to constable after arrest.]—The prisoner was arrested on a charge of stealing S.'s gun, and in answer to questions put to him by a constable who did not caution him, he made certain statements: he was afterwards charged with the murder of S. and on his trial the Crown sought to put in evidence his answers:—Held, not admissible.

Rex v. Kay, 11 B.C.R. 157, 9 Can. Cr. Cas. 403.

—Theft—Failure of prisoner to testify—Comment by Judge—Reserved case—Time of application.]—1. Where the trial Judge, in his charge to the jury, called attention to the fact that the prisoner charged with theft was not called to testify on his own behalf, and warned the jury that they were not to take that fact to his prejudice, but stated that if the accused were innocent he could have proved that he was not in the locality at the time, this is a prohibited "comment" within the meaning of s. 4 (2) of the Canada Evidence Act, 1893, entitling the accused to a new trial. A case may be reserved for the opinion of the Court after sentence has been imposed.

The King v. McGuire, 36 N.B.R. 609,, 9 Can. Cr. Cas. 554.

—Statutory statement of accused—Signature to—Evidence against him on a charge of forgery.]—The signature of a prisoner to the "statement of accused" at the preliminary hearing, may be tendered as evidence against him at his trial on a charge of forgery.

Rex. v. Golden, 11 B.C.R. 349 (Morrison, J.), 10 Can. Cr. Cas. 278.

—Prisoner as a witness—Requiring specimen of his handwriting.]—A prisoner called as a witness on his own behalf cannot be compelled to furnish a specimen of his handwriting.

Rex v. Grinder, 11 B.C.R. 370 (Hunter, C.J.), 10 Can. Cr. Cas. 333.

—Judge's charge — Comment on failure of prisoner to testify.]—The jury in a criminal trial may be sent back for further deliberation when, upon being polled, one of the jurors dissents from the verdict of "guilty" announced by the foreman; and a subsequent unanimous verdict of "guilty" may propery be accepted. Upon the trial of the prisoner for burglary and burglariously stealing property, the Judge in his charge to the jury remarked that if they did not believe the evidence of a certain witness, they were "brought face to face with the fact that the prisoner is found in possession of a pouch which was stolen . . . and that he has not given a satisfactory explanation of how he came into possession of it": —Held, that the Judge did not thereby suggest to the jury that the prisoner might have given evidence in his own behalf, or that an inference unfavourable to him might be drawn from the fact that he had not done so. The burglary was on the 18th or 19th December, 1903, and the prisoner was arrested on the 16th February, 1904, with one of the articles stolen upon his person:—Held, that the Judge could not properly have ruled, in all the circumstances of the case, that the lapse of time was so great as absolutely to repel any presumption that the prisoner was concerned in the burglary; and that the possession of the article and other circumstances warranted the jury in drawing an inference of guilt. Leave to appeal was refused, and rulings of Street, J., at the trial, were affirmed.

Rex v. Burdell, 11 O.L.R. 440, 10 Can. Cr. Cas. 365.

—Joint indictment—Separate trial—Canada Evidence Act, 1893, s. 4—Applicability to person not on trial.]—The prisoner and one F. were jointly indicted, and a true bill found against them. It was ordered that the prisoner should be tried separately and apart from F., as to whom the indictment was traversed to another sittings. At the trial of the prisoner the presiding Judge commented on the fact that F. was not called as a witness:—Held, that F. was not a person charged under s. 4 of the Canada Evidence Act, 1893, 56 Vict. c. 31 (D.), for that section only referred to the person actually on trial; F. was a competent witness, but his competency did not depend on this Act, and therefore the Judge had the right to comment as he did.

The King v. Blais, 11 O.L.R. 345, 10 Can. Cr. Cas. 354.

—Depositions on another trial—Reception of — Consent of counsel — New trial.]—Even if a mistake is made by counsel at a trial, that does not relieve the Judge in a criminal case from the duty to see that pro-

per evidence only is before the jury. At the trial of a prisoner, the prosecuting counsel put in a letter, addressed to the Crown attorney from a counsel who had been retained to act for the prisoner as follows: "I find that I will be unable to go on with this trial on the 28th December. . . . . Would you kindly see the Judge and ask him if he can take it on Saturday, the 6th January. . . . I am quite willing to accept the evidence of the family, in particular those who gave evidence at the H. trial, so that it would not be necessary for you to call them." The trial was proceeded with on December 29th; the prisoner then being represented by another counsel, when in addition to the letter, the depositions of two witnesses taken at the trial of H., who were not members of the family, were put in without the consent of, or objection to on the part of, the prisoner's counsel.—Held, that even assuming the consent in the letter, which seemed to be a concession for the proposed postponement of the trial to the 6th January, wide enough to authorize the admission of the specified depositions, the depositions of the two witnesses, not members of the family were improperly received. Conviction quashed and a new trial granted.

Rex v. Brooks, 11 O.L.R. 525, 11 Can. Cr. Cas. 188.

—Admission by prisoner made to constable without preliminary warning or caution—Subsequent repetition.]—Defendant, while confined in jail awaiting trial on a charge of murder, was visited by a detective who had been sent by the Provincial Government to inquire into the case, and who, without preliminary warning or caution of any kind, succeeded in obtaining from defendant an admission that a statement made by her previously was untrue. Shortly afterward the same admission was made to the prosecuting officer in the presence of defendant's counsel:—Held, that, in the absence of evidence to rebut the presumption that the second statement was made under the operation of the same influence as the former one, the trial Judge erred in receiving evidence of it, and that the defendant, who had been convicted, was entitled to a new trial. Also, that the burden of showing that the influences under which the first statement was made had been dispelled when the second statement was obtained, rested upon the Crown. Also, that the prisoner's counsel, who was present when the second statement was made, could not assent to or waive anything to the prisoner's prejudice, and that, in a case where the prisoner herself could not make a waiver or admission, such waiver or admission could not be made through the agency of her counsel.

The King v. Hope Young, 38 N.S.R. 427, 10 Can. Cr. Cas. 466.

—Proof of previous conviction—Time for.]—The proper time for proving a previous conviction against a prisoner under the Criminal Code section 971, is not upon the trial of the offence, but after the trial and before sentence. Where there has been a previous conviction, within the recollection of the magistrate, but the Crown has failed to prove it, and it has not been otherwise shown, the magistrate may proceed upon his own initiative, and may inform himself at the same time as to the previous conviction, and the age, character and antecedents of the prisoner. Semble, that the proper course to be pursued by the magistrate in such a case is not a proper subject for a reserved case.

The King v. Bonnevie, 38 N.S.R. 560, 10 Can. Cr. Cas. 376.

—Evidence of girl under 14—Understanding the nature of an oath.]—Upon a stated case the question was whether a girl under fourteen appeared sufficiently to understand the nature of an oath to justify the magistrate in receiving her testimony. The magistrate stated that on examination of the girl he found that she did understand, and there was nothing in her answers as reported to indicate otherwise. It appeared, also, that she had been attending school, and the handwriting of her signature to the depositions was good:—Held, that the magistrate was right in receiving the girl's evidence under oath, and that the fact that she had been instructed on the subject a few days before the trial afforded no sufficient ground for holding otherwise.

Rex v. Armstrong, 15 O.L.R. 47 (C.A.), 12 Can. Cr. Cas. 544.

—Evidence of statement by accused while in custody—Interrogation by police officer—Answer that he had nothing to state—Conduct as evidence.]—(1) When the prosecution offers evidence of an alleged confession by the accused, it is the duty of the presiding Judge to enquire into all the circumstances in order to ascertain if the confession was made freely, and, if he finds it was not, he must reject the evidence. (2) A prisoner's answer that he has nothing to say when confronted while in custody with the statement of a witness charging him with the crime of murder, cannot be considered as an admission or quasi-admission of the charge so as to be admissible in evidence against him. (3) The silence of the accused when incriminating facts are asserted in his presence does not afford a presumption of acquiescence, if the occasion, or the nature of the demand or the manner of making it will reasonably justify silence in a prudent man, and particularly if it is in the interest of the accused not to answer.

The King v. McCraw, 12 Can. Cr. Cas. 253.

—Summary conviction—Evidence in writing—Waiver by accused.]—The accused at a trial for a summary conviction may waive the taking down in writing of the evidence given against him.

The King v. Poirier; Re Janneau, 31 Que. S.C. 67, 12 Can. Cr. Cas. 360.

—Recorder's Court, Montreal—Evidence—Charter of Montreal, s. 503—Cr. Code, ss. 590, 856.]—In all cases before the recorder of the City of Montreal other than civil actions the provisions of the Criminal Code apply generally and the evidence must be taken down in writing.

Lacroix v. Weir, 8 Que. P.R. 186, 12 Can. Cr. Cas. 297.

—Statements made to constable at time of and after arrest—Admissibility — Inducement.]—The constable when arresting the accused, said: "I arrest you for assaulting old man McGarvey," and proceeded to handcuff him. Accused asked to be permitted to go to the office to get some money, and inquired: "How much will the fine be?" to which the constable replied that he did not know anything about that. Subsequently the accused asked to have the handcuffs removed as he had no intention of escaping, to which the constable answered that he was taking no chances, and that he "had not much sympathy with a man who would kick an old man and bite him:"—Held, that these remarks of the constable were not an inducement to the accused to speak.

Rex v. Bruce, 13 B.C.R. 1, 12 Can. Cr. Cas. 275.

—Attempt to commit rape—Duty of Judge to reject inadmissible evidence—Identity of party charged — Description — Rebuttal testimony — Proving contradictory statement by witness—Proving complaint to police officers.]—(1) It is the duty of the trial Judge in a criminal case to exclude inadmissible evidence, and its admission is a ground for a new trial whether objected to or not on the trial. (2) Whether or not the conditions required by section 11 of the Revised Evidence Act, 1906, formerly section 107 of the Criminal Code, 1892, to justify the admission of rebuttal testimony contradicting a witness who has denied making an alleged statement to a third party at variance with her testimony, have been fulfilled, is a question for the presiding Judge, and, if reasonably exercised, is not a ground for a new trial on a case reserved. (3) On the trial of an indictment for an attempt to commit rape statements of the person assaulted and of her companion present at the beginning of the assault, made to police officers, some four hours after the assault, that they had given a description of the assailant, but not stating what the description was, and evidence of the officers that in consequence of such description they had looked for the assailant were properly received, although statements of a like character had previously been made to other persons. (4) Where the prosecutrix on cross-examination had stated that she had given a description of her assailant in the presence of her father, and that in consequence of such description her father had suspected a person other than the prisoner, the Crown was properly allowed to prove by her father what the description was that his daughter had given in his presence. (5) On the trial of an indictment to commit rape if the only issue involved is as to the identity of the prisoner it is unnecessary for the trial Judge to point out to the jury that the law permits the finding of a lesser offence than the one charged.

The King v. Clarke, 38 N.B.R. 11, 12 Can. Cr. Cas. 299.

—Complaint in case of rape—Questions put to complainant by a relative on the following day—Admissibility.]—Where the complainant makes a statement, to a third party, not in the presence of the accused, such statement may be given in evidence, provided it is shown to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating nature.

Rex v. Spuzzum, 12 B.C.R. 291, 12 Can. Cr. Cas. 287.

—Corroboration—Illicit intercourse.]—Section 684 of the Criminal Code of 1892, which enacts that a person accused of offences of the nature therein indicated, inter alia of having illicit intercourse, with a girl of previously chaste character, is not to be convicted upon the evidence of one witness unless such evidence is corroborated in some material particular, does not make it necessarily incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. It is enough if there be other testimony to facts from which the tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged. New trial ordered after a case stated under s. 743 of the Criminal Code, and the propriety of so doing discussed.

The King v. Burr, 13 O.L.R. 485, 12 Can. Cr. Cas. 103.

—Murder — Statements of deceased — Res gestae.]—(1) On a trial for murder by shooting, evidence of statements made by the person shot immediately after the shooting and while under apprehension of further danger from the accused and requesting assistance and protection therefrom, is admissible as part of the res gestæ, even though the person accused of the offence was absent at the time when such statements were made. (2) Statements not coincident, in point of time, with the occurrence of the shooting, but uttered in the presence and hearing of the accused and under such circumstances that he might

reasonably have been expected to have made some explanatory reply to remarks in reference to them, are admissible as evidence. (3) Where on the trial for murder the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally, and no case of culpable homicide of less degree than murder was presented on the evidence, there could be no objection to a charge by the trial Judge to the jury that the offence could not be reduced by them from murder to manslaughter but that their verdict should be either for acquittal or one of guilty of murder.

Gilbert v. The King, 38 Can. S.C.R. 284, 12 Can. Cr. Cas. 127.

—Deposition of deceased person—Inadmissible where prisoner was not represented by counsel.]—The Criminal Code section 687 provides for cases in which and the conditions under which depositions taken on preliminary examinations can be used on the trial in the event of the deponent's death, and supersedes the comomn law procedure as to this matter. Where the accused was not assisted by counsel when the deposition was taken:—Held, that it could not properly be received in evidence against him and as there was no other evidence nothing was to be gained by requiring another trial.

The King v. Snelgrove, 39 N.S.R. 400, 12 Can. Cr. Cas. 189.

—Confession obtained by trick—Conversation with person who represents himself as having been sent by prisoner's counsel.]—(1) Statements made by a prisoner in a cell to a person whom he reasonably supposed to be an agent sent by his counsel to interview him regarding the defence are as much privileged as would be statements made to the counsel himself. (2) Where persons concealed themselves outside the cell in a position to overhear such statements in pursuance of a scheme previously planned, the interview should be treated as one with several persons who had fraudulently adopted the character of the counsel's representatives, and the cloak of privilege should be applied to what was heard by the listeners without, as well as the one within, the cell.

Rex v. Choney, 17 Man. R. 467, 13 Can. Cr. Cas. 289.

—Confession — Interrogation by police — Formation of jury—Juror not on list.]—Evidence should not have been received on trial for murder that the prisoner was silent or answered "absolutely nothing" to the detective who held him under arrest and asked what he had to say to the statement of the widow of the person killed that it was he (the prisoner) who had murdered her husband. Therefore, the direction by the trial Judge to the jury that this evidence formed a link in the chain of proof of guilt which they had to weigh was irregular and illegal, and a verdict of guilty when such evidence was received and such direction given should be set aside. Where a person summoned by mistake as a juror, whose name was not on the jury panel and who had not the qualification required by law was sworn and placed on the jury for a criminal trial a verdict rendered by such jury was a nullity and was set aside.

Rex v. McGraw, Q.R. 16 K.B. 193, 12 Can. Cr. Cas. 253.

—Evidence in reply of previous criminal act—Unlawful intent.]—Upon an indictment of the defendants (P., a physician and surgeon, and T., a boarding-house keeper), for procuring an abortion, the case for the Crown was that the defendants had performed an unlawful operation upon a certain woman, for the purpose of procuring a miscarriage. Of this there was evidence to go to the jury. The defence was then entered upon, and the defendant, P., swore that the operation was performed for a lawful purpose, and without any criminal intent. He was cross-examined as to whether he had not, some few weeks previously, performed an operation upon a person then in Court. He denied having done so, and all knowledge of having treated her at all. This person and the man whom she had subsequently married were, against objection, called in reply, and gave evidence that P. had been employed to operate, and had operated, upon her so as to procure a miscarriage. It was contended that this evidence was admissible, as tending to rebut the evidence of P., or, in other words, to prove the unlawful intent:—Held, that the testimony of these witnesses was improperly admitted, there being no evidence of a system which would let in proof of a single prior criminal act as part of it. The King v. Bond, [1906] 2 K.B. 389, discussed. The conviction of the defendants was set aside, and a new trial was directed under s. 1018 (b) and (d) of the Criminal Code.

Rex v. Pollard, 19 O.L.R. 96, 15 Can. Cr. Cas. 74.

—Comment of Judge on failure of accused to testify.]—A statement made by a Judge, in charging the jury in a criminal case, that the evidence of a witness for the Crown is wholly uncontradicted is not a comment on the failure of a person charged to testify, within the meaning of the Canada Evidence Act, R.S.C. c. 145, s. 4 (5).

Rex v. Guerin, 18 O.L.R. 425, 14 Can. Cr. Cas. 424.

—Untrue statement made to prisoner—Subsequent voluntary statement by prisoner.]—The prisoner, W., was tried for attempting to murder J. P., whose wife, M. P., was tried at the same time for aiding and abet-

ting in the attempt. Before the trial, and while W. was in custody, a police officer made an untrue statement to him, that M. P. had "done some talking" about the matter, upon which W. voluntarily made statements to the officer as to the key of J. P.'s house, and as to a club which he said he had used:—Held, that evidence was properly admitted as to the statements made by W. with regard to the key and the club. Subsequently to the making of the untrue statement by the police officer, conversations were overheard between W. and his father and between W. and M. P., in which the former admitted his guilt. Held, that evidence was properly admitted as to these conversations. Per Osler, J.A.:—Though the practice is not to be approved of, it is, generally speaking, no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made.

Rex v. White, 18 O.L.R. 640, 15 Can. Cr. Cas. 30.

—Prosecutions under liquor laws.]—See CANADA TEMPERANCE ACT; LIQUOR LAW.

—In summary conviction matters.]—See SUMMARY CONVICTION.

—As to special offences.]—See the title of the offence.

II. TRIAL PROCEDURE.

—Criminal Code—Alberta and Saskatchewan—Indictable offence—Preliminary inquiry—Preferring charge—Consent of Attorney-General—Powers of deputy—Lord's Day Act, s. 17.]—Section 873 A. of the Criminal Code (6 & 7 Edw. VII. c. 8) provides that, "In the Provinces of Alberta and Saskatchewan it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as an indictment the offence with which he is charged. 2. Such charge may be preferred by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the Judge of the Court or of the Attorney-General or by order of the Court":—Held, that a preliminary inquiry before a magistrate is not necessary before a charge can be preferred under this section. Held, also, that the deputy of the Attorney-General for either said provinces has no authority to prefer a charge thereunder without the written consent of the Judge or of the Attorney-General or an order of the Court. Section 17 of the Lord's Day Act provides that "no action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed, nor after the expiration of sixty days from the time of the commission of the alleged offence." Held, that the deputy of the Attorney-General of a province has no authority to grant such leave.

In re Criminal Code, 43 Can. S.C.R. 434, 16 Can. Cr. Cas. 459.

—Theft—Discharge of accused at preliminary enquiry—Subsequent committal by same magistrates—Indictment—Validity.]—

R. v. Hannay, 2 W.L.R. 543 (B.C.).

—Criminal trial—Sanity or insanity of accused—Inquiry—When to be held.]—On a trial for murder, the Crown moved for an inquiry as to prisoner's sanity and the case was sent over to the next assizes, the trial Judge remarking: "There will be that preliminary trial first to determine. Of course, when that time arrives, there may not be any doubt about his sanity, or, on the other hand, there may not be any doubt about his insanity." At the next assizes, there was a different Judge. The trial proceeded without the inquiry as to sanity being held as mentioned. It was then objected on behalf of accused that the inquiry should have been held before trial, and a reserved case requested for the opinion of the Court of Appeal. The objection was overruled, and a reserved case refused:—Held, on appeal, per Macdonald, C. J.A., that the Judge at the first assize merely directed counsel how they should proceed at the second assize, and that the motion should be dismissed. Per Irving and Martin, JJ.A.:—That counsel for accused by proceeding to verdict at the second assize, had waived missible in the present case?—Held, on or abandoned any order that was made, or supposed to have been made, at the previous assize. Per Martin, J.A.:—The proper order to have made at the first assize was to have postponed the trial in the ordinary way, leaving it to the Judge at the next assize to decide, de novo, the issue as to the sanity or insanity of the accused at the time of such next issue.

Rex v. Watt, 15 B.C.R. 466 (C.A.).

—Mixing up trials—Evidence of previous similar offence.]—There were four questions reserved for the opinion of the Court: 1. Whether there was any corroboration of the evidence of the boy on whom the assault was committed, this corroboration being required on account of the fact that the boy was too young to take an oath? 2. Was it competent for the trial Judge to look to the whole case, including the evidence put in by the defence, for such corroboration? 3. The Judge having heard one charge against the accused, he then adjourned that case

and proceeded with another charge. After hearing the second charge, he dismissed the first and convicted upon the second. Was it competent for the Judge to adopt this procedure? 4. The trial Judge admitted evidence of a boy who testified to a previous similar offence committed by the accused with regard to himself (the boy). Was this evidence ad the first point, per Macdonald, C.J.A., and Irving, J.A., that there was no corroboration. Per Martin and Galliher, JJ.A., upholding the trial Judge, that there was corroboration. Also that corroboration may be furnished by a child too young to take an oath. Held, on the second point (per curiam) that the whole case might be looked to for corroboration. Held, on the third point, per Macdonald, C.J.A., and Irving, J.A., that the matter involved in this question was simply one of procedure, and it was open to the Judge to deal with the cases in any order he chose; or at all events that the accused was not prejudiced by the manner in which the Judge heard and determined the charges. Per Martin and Galliher, JJ.A.:—That the mixing up of the two trials occasioned "a substantial wrong or miscarriage" under section 1,019. Held, on the fourth point (per curiam) that evidence of a prior offence was not admissible on the charge in the present case. The result was that the conviction was set aside and a new trial ordered.

Rex v. Iman Din, 15 B.C.R. 476.

—Comment on failure to call witness—Empanelling of jury.]—(1) If the trial Judge has no doubt that there was evidence of the offence to go to the jury, he should not reserve a case upon that point. (2) Where defendant's counsel during the trial states that he intends to call a witness to prove certain facts but does not call any witness on that point, the Crown counsel may properly comment on such failure in his address to the jury. (3) As to the Yukon Territory the provisions of the Yukon Juries' Ordinance passed under the authority of 3 Edw. VII. (Can.) c. 73, superseded sub-sections 2 and 3 of s. 667, Criminal Code, as to the procedure on impanelling a jury.

The King v. Brindamour, 11 Can. Cr. Cas. 315.

—Wilfully obstructing a peace officer—Right of accused to be put on election.]—(1) An accused party, charged before two justices of the peace with wilfully obstructing a peace officer in the execution of his duty, cannot be tried summarily by them without his consent, after being put to election as provided in s. 778 Cr. Code. A summary conviction of the accused by the justices, without his consent, is irregular and will be quashed on appeal. (2) The Court to which an appeal is taken by the accused from a summary conviction so made, shall hear and determine de novo the charge upon which it was made and make such other conviction or order as it thinks just. (S. 754 Cr. Code.)

Von Koolberger v. Lapointe, 19 Que. K.B. 240, 16 Can. Cr. Cas. 228.

—Second preliminary enquiry—Fresh information on same charge—Discharge on first and committal on second enquiry—Transmission of second depositions only.]—(1) A person discharged by a justice on a preliminary enquiry for an indictable offence may be summoned again before the same or another justice on a fresh information for the same offence. (2) If the accused is committed for trial on the second preliminary enquiry, the depositions on the first, when he was discharged, need not be transmitted to the trial Court under Code s. 600.

The King v. Hannay, 11 Can. Cr. Cas. 23.

—Insanity of prisoner—Invalidity of conviction—Habeas corpus.]—No person can be rightly tried, sentenced or executed while insane. If there be sufficient reason to doubt whether an accused person is unable, on account of insanity, to conduct his defence, the question whether by reason of such insanity he is unfit to take his trial should first be tried.

Rex v. Leys, 16 O.W.R. 544.

—Indictment—Special leave of Attorney-General.]—1. The Attorney-General has the right to directly present to the grand jury an indictment against a person suspected of committing a criminal offence, without having recourse to a preliminary enquiry before a magistrate. 2. The fact that an accused person has been sent up to the assizes for trial pursuant to a preliminary inquiry, does not deprive the Attorney-General of the right to bring an indictment before the grand jury and to ignore altogether the proceedings already taken before the magistrate.

The King v. Houle, 12 Que. P.R. 4.

—Indictable offence—Place of trial.] — At common law and under the Criminal Code, a person accused of an indictable offence has a right to be tried in the Judicial District in which the offence was committed, unless an order of the Court is first obtained, under s. 884 of the Code, directing that the trial be held elsewhere. Ss. 557, 580, 584 (c), 873 A, and 884, of the Code, considered. The Queen v. Ponton, 2 Can. Crim. Cas. 192. The King v. O'Gorman, 12 Can. Crim. Cas. 230, and The King v. Roy, 14 Can. Crim. Cas. 368, followed.

Rex v. Lynn, 15 W.L.R. 336 (Sask.).

—Count applying to more than one offence.]—Upon an indictment containing a count "That M. at the parish of St. H. in the county of M. on divers days and times

between March 31, A.D. 1909, and May 10, A.D. 1909, unlawfully did obstruct or interrupt, or cause to be interrupted or obstructed, the free use of the railway of the T. Ry. Co. by putting or placing or causing to be put or placed upon the said railway certain pieces of iron, iron bolts, horseshoes, rocks, and other matters or things," contrary to s. 518 of the Criminal Code, R.S.C. 1906, c. 146, evidence was given that obstructions were placed on the track upon several different days, among others April 14, 15, 17 and 30. Counsel for defendant requested that the prosecutor should elect which offence he proceeded upon, on the ground that each count must apply to a single transaction. The Judge refused to compel the election, and a case having been reserved:—Held, that the prosecutor could not be compelled to elect under the circumstances as the count in question charged only one offence, and the evidence of the different acts of obstruction was admissible under the count. Held, also, that the prosecution might treat the several acts of obstruction as successive cumulative acts, forming but one offence in law, and further, held, that at all events under the circumstances no substantial wrong or miscarriage had been occasioned and a new trial should be refused.

The King v. Michaud, 39 N.B.R. 418.

—Quashing of former indictment—New indictment preferred by Attorney-General.]—1. Although an indictment may have been set aside by the Court for irregularities in procedure at the preliminary inquiry, nothing prevents the Attorney-General from presenting a new indictment which will be submitted to the grand jury without there having been any preliminary inquiry or any information whatever before a magistrate.

The King v. Robert (No. 2), 12 Que. P. R. 9.

—Commissions of assize—Abolition of—Charge not objected to by defence—Non-direction—Dying declaration.]—The abolition of commissions of assize is within the competence of the Provincial Legislature, the reading of the commission not being "procedure" within the meaning of s. 91, sub-s. (27) of the B.N.A. Act. In a trial for murder, counsel for the Crown in opening the case, directed the attention of the jury to the blood-stained clothing of one of the prisoners. It developed later in the trial that the witness capable of proving the ownership of the clothing was the wife of the prisoner in question, and she was not examined. The subject was not brought to the attention of the jury in any other way, nor did the trial Judge refer to it in his summing up; nor was the charge objected to by either side:—Held, that the counsel for the Crown should not have in his opening indicated evidence of such gravity which he subsequently was unable to submit to the Court and jury, and that omission by the trial Judge to advise the jury to ignore the remarks of counsel was non-direction, causing a substantial wrong within the meaning of s. 1019 of the Code, so as to entitle the accused to a new trial. The injured woman said to another Indian woman, "Fellowes hurt me and make me die," and to her father she said, "I am going to die, hurry up and get the priest"; "Sure, I am going to die, hurry up and get the priest for me." Held, that this was sufficient indication of apprehension of imminent death and hopelessness of recovery to be admitted in evidence as a dying declaration. A "reply" of a Crown counsel under s. 944 is not restricted to answering matters dealt with by the prisoner's counsel. Where a witness, who is being examined through an interpreter, voluntarily makes a statement incriminating the accused, but which statement is included in other evidence subsequently admitted, the accused is not necessarily prejudiced thereby. Held, on the facts that the objections taken to the interpreter and his competency were not well founded.

Rex v. Walker, 15 B.C.R. 100, 13 W.L.R. 47, 16 Can. Cr. Cas. 77.

—Several justices hearing same charge—Jurisdiction.]—An information for assault was laid before S., justice of the peace for A. county. After summons issued an order nisi of prohibition was served on him at the instance of the defendant and no further proceedings were taken before him. B., another justice for the county, having been requested by S. to hear the charge, took another information and issued a summons. On the return of the summons the defendant's attorney who was clerk of the peace advised B. that he had no jurisdiction, and B. thereupon refused to proceed. An information was then laid before R., another justice of the peace for A. county who was requested by S. to act after B. had declined to proceed. An order nisi of prohibition having been granted against R.:—Held, that the three justices had concurrent jurisdiction, and as S. and B. were not bona fide proceeding in the matter, there was no ground for interfering with R.

Ex parte Peck (No. 2), 39 N.B.R. 274. 16 Can. Cr. Cas. 49.

—Magistrate's conviction under repealed statute—Attempt to sustain under different statute.]—The defendant was prosecuted before a police magistrate for a breach of the provisions of s. 415 of the Railway Act of Canada, R.S.C. 1906, c. 37, and on the evidence was found guilty of the offence as charged. No amendment was asked for, and a conviction was recorded on the charge as laid. Subsequently the magistrate discovered that s. 415 had been repealed, and he thereupon reserved for the

opinion of the Court of Appeal the question whether the conviction should be allowed to stand under s. 283 of the Criminal Code:—Held, that the conviction could not be sustained under a different statute.

Rex v. Corrigan, 20 O.L.R. 99, 15 Can. Cr. Cas. 310.

—Charge preferred before Supreme Court by Deputy Attorney-General—No preliminary hearing.]—After the conviction of the accused on a charge preferred against him by the agent of the Attorney-General, the Deputy Attorney-General, who appeared in person, without obtaining the leave of the Judge or a direction from the Attorney-General, no preliminary hearing having been held, preferred a further charge signed by himself against the accused, on which, after trial, he was convicted. Objection having been taken to the charge on the ground that the Deputy Attorney-General had no authority to prefer such charge without leave of the Judge or direction of the Attorney-General, and on the ground that no preliminary hearing had been held, a case was stated by the presiding Judge to the Court en banc:—Held (Johnstone, J., dissenting), that the Deputy Attorney-General is not an agent of the Attorney-General within the meaning of the term as used in the Criminal Code, and is not, therefore, authorized to prefer a charge as agent of the Attorney-General. 2. That while by the General Interpretation Act (Dom.) it is provided that words directing or empowering any minister to do any act or thing includes the lawful deputy of such minister, such provision is controlled by the special interpretation sections of the Criminal Code, and as the deputy is not referred to therein, it must be held that the deputy of the Attorney-General is not by reason of his office authorized to prefer a charge under the provisions of s. 873a of the Criminal Code. 3. The Deputy Attorney-General, not being an agent of the Attorney-General under the provisions of s. 873a of the Code authorized to prefer a charge, the conviction of the accused must be quashed, not having been preferred with the leave or by the order of the Court.

The King v. Duff (No. 2), 2 Sask. R. 388. 15 Can. Cr. Cas. 454.

Felony—Polling jury—Jury separating—Refreshments for jury.]—In a prosecution for felony, it is discretionary with the trial Judge to permit or refuse to allow the jury to be polled. Held, the prisoner being convicted of felony, that the circumstances—that two of the jurors had, during the trial, but before the Judge's charge, been allowed to separate for a short time from the other jurors in the custody of one of the constables, who had been placed in charge of the jury, and during such separation to hold a short conversation, not referring to the cause, with a stranger to the proceedings, and to partake, at their own expense, of intoxicating liquor, insufficient in quantity to cause intoxication—did not constitute sufficient ground for discharging the prisoner, or for a new trial.

Regina v. McClung, 1 Terr. L.R. 379.

—Grand jury—Indorsing names of witnesses on indictment.]—Motion to quash an indictment at assize. Amongst the witnesses who gave evidence before the grand jury were two who had been summoned by the grand jury on its own motion, and whose names were not indorsed on the bill of indictment:—Held, that the provisions of s. 645 of the Criminal Code, requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment, are directory only, and an omission so to indorse does not invalidate the indictment.

The King v. Holmes, 6 Can. Cr. Cas. 402.

—Contradicting one's own witness—Other relevant testimony admissible although inconsistent—Witness hostile or adverse—Refreshing the memory.]—(1) The party on whose behalf a witness is called is not debarred by Code s. 699 from proving by other witnesses any relevant facts inconsistent with or contradictory of such witness's testimony without a ruling that the witness is hostile to the party calling him. (2) The witness's deposition at the preliminary enquiry may be shown to him on his examination in chief at the trial for the purpose of refreshing his memory, but neither the examining counsel nor the witness may read the deposition aloud. (3) On the witness silently reading his previous deposition, a question, which had been put to the witness before he saw the deposition, and to which he had given an unexpected answer, may be re-put; and only in case the witness, after his memory has been so refreshed, persists in the same unexpected answer, can the question be repeated to him in a leading form from the depositions. (4) The opposite party is entitled to cross-examine not only upon the examination in chief but upon the previous depositions which had been so shown to the witness for the purpose of refreshing his memory.

The King v. Laurin (No. 5), 6 Can. Cr. Cas. 13 (Wurtele, J.).

—Private prosecutor—Right to conduct proceedings.]—A private prosecutor is no party to a criminal prosecution, and cannot insist that he or his counsel shall aid in the conduct thereof.

Rex v. Gilmore, 6 O.L.R. 286, 7 Can. Cr. Cas. 219.

—Trial — Cross-examination—Right to re-examine.]—The right to re-examine follows necessarily upon cross-examination, even as to the matter elicited during the latter which is both inadmissible and volunteered. Such matters should be expunged at the in-

stance of the cross-examiner if it be desired to avoid re-examination.

Rex v. Noel, 6 O.L.R. 385 (C.A.), 7 Can. Cr. Cas. 309.

—Swearing of grand jury—Evidence submitted to grand jury—Initialling, by foreman, of names of witnesses.]—(1) It is essential that, at the time the foreman of the grand jury is sworn, the other jurors be present and hear the oath taken by their foreman. And, therefore, where it appeared that none of the other jurors were in the box at the time their foreman was sworn, that there was no certainty that the oath taken by him was heard by them, that the other jurors were only sworn, afterwards, to observe the same oath which their foreman had taken, and that objection was duly made by motion to quash, before the arraignment of the defendant, the indictment found by the grand jury, was held to be null and void. (2) The omission by the foreman to initial the names of the witnesses examined before the grand jury, as required by law, is a fatal defect, and has the effect of annulling the indictment. (3) The submission of a record to the grand jury, in order that they may examine certain exhibits, and verify certain statements made by witnesses examined before them, is not a fatal irregularity, where it is proved that the decision of the grand jury was arrived at without reference to the depositions contained in such record. (4) The objections to the indictment above mentioned are proper grounds for a reversed case.

Belanger v. The King, 12 Que. K.B. 69, 6 Can. Cr. Cas. 295.

—Grand jury—Summoning.]—In the Province of British Columbia it is imperative that thirteen jurors should be summoned for service on the grand jury, although seven of those appearing are sufficient to constitute a grand jury; and where the sheriff summoned only twelve and omitted to summon the thirteenth because he was informed that the latter had become demented, seven of them are not competent to find an indictment.

Rex v. Hayes, 39 Can. Law Jour. 759, 7 Can. Cr. Cas. 453.

—Trial by jury in the Territories—Assault, occasioning actual bodily harm—N. W. T. Act, s. 66.]—A person charged with assault occasioning actual bodily harm contrary to s. 262 of the Criminal Code is not entitled, under s. 67 of the North-West Territories Act, to be tried with the intervention of a jury. Section 66 extends to all minor offences included in the several offences specifically enumerated therein.

The King v. Hostetter, 5 Terr. L.R. 363, 7 Can. Cr. Cas. 221.

—Misapprehension of jurors—Statements by jurors after verdict.]—It is no ground for stating a reserved case, after a trial and conviction, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; it is contrary to principle to allow the statements of jurors, even under oath, to be used for the purpose of an application for a reserved case.

Rex v. Mullen, 5 O.L.R. 373, 6 Can. Cr. Cas. 363.

—Grand jury—Indorsing names of witnesses on indictment—Cr. Code, s. 645.]—The provisions of section 645 of the Criminal Code requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment are directory only and an omission so to indorse does not invalidate the indictment. An indictment under s. 273 of the Code charging accused "with unlawfully using on her own person . . . . with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient.

Rex v. Holmes, 9 B.C.R. 294, 6 Can. Cr. Cas. 402.

—Trial—Place other than the court house.]—At the trial of an indictable offence the presiding Judge has the power to order the Court to be adjourned to a place in the county other than the courthouse for the purpose of allowing the jury to hear the evidence of a witness who was unable, through illness, to leave his home.

The King v. Rogers, 36 N.B.R. 1, 6 Can. Cr. Cas. 419.

—Grand jury—Constitution of—Cr. Code, s. 656.]—A sheriff when about to summon, pursuant to s. 48 of the Jurors' Act, one of the jurors drafted to serve on a grand jury, ascertained that the juror was demented and did not summon him:—Held, that the grand jury was not legally constituted and that an indictment found by the jurors who had been summoned must be quashed. A motion to quash such an indictment is not an objection to the constitution of the grand jury within the meaning of s. 656 of the Criminal Code.

Rex v. Hayes, 9 B.C.R. 574, 7 Can. Cr. Cas. 453.

—Wounding and assault—Limit of twelve peremptory challenges.]—On an indictment for unlawful wounding, in which is included a separate count for assault, the accused is not entitled to claim the total number of peremptory challenges of jurors as he would have if the charges were contained in separate indictments, but is limited to the largest number allowed in respect of any single count.

The King v. Turpin, 8 Can. Cr. Cas. 59, Ritchie, J.

—Trial in N.W.T.—Election to be tried by Judge or Judge and jury—Refusal of Judge to dispense with a jury.]—The N.W.T. Act,

R.S.C. 1886, c. 50, s. 67 (section substituted by 54-55 Vict. 1891, c. 22, s. 9, provides that: "When the person is charged with any other criminal offence the same shall be tried, heard and determined by the Judge with the intervention of a jury of six; but in any such case the accused may, with his own consent, be tried by a Judge in a summary way, and without the intervention of a jury. So held, where the event of the accused electing to be tried by a Judge alone, the Judge is not bound so to try the case, but may insist upon the intervention of a jury. So, held, where the accused was first tried with the intervention of a jury who disagreed, and upon a second trial coming on withdrew his first election and elected to be tried by the Judge alone.

The Queen v. Webster, 2 Terr. L.R. 236, 8 Can. Cr. Cas. 457.

—Remarks by trial Judge during trial.]—Held (affirming the judgment of Wurtele, J.), 6 Can. Cr. Cas. 365, 12 Que. K.B. 368:—1. A verdict cannot be impeached in consequence of an observation made by the Judge presiding at the trial, unless such observation was calculated to influence the jury against the defendant; and, consequently, the fact that the presiding Judge remarked to the defendant's counsel while the jury was being sworn, "if you continue to challenge every man who reads the newspapers, we will have the most ignorant jurors selected for the trial of this cause," is not a proper ground for granting leave to appeal to the Court of King's Bench, appeal side, such remark having no tendency to influence the jury against the defendant, and being without importance. 2. On a trial for conspiracy to defraud a railway company, by fraudulently obtaining information of the secret audits about to be made and furnishing the same to conductors of cars to enable them to be prepared for the audits, proof that information of this nature might be given by one conductor to another for purposes other than to defraud the company, was properly excluded, because such evidence would be merely hypothetical, and could not disprove the object of the conspiracy, or throw any doubt on the evidence which had been adduced to show the object which the parties had in view. 3. An observation by the Judge presiding at the trial of a criminal case, in his charge to the jury, to the effect that "about forty or fifty witnesses had been examined for the purpose of establishing the defendant's good character, and that it was very strange that it should take forty or fifty witnesses to establish it," is not an irregularity which can constitute a ground for granting leave to appeal, the presiding Judge having the right to express his opinion of the evidence, which, however may or may not be accepted by the jury. The essential point is that the whole evidence be submitted to the jury who decide finally as to the innocence or guilt of the accused. 4. An appeal from the verdict to the Court of King's Bench sitting in appeal lies only upon questions of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge. It follows that in cases such as the following, the right of appeal does not exist, viz., where it is alleged that one of the jurors was prejudiced against the prisoner; where it is alleged that the verdict was the result of an improper arrangement entered into between the jurors, these being questions of fact; or where it appears that no application was made to the trial Judge to reserve the question for the opinion of the Court of Appeal.

The King v. Carlin, 12 Que. K.B. 483, 6 Can. Cr. Cas. 507.

—Verdict — Interpretation — Wounding with intent—"Guilty without malicious intent."]—On an indictment for wounding with intent a verdict of "guilty without malicious intent" is an acquittal. Judgment appealed from (R. v. Slaughenwhite, 9 Can. Cr. Cas. 53, 37 N.S.R. 382, reversed (Davies and Idington, JJ. dissenting).

Slaughenwhite v. The King, 35 Can. S. C. R. 607, 9 Can. Cr. Cas. 173.

—Re-examination of witness on new matter—Application to cross-examine thereon.]—If upon a summary hearing the justice permits the prosecution, in re-examination of a witness, to open up new matter although objection was taken by the defence, he must also allow the accused to cross-examine upon such new matter; but if permission to again cross-examine is not applied for, the proceedings are not objectionable because of such re-examination.

The King v. Perras, (N.W.T.), 9 Can. Cr. Cas. 364.

—Crown prosecutors in Ontario—Right of reply.]—A Crown prosecutor instructed by a provincial Attorney-General is a counsel "acting on behalf of the Attorney-General" under Code s. 661 (2) and has the right of reply, although no witnesses are called for the defence.

The King v. Martin, (Ont.), 9 Can. Cr. Cas. 371, 9 O.L.R. 218.

—Right of reply—Crown prosecutors in N.W.T. instructed by Department of Justice.]—Crown prosecutors in the North-West Territories acting under instructions from the Department of Justice at Ottawa are within the provision of Code s. 661 respecting counsel acting on behalf of the Attorney-General or Solicitor-General and have the right of reply, although no witnesses are examined for the defence.

The King v. Charles King, (N.W.T.), 9 Can. Cr. Cas. 426.

—Exclusion of jury—Enquiry as to admissibility of evidence.]—The jury should not

be excluded during the preliminary enquiry as to whether a certain statement is admissible as a dying declaration.

Rex v. Aho, 11 B.C.R. 114, 8 Can. Cr. Cas. 453.

—Speedy trial—Election—Warrant of commitment—Depositions.]—Where the depositions disclose an offence which could not have been disposed of by speedy trial the prisoner will not be allowed to elect for speedy trial if the Crown intends to lay the more serious charge, even though he is committed for an offence which may be disposed of by speedy trial.

Rex v. Preston, 11 B.C.R. 159, 9 Can. Cr. Cas. 201.

—Nolle prosequi—Costs of defendant.]—Where a nolle prosequi has been entered by the Attorney-General, upon an indictment in the name of the King at the instance of a private prosecutor, and the accused is thereupon discharged, judgment is, within the meaning of Art. 833 of the Criminal Code, given for the defendant, and he is entitled to recover costs from the private prosecutor.

R. v. Blackley, 13 Que. K.B. 472, 8 Can. Cr. Cas. 405.

—Election of prisoner to be tried summarily—Amendment — Further election of prisoner.]—A prisoner was indicted before a county Judge charged under s. 181 of the Criminal Code with having on the 9th January, 1905, seduced a girl of or above the age of 14 and under that of 16 of, as alleged, previously chaste character, upon which he elected, under s. 767 of the Code, to be tried summarily, but on the evidence disclosing a connection with her six days previously at another place, the charge was amended by setting up the offence as having been committed on such prior date, and without giving the prisoner the right of electing whether or not he would be tried summarily on such amended charge, he was tried thereon and convicted:—Held, that the conviction could not be supported, for the offence could only be committed once, namely, on the first occasion on which the connection took place, so that the date was material to the charge, and while an amendment could be made substituting the prior date, which was in effect preferring a new charge based in a different transaction, the prisoner should have been given the opportunity of electing under s. 767 how he would be tried thereon.

Rex v. Lacelle, 11 O.L.R. 74 (C.A.), 10 Can. Cr. Cas. 229.

—Summary trial—Conviction for theft—Defect in form—Waiver.]—Defendant was charged before the stipendiary magistrate for the City of Halifax with the theft of a number of amalgam plates and copper plates with gold amalgam thereon of the value of $200 or thereabouts, and, the charge having been stated to him in open Court and he having pleaded guilty, he was thereupon convicted of the offence charged and sentenced to three years' imprisonment in the penitentiary. An order in the nature of a habeas corpus for defendant's discharge was applied for, on the ground that the magistrate could not proceed with the trial without the preliminary examination required under section 789 of the Code and that the requirements of section 786 were not complied with:—Held (Weatherbe, C. J., dissenting), that the stipendiary magistrate had power to proceed with the trial under section 785 of the Code, as amended by Acts of 1900, c. 46, without entering upon the preliminary examination under section 789. Also, that the procedure adopted by the magistrate was sufficiently in accordance with the requirements of the statute to be considered as defective in form only, and, there being a good conviction and one alleging that defendant had been convicted, the provisions of section 800 applied. Also, the charge having been read to defendant in the terms of the information, which was in writing, and defendant having pleaded guilty, it was not competent for him thereafter to say that he was not aware of the nature and particulars of the charge.

Rex v. McLeod, 39 N.S.R. 108.

—Summary hearing—Omission of magistrate to reduce evidence to writing.]—The omission of the magistrate to have the evidence taken in writing at the trial of a charge under the summary convictions clauses is fatal to the conviction.

R. v. McGregor, 11 B.C.R. 350 (Hunter, C.J.), 10 Can. Cr. Cas. 313.

—Summary trial—Election by accused—Preliminary question.]—The omission by the magistrate to hold the preliminary inquiry as provided in section 879 of the Code, to enable him to decide whether or not the case should be disposed of summarily, invalidates the conviction. Held, further, that the omission to inform the accused as to the probable time when the first Court of competent jurisdiction would sit, was also fatal.

Rex v. Williams, 11 B.C.R. 351 (Hunter, C.J.), 10 Can. Cr. Cas. 330.

—Preliminary enquiry — Commitment on other charges — Indictment — Attempt to murder—Amendment of indictment.]—(1) The magistrate who holds the preliminary investigation on a charge preferred against an accused person, may commit him on any other one or more charges disclosed by the evidence. (2) On the trial of a person accused of attempt to murder by shooting, evidence that he had burglar's tools in his possession at the time is admissible, as tending to prove criminal intent. (3) An indictment that "A.B. attempted to kill and murder C.D." sufficiently discloses an in-

dictable offence, and the Court has the power to allow it to be amended so as to read that "A.B. with intent to commit murder, shot at C.D." (4) It is lawful for the Judge, in charging the jury in a trial for an attempt to murder, to instruct them that they may draw an inference as to the prisoner's intent to kill from the circumstances of his being a stranger loitering in a street or park, between four and five o'clock in the morning, with a loaded revolver and burglar's tools in his possession.

The King v. Mooney, 15 Que. K.B. 57, 11 Can. Cr. Cas. 333.

—False statutory declaration—No allegation of intention to mislead—Amendment of charge—Withdrawal of election to be tried by jury—Preliminary inquiry on several charges against different defendants.] —The defendant was charged for that in a certain statutory declaration, he did falsely, wilfully and corruptly declare to the truth of certain facts, setting them out. Upon objection before plea the charge was amended on the application of the Crown by adding an allegation that the defendant was duly authorized to make the declaration, but there was no allegation that it had been made with intent to mislead:—Held, that no allegation of intention to mislead was necessary; that the amendment was properly allowed, and that the charge was sufficient in point of form. Held, further, that section 26 of the Canada Evidence Act, 1893, authorized the making as well as the taking of the declaration. The defendant pleaded to the charge before amendment and elected to be tried by a Judge with the intervention of a jury. Upon being called upon to plead to the charge as amended he sought to alter his election and to be tried by the Judge alone. This was refused. Held, that the refusal was justified. The declaration in question had been made by four parties commencing, "We," and setting out the names of the declarants, but there was no statement that it was made jointly and severally. Held, that, the defendant having signed it, there was no reason why he should not be taken to have made it of his own personal knowledge. The evidence at the preliminary investigation was taken on an information against the defendant at the same time as upon separate informations against two of his co-declarants. Held, that the defendant was properly charged upon such evidence. The defendant at the preliminary investigation, after being cautioned, requested that he should be sworn, and made his statement upon oath. Held, that such statement was properly receivable against him at the trial.

Regina v. Skelton, 3 Terr. L.R. 58, 4 Can. Cr. Cas. 467.

—Intermixing of trials by magistrate—Same evidence in both cases except as to testimony of accused — First charge sustained and second dismissed.]—(1) On the summary trial of concurrent charges of assault and pointing a fire-arm, the magistrate after hearing the assualt case reserved judgment to take up the second charge, but no further evidence then being adduced except the examination of the defendant, the magistrate dismissed the second charge and entered a conviction upon the charge of assault. There is no presumption under such circumstances that the intermixing of the trials has prejudiced the accused, and the conviction should be sustained unless such prejudice is clearly shown. (2) On obtaining the consent of the accused to a summary trial, under Rev. Cr. Code, s. 778, and stating to him his option of jury trial, it is not essential that the date of the sittings of the jury Court should be stated if the name of the latter Court and the city where the trial would take place are both specified and the accused told that he may be sent for trial at its "next ensuing sitting."

The King v. Reid, 12 Can. Cr. Cas. 352.

—Hard labour — Sentence.]—A summary conviction by the recorder of Montreal with imprisonment with hard labour under an Act authorizing a penalty of imprisonment is a nullity and will be quashed on certiorari by the Superior Court.

Gévry v. Weir, Q.R. 30 S.C. 95 (Sup. Ct.).

—Depositions not in writing — Plea of guilty.]—(1) When a prisoner has pleaded guilty, in a summary trial, the depositions need not be in writing. (2) The discharge of a prisoner can only be obtained by an application for a writ of habeas corpus, and not by a certiorari.

King (Wm.) v. Weir (No. 2), 8 Que. P.R. 405.

—Evidence not taken down in writing—Consent of the accused.]—In a trial before the Recorder's Court, the accused may validly waive the taking down of evidence in writing, and a summary conviction pronounced after such trial will not be quashed on certiorari on the ground that such consent would be illegal.

King (Wm.) v. Weir, 8 Que. P.R. 400.

—Speedy trial—Adding counts to charge.] —When an accused person elects to take his trial before a judge without a jury on the charge upon which he was committed or to answer which he was bound over to take his trial under section 601 of the Criminal Code, 1892, leave should not be granted, under section 773 of the Code, for the addition to the charge of new or other charges for offences substantially different, unless the accused elect to be tried on such other charges also by a Judge without a jury. Rex v. Carriere (1902), 14 M.R. 52, followed.

Rex v. Douglas, 16 Man. R. 345, 12 Can. Cr. Cas. 120.

—Trial—Motion to discharge jury—Evidence given ruled to be inadmissible.]— Although a witness at a trial before a jury volunteers evidence which the trial Judge has already ruled to be inadmissible and which might have weight with the jury in arriving at a verdict, yet the Judge should not for that reason immediately discharge the jury and impanel a new jury to try the issue.

Rex v. Grobb, 17 Man. R. 191, 13 Can. Cr. Cas. 92.

—Summary trial—Jurisdiction of magistrate — Offence committed in another county.]— If a person is brought before a justice of the peace charged with an offence committed within the Province, but out of the limits of the jurisdiction of such justice the latter, in his discretion, may either order the accused to be taken before some justice having jurisdiction in the place where the offence was committed, Cr. Code [1892] s. 557; Cr. C. [1906] s. 665, or may proceed as if it had been committed within his own jurisdiction. S. was brought before the stipendiary magistrate of the City of Halifax charged with having committed burglary in Sydney, C.B.:—Held, that the stipendiary magistrate could, with the consent of the accused, try him summarily under Cr. Code [1892] s. 785 as amended in 1900. Cr. Code [1906] s. 777.

Re Charles Seeley, 41 Can. S.C.R. 5, 14 Can. Cr. Cas. 270.

—Trial—Charge to jury—Right of jury to find for lesser offence.— If the Judge allows the indictment to go generally to the jury, it is not competent for him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment.

Rex v. Scherf, 13 B.C.R. 407, 13 Can. Cr. Cas. 382.

And see SPEEDY TRIAL; SUMMARY CONVICTION; SUMMARY TRIAL.

—Summary trial — Conviction — Invalidity for uncertainty—Unlawful act causing danger.]— A conviction under Code s. 517 (f) for doing an unlawful act on a railway in a manner likely to cause danger is bad if it does not disclose the nature of the unlawful act.

The King v. Porte, 14 Can. Cr. Cas. 238, 18 Man. R. 222.

—Change of venue.]— The Court, in dealing with applications for change of the place of trial, is bound to act with caution, particularly, in ordering the change from the place in which the offence was committed, and to consider expediency to the ends of justice, nor is its power exhausted when once exercised. Hence, after a first order has been made to have a trial take place in another district than that in which it is charged the offence has been committed, the Court will make a further order that it be held in the latter district, on proof that the circumstances which necessitated the first order, have disappeared.

The King v. Roy, 18 Que. K.B. 506, 14 Can. Cr. Cas. 368.

—Evidence at trial—Comment thereon in Judge's charge.]— A Judge presiding at a criminal trial may, in his charge to the jury, state his own opinions as to what inferences of fact may be drawn from the testimony, while leaving it to the jury to believe or disbelieve any portion of the evidence and to draw their own inferences therefrom.

The King v. Swyryda, 15 Can. Cr. Cas. 138.

—Conspiracy—Offence committed in one county and tried in another—Venue.]— On an information laid in the county of York, the accused were charged with numerous offences against the election law alleged to have been committed in the "county of York, and in the county of Middlesex, and at other places in the province unknown." None of them resided, nor were found, nor apprehended in the county of York, but they were brought into that county solely by process issued under the information. Before the sitting of the Assize Court in the county of York the accused surrendered to the sheriff of the county, and elected to be tried before the County Court Judge. The grand jury returned a true bill against them. The offence, however, found to be established, and on which they were convicted, was a conspiracy wholly entered into and wholly carried out in the county of Middlesex, with no overt acts outside that county:—Held, on a case reserved, that there was no jurisdiction to try the case in the county of York, and that the conviction should be quashed notwithstanding s. 577 of the Criminal Code.

Rex v. O'Gorman, 18 O.L.R. 427, 15 Can. Cr. Cas. 173.

—Selling obscene pictures—Place of offence —Evidence — Summary trial — Reducing charge to writing — Examination of documents before trial.]— The defendant was summarily tried and convicted by one of the police magistrates for the city of Toronto upon a charge laid under s. 207 (a) of the Criminal Code. The information was that he "at the city of Toronto . . . did sell a quantity of obscene books, printed matter, pictures and photographs tending to corrupt morals." Being in prison pursuant to the conviction, an application was made for his discharge on the return of writs of habeas corpus and certiorari in aid. The evidence before the magistrate was given by police detectives, who said that they found the articles produced upon the person

of the defendant and in a valise in his room, that the defendant admitted that the valise was his, and said he had sold all these things for $200—"he did not say he had sold them here," i.e., in the city of Toronto, "but said he was here and expected to get the money here." No evidence was offered for the defence:—Held, that there was evidence that the sale took place in Canada. (2) It was urged that before evidence of a confession can be admitted, the prosecution must prove affirmatively that the confession was free and voluntary. Held, assuming the rule to be as stated and to be applicable upon such a motion, that there was nothing to show that all the facts necessary to make the evidence admissible were not properly proved; the written record need not contain the allegations of a witness which will render his evidence admissible. (3) A confession alone is sufficient to justify a conviction. (4) Upon the evidence, s. 778 (3) of the Criminal Code, requiring the charge to be reduced to writing and read over to the accused, after his consent to be summarily tried, was complied with; there is no reason why the charge should not be prepared in advance in anticipation of the accused's election; and the fact that the charge is in the form of an information is immaterial. (5) It was objected that, before the actual trial of the case, the magistrate had looked at the books and pictures found in the defendant's possession, and had thereby necessarily become prejudiced against the defendant. Held, that, as the magistrate was at liberty to look at the productions before issuing a summons or warrant, in order to form his opinion as to whether or not a case was made out, he was entitled to do so after the defendant was in custody, or at any time. (6) The information under which the defendant was convicted omitted to state that he "knowingly" did the act charged, which under the statute is a material element in the offence, and the same omission was made in the conviction and in the warrant of commitment. Held, that, though the magistrate had amended the conviction, before return to the certiorari, by inserting the word "knowingly," and, though the defect in the information was immaterial, the omission of the word "knowingly" in the warrant was a fatal objection to its validity, which was not cured as being an "irregularity, informality, or insufficiency," within the meaning of s. 1124 of the Code. (7) Although, however, the original warrant was clearly bad, the Court or Judge had power under s. 1120 of the Code to "make an order for the further detention of the person accused," and to direct the issue of a new warrant in accordance with the conviction as amended by the magistrate. Rex v. Morgan (1901), 5 Can. Cr. Cas. 63, 272, 2 O.L.R. 413, 3 O.L.R. 356, followed. (8) A conviction made by a magistrate, though under the summary trial provisions of the Criminal Code, is not in the same position as a conviction made by the sessions, and may be amended by the magistrate before return to a certiorari.

Rex v. Graf, 19 O.L.R. 238, 15 Can. Cr. Cas. 193.

—Conviction of foreigner — Interpreter—Capacity.]—Upon a motion to discharge a prisoner, upon the return of a writ of habeas corpus, the proceedings should not be conducted as upon an appeal from the magistrate's finding; the most that can be done is to see if there is evidence upon which the magistrate could pass and find as he did. All questions as to admissibility of evidence, method of conducting examinations, etc., are in the power of the trial tribunal; and such questions cannot be raised upon a motion to discharge. In this case the return was good upon its face, showing a warrant of commitment, which recited the conviction of the defendant for unlawfully committing an act of indecency in a public place; and there was ample evidence to support the conviction; but the defendant attempted to show by affidavits that, not understanding English, he did not know that he was on trial, and did not understand the evidence given. This was contradicted by one who was sworn as an interpreter at the trial, and by a policeman:—Held, that the capacity of the interpreter and all matters connected with the interpretation of the evidence were questions for the magistrate, and his finding could not be attacked in this way. Semble, that there is no inherent right in any foreigner that the proceedings taken in the Courts of this province shall be made wholly intelligible to him, even though he should be charged with crime. Cases in which a contrary doctrine is laid down turn upon some statutory or constitutional provision.

Rex v. Meceklette, 18 O.L.R. 408, 15 Can. Cr. Cas. 17.

—Summary trial — Stipendiary magistrate for county acting in absence of and on his request.]—Even though a stipendiary magistrate for a county may have conferred upon him by a provincial statute the powers of a police or stipendiary magistrate for a city or incorporated town, nevertheless he is not a police or stipendiary magistrate for the purpose of trying offences summarily under s. 777 of the Criminal Code. It is desirable that there should be uniformity of decisions in all the Courts of Canada on Federal legislation.

Rex v. Nar Singh, 14 B.C.R. 192, 14 Can. Cr. Cas. 454.

—As to special offences.]—See the title of the offence.

III. PROCEEDINGS IN APPEAL.

—Summary convictions—Appeal—Enforcing conviction after affirmance—Commitment—

Amendment.]—(1) The proviso in s. 3, c. 148, R.S.C. 1906, that no time during which a party convicted is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced, applies to cases of release on bail in appeal, under s. 750c Cr. Code. Hence, when the appealing convict has been out on bail and the conviction has been affirmed, it may be enforced by the appellate Court, although, when originally made, it contained no express direction that it should be suspended by an appeal, s. 1023 Cr. C. (2) A commitment for a time in excess of that ordered in the conviction, is not bad on that ground, which is merely an irregularity that may be cured by amendment under ss. 1121 and 1124 Cr. C. (3) When a conviction is affirmed and the appellate Court further condemns the convict to pay the costs of appeal, a commitment signed by the clerk of the Court commanding the gaoler to detain the convict during the period ordered in the conviction, and, further, until he shall have paid the costs of appeal, of the distress, of the commitment and of the conveyance to gaol, is valid. (4) A commitment for the period ordered in the conviction and, further, until certain costs are paid, is wrong as to the latter part, in not specifying the period of detention in default of payment. This, however, is not a ground for quashing the commitment, but an irregularity that may be cured by amendment under ss. 1121 and 1124 Cr. C.

Collette v. The King, 19 Que. K.B. 124.
16 Can. Cr. Cas. 281.

—Appeal to District Court—Reference by District Court Judge of question of law.]— An appeal from a conviction by two justices of the peace having been taken to the District Court, and a question having arisen as to the regularity of the proceedings, the District Court Judge referred such question to the Court en banc:—Held, that in such matters the Court appealed to, and in this case the District Court, is the absolute judge of facts and law, and the Court en banc had no authority to advise in the matters.

Mischowsky v. Hughes, 2 Sask. R. 219. 15 Can. Cr. Cas. 364.

—Appeal from summary conviction—Costs of appeal to be fixed by County Judge.]— Where upon an appeal from a summary conviction the County Court Judge purports to delegate the taxation of the costs of the appeal to the clerk of the Court, instead of himself fixing the costs of the appeal, a Superior Court on an application for prohibition from collecting the costs taxed by the clerk, may enlarge the motion to allow of an application to the County Judge to fix the costs and amend his judgment accordingly.

The King v. Hamlink, 2 O.W.N. 186.

—Reserved case after sentence—Admitting convict to bail pending appeal.]— 1. On reserving a case by way of appeal after conviction, the trial Judge has power to postpone sentence and admit the accused to bail meanwhile or after sentencing the accused to stay the execution of the sentence pending the determination of the reserved case upon bail being given. 2. Where the trial Judge has ordered bail and has fixed the amount thereof and the method of testing the sufficiency of the sureties, the taking of the recognizance is a ministerial act which may be delegated to justices of the peace. 3. When the recognizance of bail is taken by justices under the Judge's order, the justices become, for the purpose of such recognizance, temporary officers of the Court in which the order was made, and the recognizance is subject to estreat in such Court. 4. The power to respite the execution of the sentence pronounced until the appeal shall have been decided, is not restricted to cases reserved during the trial or in which no part of the sentence has been carried out, but may be exercised on granting a reserved case, after a substantial portion of the imprisonment ordered has been served. 5. A recognizance of bail may likewise be validly taken, on granting a reserved case after the trial and during the currency of the term of imprisonment conditioned for the surrender of the convict forthwith on the determination of the reserved case, if the Court of Appeal should either affirm the conviction or set it aside and order a new trial.

Johnston v. Attorney-General; The King v. Johnston, 16 Can. Cr. Cas. 296 (N.S.).

—Crown case reserved—Reversing verdict of County Court Judge.]— A County Court Judge, sitting under the Speedy Trials Act, Part 18 of the Criminal Code, made certain findings of fact and entered a conviction against the defendant for an offence against s. 417 of the Code. A case having been reserved by him, held, upon the findings the County Court Judge should have entered a verdict of acquittal and the Court ordered a verdict to be entered accordingly.

The King v. Ayoup, 39 N.B.R. 598.
16 Can. Cr. Cas. 375.

—Appeal from summary conviction—Courts of General Sessions in Ontario—No right to a jury on the appeal.]— An appeal from a summary conviction under the Criminal Code is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury.

R. v. Malloy, 4 Can. Cr. Cas. 116.

—Criminal appeal—Reserved case—Criminal Code, ss. 742, 743, 744.]— T., a letter carrier employed in the city of Quebec, was accused of having stolen a letter containing $4.50. He was arrested, and, after a preliminary inquiry, was committed for trial. Being afterwards brought before the same

magistrate under the provisions of Part LIV. of Criminal Code, he elected to be tried without a jury. Before pleading to the indictment his counsel raised a question of law and asked to have it reserved for the Court of Appeal, namely that it had not been proved that the letter he was accused of stealing (a decoy letter) was "a letter deposited in the post office," as provided by s. 326 (c) of the code:—Held, that in order to have a case reserved for the Court of Appeal there must be a trial, a decision on a point of law and a verdict of conviction. The case was therefore remitted to the clerk of the peace, District of Quebec, for further proceedings according to law.

The King v. Trépannier, 10 Que. Q.B. 175, 4 Can. Crim. Cas. 259.

—Case stated—Recognizance, imperative—Cash deposit not good—Criminal Code, s. 900, sub-s. 4.]—The recognizance required by s. 900, sub-s. 4, of the Criminal Code, is a condition precedent to the jurisdiction of the Court to hear the appeal and no substitute therefor is permissible.

Rex v. Geiser, 8 B.C.R. 169 (Walkem, J.), 5 Can. Cr. Cas. 154.

—Case stated—Transmitting case to District Registry.]—The provision in s. 87 of the B.C. Summary Convictions Act, that the appellant shall, within three days after receiving the case stated, transmit it to the District Registry, is a condition precedent to the jurisdiction of the Court to hear the appeal.

Cooksley v. Nakashiba, 8 B.C.R. 117 (Martin, J.), 5 Can. Cr. Cas. 111.

—Acquittal by magistrate—Application by prosecutor—Criminal Code, s. 744.]—A motion by the prosecutor, under s. 744 of the Criminal Code (as amended by 63 and 64 Vict., c. 46), for leave to appeal from the decision of a police magistrate acquitting the defendant of perjury, and refusing to reserve for the opinion of the Court of Appeal the questions whether there was corroborative evidence of the prosecutor in any material particular, and whether the magistrate exercised a legal discretion under s. 791 of the Code in deciding to adjudicate summarily upon the case, and had jurisdiction to try the defendant, who was a client of the County Crown Attorney, in absence of counsel for the Crown, was refused, under the circumstances and for the reasons stated in the judgments.

Rex v. Burns, 1 O.L.R. 336, 4 Can. Crim. Cas. 323 (C.A.).

—Information by agent of a society—Notice of appeal in name of the society—Service of notice on justices for respondent.]—1. Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no locus standi to appeal from the justices' order dismissing the charge. 2. The notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed. 3. Where a notice of appeal under the summary convictions clauses is served on the justice who tried the case, instead of on the respondent, it must show on its face that it is so served on the justice for the respondent.

Canadian Society v. Lauzon, 4 Can. Crim. Cas. 354 (Bélanger, J.).

—Appeal from summary conviction—Notice—Sufficiency thereof.]—A notice of appeal from a summary conviction neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient though it appears that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor.

Hostetter v. Thomas, 4 Terr. L.R. 224, 5 Can. Cr. Cas. 10.

—From summary conviction—Entry of—Time of giving recognizance—Quashing appeal—R.S.B.C. 1897, c. 176.]—The recognizance required by s. 71 (c) of the B. C. Summary Convictions Act, on an appeal to a County Court from a summary conviction, must be entered into before the appeal is entered for trial; and the giving of the recognizance thereafter, but before the sitting of the Court, is insufficient.

The Queen v. King, 4 Can. Cr. Cas. 128; 7 B.C.R. 401.

—Summary conviction—Appeal to County Court—Subsequent habeas corpus proceedings.]—The decision of the County Court in appeal from a summary conviction is final and conclusive, and a Supreme Court Judge has no jurisdiction to interfere by habeas corpus.

Rex v. Beamish, 8 B.C.R. 171 (Walkem, J.), 5 Can. Cr. Cas. 388.

—From summary conviction—Notice of—Parties.]—A notice of appeal from a summary conviction (B.C. provincial) served upon the convicting magistrate is not invalid because it is not also addressed to and served upon the respondent. It is not a pre-requisite to the right of appeal that the person convicted should have been taken into custody. Quære, whether service of notice of appeal on respondent's solicitor would not be sufficient in any event.

Rex. v. Jordan, 9 B.C.R. 33, 5 Can. Cr. Can. 438.

—Summary conviction—Joint appeal by several defendants — Recognizance — Two sureties essential—Crim. Code, ss. 879, 880.]—(1) On a joint appeal, under s. 879 of the Criminal Code, by several defendants from a summary conviction, the recognizance must be that of two sureties besides

the appellant's, and the appeal will be quashed if the recognizance be given with only one surety. (2) An appeal not being a common law right, the conditions precedent imposed by the statute must be strictly complied with. (3) The giving of security is an essential part of the appeal, and unless it be done in the manner required by statute, the giving of a notice of appeal will be unavailing and the conviction may be prosecuted as if no notice had been given.

The Queen v. Joseph, 11 Que. K.B. 211, 6 Can. Cr. Cas. 144.

—Fisheries Act, R.S.C. 1886, c. 95—Code, s. 879.]—An appeal lies under Code s. 879 from a conviction made under the Fisheries Act, R.S.C., c. 95, s. 18, notwithstanding the special appeal provided by that Act. The special appeal which, under the Fisheries Act may be made to the Minister of Marine and Fisheries, may be taken after the disposal of an appeal to a County Court.

The King v. Townsend; The King v. Murtagh, 5 Can. Cr. Cas. 143.

—To Supreme Court of Canada—60 and 61 Vict., c. 34.]—The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court (60 and 61 Vict., c. 34) applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code.

Rice v. The King, 32 Can. S.C.R. 480; 5 Can. Cr. Cas. 529.

— Acquittal — Crown case reserved at Crown's instance—Judgment for Crown — Discretion to refuse new trial.]—The Court of Appeal hearing a Crown case reserved and answering the questions reserved adversely to the accused, is not bound to direct a new trial. Per Osler, J.A.:—Where there has been an acquittal, the trial Judge should leave the prosecutor to apply for leave to appeal, rather than reserve a case.

Rex v. Karn, 5 O.L.R. 704, 6 Can. Cr. Cas. 479.

—Gambling—Plea of guilty—Appeal, right of—Estoppel.]—A person who has pleaded "guilty" to a charge, and has been summarily convicted, may raise a question of law in an appeal under s. 897 of the Criminal Code, but on such appeal his former plea of "guilty" estops him from calling upon the respondent to prove his guilt. So far as his guilt or innocence is concerned he is not a "party aggrieved" within the meaning of s. 879 of the Criminal Code.

The King v Brook, 5 Terr. L.R. 369, 7 Can. Cr. Cas. 216.

—Appeal from stipendiary magistrate to County Court—Stating a case—Res adjudicata.]—Defendant was convicted before a stipendiary magistrate for violation of certain regulations made under the Fisheries Act, R.S.C. c. 96, s. 17, and an appeal was taken to the County Court for District No. 3, where the conviction was affirmed. No appeal was taken from the judgment in the County Court, but the stipendiary magistrate was applied to to state a case for the opinion of this Court, with the view of questioning the validity of the conviction, which he did:—Held, quashing the case stated, that, with the judgment of the County Court standing in the way, defendant was precluded from asking the stipendiary magistrate to state a case for the purpose of attacking the conviction in this Court. Held, that the judgment in the County Court, in the identical case, was binding as between the parties, and upon the stipendiary magistrate, and that the matter was therefore res adjudicata, and one in which the magistrate could not be asked to state a case.

The King v. Townshend, 35 N.S.R. 401, 6 Can. Cr. Cas. 519.

—Summary conviction — Appeal—Notice —Description of offence—Sufficiency of.]—A notice of appeal from a conviction for playing in a common gaming house, which describes the offence for which the appellant was convicted as "looking on while another was playing in a common gaming house," is insufficient.

Rex v. Mah Yin, 9 B.C.R. 319, 6 Can. Cr. Cas. 63.

—Appeal from summary conviction—Jurisdiction of County Court Judge.]—A County Court Judge, who has allowed an appeal from a summary conviction under a statutory provision similar to Code s. 883 and has quashed the conviction as invalid on its face without hearing further evidence and trying the case de novo, cannot be compelled by mandamus to re-open the appeal for the purpose of hearing such evidence.

Strang v. Gellatly, 8 Can. Cr. Cas. 17 (Irving, J.).

—From summary conviction—Notice.] — A notice of appeal under Code s. 880 is sufficient if addressed to and served upon the magistrate or justices without being also addressed to the prosecutor.

The King v. Davitt, 7 Can. Cr. Cas. 514.

—Summary conviction—Two offences included.]—A single conviction for two separate offences may be quashed although the accused did not appear before the justice, if it cannot be ascertained from the proceedings for which separate offence the justice intended to convict, but the appellant will not be allowed his costs of the appeal.

Simpson v. Lock, 7 Can. Cr. Cas. 294.

—Summary conviction — Appeal — Recognizance — Costs — Jurisdiction.] — The Court may allow new grounds to be added

on showing cause against an order nisi to quash an order dismissing an appeal from a conviction under the Criminal Code granted under the rule of Court of Michaelmas term, 1899, although the rule requires the ground to be stated in the order. A recognizance entered into under s. 880 (c) of the Code is bad if the word "personally" is omitted from the condition to appear and try the appeal and abide the judgment of the Court thereupon. And the Appellate Court, on this objection being raised to the recognizance, has jurisdiction to dismiss the appeal with costs.

The King v. Wedderburn; Ex parte Sprague, 36 N.B.R. 213, 8 Can. Cr. Cas. 109.

—Defence of insanity—Evidence in support —Acquittal — Case reserved.]—Defendant was indicted for theft under s. 305 (a) of the Criminal Code. The act of theft was admitted, but it was contended that there was evidence of insanity at the time the act was committed. The trial Judge charged the jury that there was no such evidence, and that the case did not come within s. 736 of the Code. The jury having found the prisoner not guilty, two questions were reserved for the opinion of the Court:—(1) Whether there was evidence of insanity as required by s. 736, and (2) If not, whether there should be a new trial. The Court was moved to quash the case reserved on the ground that where there had been an acquittal the Crown could not have a case reserved or an appeal:—Held, that the motion must be dismissed, and the reserved case proceeded with, to ascertain whether there was evidence of insanity sufficient in law for submission to the jury.

Rex v. Phinney (No. 1), 36 N.S.R. 264, 6 Can. Cr. Cas. 469.

—No reserved case on weight of evidence—Code, s. 736.]—The prisoner was indicted for theft and was acquitted on the ground of insanity:—Held, that the trial Judge cannot reserve a case depending upon the weight of evidence, and that the question reserved, whether there was evidence of insanity as required by s. 736 of the Code was within the principle decided. Also, that the question of the weight of evidence is entirely for the jury, and that the provision for granting a new trial, where the verdict is against the weight of evidence, cannot be invoked on the part of the Crown.

Rex v. Phinney (No. 2), 36 N.S.R. 288, 7 Can. Cr. Cas. 280.

—Alibi — Proof of — Misdirection — New trial.]—Where the defence to a criminal charge is an alibi, it is misdirection to tell the jury that the onus is on the prisoner to prove it to their entire satisfaction, and to show beyond all question or reason that he could not have been present at the commission of the crime.

The King v. Myshrall, 35 N.B.R. 507, 8 Can. Cr. Cas. 474.

—Summary conviction—Appeal to sessions —Form of recognizance—Payment of fine—Repayment on allowance of appeal.]—A person elected as school trustee, who has under the provisions of s. 103 of the Public Schools Act (R.S.O. 1897, c. 292), been ordered by a justice of the peace to pay a fine of $20 because of alleged refusal to perform the duties of the office has, having regard to the provisions of s. 7 of the Ontario Summary Convictions Act (R.S.O. 1897, c. 90), a right to appeal to the General Sessions. Payment of the fine does not bar the right of appeal, when the payment is made contemporaneously with the expression of intention to appeal, and under pain of distress. In re Justices of York and Peel, ex parte Mason (1863), 13 C.P. 15, followed, Rex v. Neuberger (1902), 9 B.C.R. 272, distinguished. A recognizance to appear at the General Sessions and "enter an appeal," is sufficient. Rex v. Geiser (1901), 5 Can. Cr. Cas. 154, distinguished. Upon the allowance of such an appeal repayment of the fine and costs and payment of the costs of the appeal are properly ordered. Regina v. McIntosh (1897), 28 O.R. 603, followed.

Rex v. Tucker, 10 O.L.R. 506 (MacMahon, J.), 10 Can. Cr. Cas. 217.

—Conviction—Substantial wrong or miscarriage—Criminal Code, s. 746 (f).]—Upon a trial for perjury alleged to have been committed at a previous trial for a criminal offence, the fact of the previous trial must be proved by the production of the indictment and the formal record, or of a certificate under s. 691 of the Criminal Code; the evidence of the clerk of the Court, accompanied by the production of his minutes of the trial, and the evidence of the Court stenographer who took down the evidence at the trial, are not proof of the indictment and trial. Where there is no proper evidence of some fact essential to the proof of the crime charged and a conviction takes place, there is a substantial wrong or miscarriage at the trial, and s. 746 (f) of the Code cannot be applied to uphold it. Conviction by the chairman of the General Sessions of the peace for the county of Brant set aside, and a new trial ordered.

Rex v. Drummond, 10 O.L.R. 546, C.A. 10 Can. Cr. Cas. 340.

—Appeal—New trial—Perverse verdict.]—On a charge of theft a new trial was refused although the verdict was contrary to the view of the trial Judge, the evidence being conflicting, but the Court being of opinion that the verdict of guilty was one which reasonable men could properly find. In deciding the question of the reasonableness of the verdict of the opinion of the trial Judge is entitled to and ought to receive great weight; but it is not conclusive.

The Queen v. Brewster (No. 2), 2 Terr. L.R. 377, 4 Can. Cr. Cas. 34.

—Grand jury constitution of—Misdirection —Murder and manslaughter — Benefit of doubt—Motion for new trial—Jurisdiction.] —1. Where eleven grand jurors answered their names when the roll was first called, but ten only were impanelled and sworn (one having failed to answer on the second calling), the grand jury was properly formed and the accused, having suffered no prejudice thereby, cannot, on that ground, move for the rejection of the true bill found against him. 2. Where the Judge in a trial for murder concludes his charge thus: "the verdict of the jury is generally resumed in a few words, in the solemn words of guilty or not guilty," it is not to be inferred that such is a direction to bring in but one of the two verdicts of guilty or not guilty of murder, if in other parts of his charge he has sufficiently pointed out the distinction between murder and manslaughter, and instructed them as to their duty to find whether the prisoner acted with or without intent to kill. 3. Where the Judge considers that no doubt exists, he is not obliged to instruct the jury that the prisoner is intitled to any doubt they may entertain, such a course being more likely to impede than to assist them in the discharge of their duty. 4. A motion for a new trial can only be made before the Court of Appeal, upon leave therefore granted by the Court before which the trial has taken place.

Rex v. Fouquet, 14 Que. K.B. 87, 10 Can. Cr. Cas. 255.

—Appeal—Leave—Practice.]—Leave to appeal to the Court of Criminal Appeal should not be lightly granted, and the representative of the Crown should be served with a notice of motion setting out the grounds of appeal. Quære, whether the ruling of a Judge as to the admissibility of a confession is open to review by the Court of Criminal Appeal?

Rex v. Lai Ping, 11 B.C.R. 102, 8 Can. Cr. Cas. 467.

—Crown case reserved—Questions of law.] —The Court of King's Bench (Que.) sitting as a Court for the hearing of cases reserved by criminal Courts, has jurisdiction only to pronounce upon a question of law, under facts proved, and mentioned in the reserved case. Consequently, where the question stated in the reserved case was whether the use of a particular apparatus constituted a mixed game of chance and skill, or only a game of skill, and did not submit the question whether, under facts proved, and stated in the reserved case, the game was one which came within the prohibition of the Criminal Code, the Court declared that it was without jurisdiction in the matter.

The King v. Fortier, 13 Que. K.B. 308, 7 Can. Cr. Cas. 417.

—Appeal from refusal to reserve case — Substantial wrong or miscarriage—Code s. 746 (f).]—On the trial of defendant on an indictment charging him with the forgery of two promissory notes, the defendant having been found guilty, a reserved case was applied for on the following grounds: (a) Because one of the jurors was absent from the Court room at a time when a witness gave evidence of having seen defendant at a previous trial write a number of names on a sheet of paper. (b) Because in the course of his address to the jury the learned trial Judge commented upon the failure of defendant to produce a witness, S., and said that in the interests of truth and justice he should have done so. (c) Because certain notes other than those set out in the indictment having been received in evidence for certain purposes the trial Judge did not tell the jury that these other notes could only be regarded for the purpose of showing that the notes set out in the indictment were intended by the prisoner to be acted upon as genuine, and that they must disregard them for all other purposes. The reserved case applied for having been refused and an appeal taken the Court was equally divided:—Held, per Graham, E.J., Townshend, J., concurring, that a case should be stated for the opinion of the Court. Per Russell, J., Longley, J., concurring, that the points mentioned were within the provisions of s. 746 (f) of the Code, and there having been no substantial wrong or miscarriage which would be ground for a new trial the appeal should not be allowed. R. v. Corby, 1 Can. Cr. Cas. 457, 30 N.S.R. 330, and R. v. Hill, 36 N.S.R. 253, discussed.

The King v. McLean, 39 N.S.R. 147.

—Stated case — Application — Time.]— S. 900 of the Criminal Code is now available for the review of all summary convictions under Ontario law, by virtue of the amendment to R.S.O. 1897, c. 90, by 1 Edw. VII. c. 13, s. 2 (O.). An application to a magistrate to state a case in regard to a prosecution under an Ontario statute need not be made within the time limited by R.S.O. 1897, c. 90, s. 9, which applies only to appeals to the general sessions, but should be made within a reasonable time, no time being limited by s. 900, and no rules having been made under s. 533 of the Code.

Rex v. Ferguson, 12 O.L.R. 411 (Boyd, C.), 11 Can. Cr. Cas. 277.

—New trial—Testimony of accused—Appreciation by jury — Criminal Code, s. 747.]—Leave to apply to the Court of Appeal for a new trial on the ground that the verdict is contrary to the evidence (Crim. Code, s. 747) cannot be granted unless there has been a denial of justice. (2) This defect cannot be attributed to the verdict by reason of the jury not considering the evidence of the accused as to facts tending to his acquittal in rendering it. The jury, being sole judge of the weight of such evidence, was at liberty to refuse to believe it.

Rex v. Molleur, Q.R. 15 K.B. 1, 8 Can. Cr. Cas. 16.

—Appeal from order of magistrate — Sittings of the Court—Plea of autrefois convict —Conviction on information for offence charged in previous one still pending—Collusive prosecution—Criminal Code, s. 880.] —(1) The words "sittings of the Court" in paragraph (a) of Code, s. 880, refers to the opening of the term of the Court as fixed by law and not to a sitting on a date to which an adjournment had been ordered during such regular session; and an appeal is not late when not taken to the adjourned sittings first following the delay of fourteen days. (2) An appeal lies to the Court of King's Bench in Quebec from an order of a justice of the peace, dismissing an information or complaint on a plea of autrefois convict. (3) A conviction by a magistrate or magistrates upon an information or complaint charging an offence for which a previous information against the same defendant has been made before another magistrate, and while such previous information is pending, is null and void, and will not avail in support of a plea of autrefois convict to the first complaint.

Cotton v. Bombardier, 15 Que. K.B. 7 (Lynch, J.).

R. v. Bombardier, 11 Can. Cr. Cas. 216.

—Judgment upon stated case—Subsequent motion to quash conviction—Res judicata—Necessity for writ of certiorari.] — Held, that where a summary conviction has been questioned on a case stated by the magistrate under s. 900 of the Criminal Code, 1892, and has been upheld, a subsequent application to quash it by way of certiorari, will not be entertained. Semble, per Richardson and Wetmore, JJ. (Scott and Rouleau, JJ., dissenting), that the papers in connection with a summary conviction, returned by the magistrate to one of the clerks of the Court under s. 888 of the Criminal Code, 1892, are not before the Court for all purposes, and that a writ of certiorari must issue in order that a motion to quash the conviction may be entertained.

Regina v. Monaghan, 3 Terr. L.R. 43, 2 Can. Cr. Cas. 488.

—Summary conviction—Notice of appeal — No substitutional service permitted.] — A notice of appeal from a summary conviction (Revised Cr. Code, s. 751) cannot be served substitutionally on the respondent by mailing it to his last known address or leaving it at his last known place of abode.

Olson v. Cameron, 12 Can. Cr. Cas. 193.

—Case improperly withdrawn from jury — New trial.]—Where the trial Judge has erred in withdrawing the case from the jury and directing a verdict of not guilty, a new trial may be ordered on a case reserved on the Crown's application.

Rex v. Duggan, 16 Man. R. 441, 12 Can. Cr. Cas. 147.

—Appeal from conviction—Notice of appeal —Sufficiency of—Form of notice.]—A notice of appeal from a conviction is insufficient if it is not addressed to any person. No affidavit of justification of the sureties need accompany the recognizance.

Cragg v. Lamarsh, 3 Terr. L.R 91, 4 Can. Cr. Cas. 246.

—Extension of time for notice of appeal.] —The power given by s. 1024 of the Revised Criminal Code to a Judge of the Supreme Court of Canada to extend the time for service on the Attorney-General of notice of an appeal in a Crown case reserved, may be exercised after the expiration of the time for the service of such notice.

Gilbert v. The King (No. 1), 38 Can. S.C.R. 207, 12 Can. Cr. Cas. 124.

—Appeal—Criminal law—Reserved case — Application for "during trial."] — By s. 1014 (3) of the Criminal Code either party may "during the trial" of a prisoner on indictment apply to have a question which has arisen reserved for adjudication by the Court of Appeal:—Held, that for the purposes of such provision the trial ends with the verdict after which no such application can be entertained.

Ead v. The King, 40 Can. S.C.R. 272, 13 Can. Cr. Cas. 348.

—Summary conviction on plea of guilty— Unauthorized punishment—Reduction on appeal—Jurisdiction of Appellate Court to award less than maximum.]—(1) On an appeal from a summary conviction, the Court hearing the appeal is the absolute judge both of law and facts, and, where the conviction appealed from awards a penalty in excess of that authorized by law, the Appellate Court may impose a new sentence at its discretion. (2) Where an excessive sentence has been imposed on a summary conviction following a plea of guilty, the Court hearing an appeal therefrom may modify the conviction by imposing a lawful punishment less than the legal maximum. (3) The Appellate Court tries the case de novo upon the merits, and its powers are not limited to the cutting off of the unlawful excess.

The King v. Baird, 13 Can. Cr. Cas. 240.

—Summary convictions—Order dismissing complaint—Prosecutor's appeal—Transmitting order appealed from—Filing before hearing of appeal.]—(1) An appeal from an order dismissing a summary complaint will not be quashed because the order appealed from was not transmitted and filed in the Appeal Court before the commencement of the sittings at which the appeal is to be heard; and the Court may hear the appeal if the order appealed from is in Court when the appeal is called. (2) The

provision contained in Cr. Code s. 757 for transmitting proceedings before justices to the Court having jurisdiction in appeal therefrom, is directory only.

The King v. Williamson, 13 Can. Cr. Cas. 195.

—Finding sureties to keep the peace — Threats of personal injury—No appeal — Application for release.]—(1) An appeal does not lie from a justice's order made under Code s. 748 (2) requiring a person to find sureties to keep the peace. (2) After two weeks' imprisonment in default of finding sureties, the defendant may apply to a Judge of a Superior Court under Code s. 1059 for a release.

The King v. Mitchell, 13 Can. Cr. Cas. 344 (Y.T.).

—Summary trial—Appeal—Jurisdiction.]—Since before 1895 two justices of the peace in the Northwest Territories had jurisdiction to try offences under paragraph (a)-(f) of s. 783 of the Criminal Code, 1892, and there was no appeal from their decision, the extension in that year of this jurisdiction to two justices in any province, subject to appeal where the trial was had before them by virtue only of the new enabling clause, did not extend the right of appeal to the Northwest Territories. (See now R.S.C. 1906, c. 146, s. 797.) The Alberta Act since it continued the law theretofore in force made no change in this respect.

Rex v. Pisoni, 6 Terr. L.R. 238.

[See Crim. Code s. 797.]

—Appeal from refusal of trial Judge to reserve case — Application not made at trial.]—On the trial of the accused before a Judge without a jury his counsel objected that the accused was entitled to be tried by a jury, but the objection was overruled and the trial proceeded, no application being made for a reserved case. The accused was convicted and sentenced, and two days afterwards an application was made to the trial Judge to reserve a case for the Court of Appeal. The application was refused:—Held, that an appeal from the refusal of the trial Judge to reserve a case on a question of law arising during a criminal prosecution lies only when the application is made at the trial, and although after the trial the Judge might still, in his discretion, reserve a case, yet if he refused, no appeal lay.

The King v. Toto, 6 Terr. L.R. 89 (also reported, 8 Can. Cr. Cas. 410).

—Case reserved as to communication with jury—Question of fact.]—Defendant was indicted and tried for the crime of rape, committed upon the person of a girl a few weeks over the age of fourteen years. The jury found the prisoner guilty and he was sentenced to imprisonment for the term of one year. Before sentence there was a motion on behalf of the prisoner to reserve a case, upon affidavits of two of the jurors to the effect that while they were deliberating in their room they called the sheriff in and asked him "whether they could report that there had been sexual connection, but with consent, and recommend the prisoner to mercy" to which the sheriff replied "no, that they would be obliged to report the defendant guilty or not guilty, and that if they found him guilty with a recommendation to mercy, the Judge would give him a light sentence." This was denied by the sheriff who swore that all he said in reply to the question asked him was "whatever your verdict is bring it into Court":—Held, per Townshend, Meagher and Drysdale, JJ., that as the case as reserved called upon the Court to first decide the question of fact whether anything was said to the jurors by the sheriff to which objection could be taken, the Court for this reason had no jurisdiction to deal with the question. Per Graham, E.J., and Russell, J., that the conviction should be quashed.

The King v. Barnes, 42 N.S.R. 55, 13 Can. Cr. Cas. 301.

—Charge to jury—Exception to—When to be taken—Application for a reserved case.]—After verdict, but before sentence, it is too late to move for a reserved case. S. 1014, sub-s. 2 of the Code provides that the Court before which any person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any proceedings preliminary, subsequent or incidental thereto, or arising out of the direction of the Judge, for the opinion of the Court of Appeal . . . :—Held, that this means that any reservation of a case after verdict must be of the Court's own motion.

Rex v. Pertella; Rex v. Lee Chung, 14 B.C.R. 43, 14 Can. Cr. Cas. 208.

—Appeal—Circumstantial evidence — Identity—Weight of evidence.]—The deceased was murdered, according to the only eye witness (a girl of about 8 years), by a dark man with a fat face, dressed in brown trousers, in the seat of which were two rents. He also had on a black shirt with white stripes and a dark coat. Prisoner had been seen in the vicinity of the murder, within 1,000 feet of the place, some 20 or 30 minutes previously. His dress corresponded with the shirt, coat and trousers mentioned, in addition to which he wore a stiff black hat. A knife, sworn to as having been in the prisoner's possession three days before, was found on the afternoon of the murder, still wet with blood, a few feet from the murdered woman's body. When arrested, three days later, prisoner was without the dark shirt:—Held, refusing an application for a new trial, that the jury was justified on the evidence in coupling the prisoner with the crime. In a criminal, as in a civil case, on an application for a new trial on the ground that the

verdict is against the weight of evidence, the Court will be governed by the fact whether the evidence was such that the jury, viewing the whole of the evidence reasonably could not properly find a verdict of guilty. While, under the criminal law, the accused person is not called upon to explain suspicious circumstances, there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned.

Rex v. Jenkins, 14 B.C.R. 61, 14 Can. Cr. Cas. 221.

—Appeal from summary conviction—Revision of sentence.]—The plaintiff was convicted for unlawfully selling liquor to an Indian in violation of the Indian Act, before the defendant as a stipendiary magistrate, who sentenced him to fine and imprisonment absolute. He appealed to the County Court where both penalties were reduced in his absence as he was confined in jail on a conviction under another penal statute. On the hearing of the appeal the defendant acted as counsel for the prosecutor, prepared the conviction and warrant, and by appointment handed them to the sheriff who executed them. The plaintiff had been discharged by the Court in banco, under a writ of habeas corpus, on notice to the defendant, the order reciting an adjudication that the conviction was illegal and without jurisdiction (R. v. Johnston, 41 N.S.R. 105), and on that application the defendant filed an affidavit against the motion. In an action by the plaintiff against the defendant, in his capacity as solicitor, for false imprisonment, the trial Judge withdrew it from the jury at the close of the plaintiff's case, on the ground that there was no evidence of malice, and that the defendant's privilege as a solicitor protected him:—Held, dismissing the plaintiff's appeal and motion for a new trial, that the plaintiff could be legally sentenced to imprisonment absolute in his absence by the County Court Judge on the appeal, but assuming he could not, that the action of the County Court Judge in so sentencing him was a mere error which did not invalidate the conviction, and as the defendant was not shown to have acted maliciously or officiously he was not liable in trespass.

Johnston v. Robertson, 42 N.S.R. 84, 13 Can. Cr. Cas. 452.

—Appeal from police magistrate—Order appealed from not lodged until after the first day of sittings.]—S. 757 of the Criminal Code is directory only, and the transmission of the conviction to the Court in accordance with the provisions of that section before the time when the appeal may first be heard is not a condition precedent to the appeal. It is sufficient if the conviction or order be lodged in Court before the appeal is actually heard.

Harwood v. Williamson, 1 Sask. R. 58, 14 Can. Cr. Cas. 76.

—Appeal from summary conviction—County Courts—Sittings in another county in the same district—Time between conviction and appeal sittings.]—(1)—Per Townshend, C. J., Meagher, and Russell, JJ.:—An appeal under ss. 749 and 750 of the Code from a summary conviction is to be made to the appropriate sittings following the conviction in point of time, of the Judge presiding over the County Court District where the cause of complaint arose, whether such sittings be in the same or another county comprised in such district. (2) Per Longley, J.:—The appeal is to the County Court of the county in which the cause of complaint arose, and notice of appeal is properly given for a session to be held within the county without regard to an intervening session by the Judge of the same district held in another county. (3) Per Townshend, C.J., and Meagher, J.:—In computing the time which must intervene between the conviction and the sittings of the Court hearing an appeal under Code s. 750, the term "more than 14 days before the sittings" means that 15 days at least must intervene between the date of conviction and the date fixed for the sittings. (4) Per Russell, J.:—The term "more than 14 days before the sittings" means that 14 days only need intervene between the date of conviction and the date fixed for sittings.

The King ex rel. Johnston v. Judge of the County Court, 42 N.S.R. 537.

R. v. Johnston, 13 Can. Cr. Cas. 179.

—Leave to appeal — Judgment on speedy trial.]—(1) On granting leave to appeal to the Court of Appeal under s. 1015 of the Revised Criminal Code, the Court of Appeal may direct that the Court below shall state a case as if the questions had been reserved.

The King v. Sam Chak (No. 1), 42 N.S.R. 372, 12 Can. Cr. Cas. 495.

—Appeal to District Court from summary conviction — Reference by District Court Judge.]—An appeal from a conviction by two justices of the peace having been taken to the District Court, and a question having arisen as to the regularity of the proceedings, the District Court Judge referred such question to the Court en banc:—Held, that in such matters the Court appealed to, and in this case the District Court, is the absolute judge of facts and law, and the Court en banc had no authority to advise in the matters.

Mischowsky v. Hughes, 2 Sask. R. 219.

R. v. Mischowsky, 15 Can. Cr. Cas. 364.

—Appeals under special statutes]—

See the title of the offence.

IV. OFFENCES.

See the various titles of offences.

V. CERTIORARI.

See CERTIORARI.

VI. HABEAS CORPUS.

See HABEAS CORPUS.

VII. PRACTICE GENERALLY.

—Preliminary inquiry—Hearing a witness in absence of the accused.]—The object of a preliminary inquiry is not to establish the guilt or innocence of the accused, but merely to ascertain whether he should be committed for trial or not. Hence, irregularities thereat afford no grounds for quashing an indictment subsequently preferred, such as the hearing of one of the witnesses in the absence of the accused.

Rex v. Eliasoph, 19 Que. K.B. 232.
16 Can. Cr. Cas. 131.

—Depositions at preliminary enquiry—Quashing commitment and indictment where depositions not authenticated.]—1. If the depositions at a preliminary inquiry are not signed by presiding magistrate, they are not clothed with the authentic character required by law, and in such case no preliminary inquiry exists on the docket. 2. A motion to quash a commitment based upon such an enquete will be granted.

The King. v. Robert (No. 1), 12 Que. P. R. 7.

—Information—Criminal offence disclosed—Refusal of magistrate to issue process.]—1. In Ontario a magistrate who refuses to issue either a summons or a warrant upon an information laid before him for a criminal offence may be called upon by order nisi from the High Court of Justice to show cause why the information had not been proceeded upon. 2. The person accused by such information may also be made a party to the proceedings against the magistrate that he may also show cause why the magistrate should not issue process against him. 3. A charge against a magistrate of wrongfully exacting illegal fees for his own use and benefit discloses a common law offence.

The King v. Graham, 2 O.W.N. 306.

—Theft—Arrest without warrant.]—The applicant had been arrested, without a warrant, by the chief of police for Vancouver at the instance of a private detective there who had received a telegram from a private detective in Montreal. The offence alleged was that the accused had, in Montreal, received a ring with instructions to hand it over to a third person. A second ring he had, as alleged, stolen from such third person directly. He converted it to his own use and left for British Columbia: —Held, that this was not an offence within the meaning of s. 355 for which an arrest could be made without a warrant.

Rex v. Schyffer, 15 B.C.R. 338.

—Deposition of one witness taken in absence of one defendant—Regularity of enquiry as against co-defendant.]—1. An indictment will not be quashed because of an irregularity in the taking of some of the depositions at the preliminary enquiry if the depositions regularly taken thereat are alone sufficient to justify the committal for trial. 2. Where one of two persons accused is absent during a part of the preliminary enquiry when the evidence of one witness was taken for the prosecution, the deposition of that witness may be regularly taken as against the co-defendant then present. 3. An indictment not preferred with the consent of the Judge or the direction of the Attorney-General under Code s. 873 may be quashed if not founded upon facts disclosed in the depositions taken on the preliminary enquiry. 4. Semble, the consent of the Judge under s. 873 to the preferring of an indictment may be called in question on a motion to quash the indictment, if it appears that the consent was obtained without disclosing a material fact known to the prosecutor the disclosure of which would probably have caused the consent to be refused, ex gr. the previous withdrawal of a complaint in respect of the subject matter of the indictment.

The King v. Eliasoph, 16 Can. Cr. Cas. 131 (Que.).

Irregular deposition—Deposition taken in the absence of the magistrate.] — Depositions taken at a preliminary inquiry, in the absence of the magistrate before whom the case is proceeding, have no legal value whatever; and, therefore, the commitment by the magistrate of a prisoner for trial, the bill of indictment founded on his illegal commitment on the illegal depositions, and the true bill and indictment reported by the grand jury are null and void.

R. v. Traynor, 10 Que. Q.B. 63, 4 Can. Cr. Cas. 410 (Würtele, J.).

—Order to juror to stand by—Time when it may be made.]—The direction to a juror to stand by is practically a challenge for cause, and, therefore, the order to stand by must be given at a time when a challenge could be made; and inasmuch as the right to challenge must be exercised before the juror has taken the book in order to be sworn, the direction to stand by can only be given before the juror has received the book. R. v. Barsalou (No. 1), 10 Que. K.B. 180, 4 Can. Cr. Cas. 343 (Würtele, J.).

—Acquittal of defendant—Further prosecution—Indictment.]—A person accused of perjury may, with his own consent, be summarily tried before a police magistrate: Criminal Code ss. 145, 539, 782, 785. And where the defendant sought and consented to be tried summarily under s. 785, pleading "not guilty," and the magistrate, upon hearing the evidence, adjudicated summarily and

dismissed the charge under s. 787:—Held, that the magistrate was right in refusing thereafter to bind the prosecutor over to prefer and prosecute an indictment against the defendant, as provided for in s. 595; for the magistrate has, under s. 791, to determine, before the defence has been made, whether he will try the case summarily or not.

Re Rex v. Burns, 1 O.L.R. 341, 4 Can. Cr. Cas. 330.

—Preliminary enquiry—Change to summary proceeding—Excess of jurisdiction.]—A defendant being charged with offering for sale, publicly, meat unfit for food, the magistrate treated the charge, though ambiguously worded, as one for an offence under the Criminal Code s. 194 (and took evidence in support. They then concluded that an offence had been made out under a municipal by-law based on the Public Health Act, R.S.O. 1897, c. 248, but not under the Criminal Code, and adjourned for a week "to enable the accused to put in a defence under the new conditions if he so decided." The defendant protested, and offered no defence, and was convicted under the by-law: —Held, on certiorari, that the conviction must be quashed on the ground of want of jurisdiction; and also because, even if there was power to change the charge to one under the Public Health Act, no evidence was given of the offence so charged after that charge was made. It is not competent for magistrates where an information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information.

Rex v. Dungey, 2 O.L.R. 223, 5 Can. Cr. Cas. 38.

—Attempt to incite—Perjury—Bail—Recognizance—Estreat.] — A defendant charged with offering money to a person to swear that certain other persons gave him a sum of money to vote for a candidate at an election, was admitted to bail, the recognizance being taken before one justice of the peace:—Held, that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence, regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognizance was properly taken before one justice, who had power to admit the accused to bail at common law, and that s. 601 of the Code did not apply. The comomn law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the latter law.

Rex v. Cole, 3 O.L.R. 389, 5 Can. Cr. Cas. 330.

—Absence of magistrate—Proceeding de novo—Certiorari.]—A preliminary hearing in a criminal case commenced before one magistrate cannot be continued before another. But if the magistrate who had begun the hearing dies, is dismissed, resigns his office or withdraws from the hearing, then another competent magistrate may take it up, but he should begin the hearing de novo before himself; he cannot merely continue that previously begun. The Judge of the sessions of the peace, Hon. Mr. Chaveau, who had begun the preliminary hearing having obtained leave of absence, and, without concluding it, started for a voyage to Europe, is deemed to be withdrawn from the proceeding; and in such case, with the consent of the Crown, the party prevented from proceeding was entitled to obtain from the magistrate, Angers, who replaced him, an order for beginning de novo the hearing in order to dispose of the matter. A writ of certiorari will not, in such case, be granted to prevent the Magistrate Angers from taking up the case and beginning it again,

Bertrand v. Angers, 21 Que. S.C. 213 (Sup. Ct.).

—Statutory prohibition of certain acts — Public policy — Remedy by indictment.]—Where the doing of a particular act is prohibited by statute on public grounds, and the statute does not declare a mode of enforcing the prohibition, the offence is indictable. A person who without lawful excuse wilfully and corruptly votes more than once at a municipal election for city aldermen by general vote under s. 158 (a) of the Ontario Municipal Act is guilty of an indictable offence by virtue of s. 138 of the Criminal Code (disobedience of statutes). Wrongfully voting twice at an election would not be indictable at common law unless prohibited by statute, and, semble, every contempt of a statute is indictable at common law where no other mode of punishment is provided. Where a magistrate is applied to for process in respect of an indictable offence which cannot be dealt with summarily, no fees can be demanded by him therefor. The Court will not grant to the prosecutor a mandamus to compel a rehearing by the magistrate of an application for process in respect of an indictable offence, if the magistrate had exercised his discretion (although erroneously) in refusing the process after being put in possession of the facts, on which he can exercise discretion. If the magistrate on an application for process erroneously holds that the offence is not indictable and that he therefore has no jurisdiction to hold a preliminary inquiry in respect thereof, a mandamus will lie to compel him to do so.

The King v. Meehan (No. 2), 5 Can. Cr. Cas. 312, 3 O.L.R. 567.

—Preliminary hearing — Re-opening — Discretion.]—In a criminal case the prelimin-

ary hearing before the magistrate of an offence punishable on indictment, is not, properly speaking, the enquete of the informant, but that of the magistrate. On the preliminary hearing, after the enquete on the information has been declared closed, and no evidence has been offered on the part of the accused, and even after argument on question of law arising from the evidence given, the magistrate may, in his discretion, allow the informant to reopen the enquete and give further evidence.

Belanger v. Mulvena, Q.R. 22 S.C. 37 (Sup. Ct.).

—Fine and imprisonment authorized —Discretion of magistrate.]—1. S. 932 of the Code applies as well to proceedings under Part LVII., "Summary Convictions," as to proceedings by indictment. 2. Where both fine and imprisonment are provided as the authorized punishment for a statutory offence upon summary conviction, the magistrate may in his discretion impose either a fine alone or an imprisonment alone or both, unless the particular statute specially provides otherwise.

Ex parte Kent, 7 Can. Cr. Cas. 447.

—Dispensing with distress—Summary conviction.]—1. Where a fine is imposed by a summary conviction made by two justices and distress in default and imprisonment for want of distress, the discretionary power of dispensing with distress and directing imprisonment if the distress would be ruinous to the accused and his family, is one which belongs to the convicting justices jointly, and one of such justices has no power to commit upon his own finding alone in respect thereof. 2. The accused is entitled to be heard on the question of dispensing with the distress warrant. 3. The want of sufficient distress, necessary for the alternative of imprisonment, can only be proved by the return of nulla bona to a warrant of distress or by hearing the defendant regarding the same.

The King v. Rawding, 7 Can. Cr. Cas. 436.

—Procedure to escheat recognizance—Condition—Notice.]—A recognizance was entered into by the defendant and his surety before the stipendiary magistrate conditioned to keep the peace and to appear before the magistrate on a day named. Defendant failed to appear and the recognizance was estreated without notice to defendant or to his surety:—Held, per Graham, E.J. (McDonald, C.J., concurring), following The Queen v. Creelman, 25 N.S.R. 404, that notice was necessary under the N.S. Crown Rules and that the order estreating the recognizance was improperly made. Held, per Townshend, J., and Meagher, J., that notice was not necessary. R. v. Brooke, 11 T.L.R. 163, referred to.

Rex v. Barrett; Re Barrett's Bail, 36 N.S.R. 135, 7 Can. Cr. Cas. 1.

—Bail—When a matter of right and when discretionary.]—1. All Superior Courts of criminal jurisdiction, or one of their Judges, and also, in the Province of Quebec, a Judge of the Superior Court, have authority to admit to bail persons accused of any crime whatsoever (including treason and capital offences), but as respects indictable offences which, before the enacting of the Criminal Code, were felonies, it is within their discretion to grant or refuse the application for bail. With respect to indictable offences which were formerly misdemeanours, the accused is entitled to be admitted to bail as a matter of right. 2. The propriety of admitting to bail for indictable offences which were formerly classed as felonies should be determined with reference to the accused person's opportunities for escape, and to the probability of his appearing for trial. To determine this point it is proper to consider the nature of the offence charged and its punishment, the strength of the evidence against the accused, his character, means and standing. Where a serious doubt exists as to his guilt the application for bail should be granted. If, on the evidence, it stands indifferent whether he is guilty or innocent, the rule generally is to admit him to bail; but if his guilt is beyond dispute the general rule is not to grant the application for bail unless the opportunities to escape do not appear to be possible and it is consequently almost certain that he will appear for trial. The fact that the application for bail is not opposed either by the attorney-general or the private prosecutor may also be taken into account by the Court or Judge.

The King v. Fortier, 13 Que. K.B. 251, 6 Can. Cr. Cas. 191.

—Prior convictions—Right to inspect informations and depositions.]—By s. 11 of R.S.O. 1897, c. 334, "A person affected by any record in any Court in this province, whether it concerns the King or other person, shall be entitled, upon payment of the proper fee, to search and examine the same, and to have an exemplification and a certified copy thereof made and delivered to him by the proper officer." The applicant was committed for trial at the sessions upon three charges of receiving cattle stolen from C. and two other persons, knowing them to have been stolen. At the previous sessions three persons were convicted of having stolen cattle from C., one of whom and two others were also convicted at the same sessions of having stolen cattle from S. No charge was pending against the applicant of having received stolen cattle from S.:—Held, that in such case the question is whether the applicant would be affected by the records which he sought to examine, and that while he might be so affected as regards the cattle stolen from C., and so was entitled to the inspection asked for, he was not as regards those stolen from S.

Re Chantler, 8 O.L.R. 111, 8 Can. Cr. Cas. 245, Street, J.

— Recognizance by married woman — Separate estate.]—See CRIMINAL LAW II.

Rex v. Johnston, 7 O.L.R. 525, 7 Can. Cr. Cas. 525.

—Quashing summary convictions — Jurisdiction in N.W.T.]—A single Judge in the territories has jurisdiction under 54-55 Vic. (Can.), c. 22, s. 7, to entertain an application to quash a summary conviction, returned under the N.W.T. Act, s. 102, to the clerk of the Supreme Court, although a certiorari has not issued.

The King v. Ames, 5 Terr. L.R. 492, 10 Can. Cr. Cas. 52.

—N.W.T. Act—Jury—Judge's power to refuse to try summarily.]—The Northwest Territories Act, R.S.C. c. 50, s. 67 (section substituted by 54-55 Vic. (1891), c. 22) provides that "when the person is charged with any other criminal offence, the same shall be tried, heard and determined by the Judge with the intervention of a jury of six, but in any such case the accused may, with his own consent, be tried by a Judge in a summary way, and without the intervention of a jury:"—Held, that the consent to the accused does not make it imperative upon the Judge to try the charge without the intervention of a jury.

The Queen v. Brewster (No. 1), 2 Terr. L.R. 353.

—Summary conviction—Penalty fixed by statute.]—Where a statute imposes a definite penalty for an offence, a summary conviction awarding a lesser fine, and, in default of payment, a lesser term of imprisonment than that specified, is bad and must be quashed in a case to which Code ss. 889 and 890 do not apply.

The King v. Hostyn, N.W.T. 9 Can. Cr. Cas. 138.

—Perjury—Description of offence.] — A count alleging perjury before a coroner—omitting any reference to the coroner's jury—was held sufficient in view of s. 611, sub-s. 3 and 4, and s. 723 of the Criminal Code.

The Queen v. Thompson, 2 Terr. L.R. 383, 4 Can. Cr. Cas. 265.

—Recognizance — Estreat — Sittings of Court—Non-appearance—Notice to appear—Notice of intention to estreat.]—In a recognizance of bail the expression "the next sittings of a Court of competent criminal jurisdiction," means the next sittings fixed by the Lieutenant-Governor in Council in pursuance of the N.W.T. Act, s. 55. The fact that a special sitting was held in the interval pursuant to the N.W.T. Amendment Act, 1891, s. 12, sub-s. 2, for the trial of a designated prisoner confined in goal and awaiting trial, did not affect the obligation of the accused to appear at the next sittings fixed by the Lieutenant-Governor. No notice to the bail of intention to estreat or to produce the accused is necessary.

Re McArthur's Bail (No. 1), 2 Terr. L. R. 413, 3 Can. Cr. Cas. 195.

—Depositions — Magistrate's signature — Irregularity—Criminal Code s. 590.]—Depositions to which the magistrate has affixed his signature, although such signature was not placed at the foot or end thereof (Code s. 590) are sufficiently signed for the purposes of a "charge" brought thereunder under the speedy trial clauses.

The King v. Jodrey (N.S.), 9 Can. Cr. Cas. 477, 38 N.S.R. 142.

—Speedy trial—No resident County Judge —Powers of prosecuting officer.] — (1) Where there is no Judge of the County Court residing in a county the prosecuting officer or counsel for the county appointed under the provisions of R.S.N.S. (1900), c. 165, s. 1, is empowered to take the election of a prisoner to be tried before the Judge of the County Court without a jury in Nova Scotia. (2) The power given to such officers to conduct "all criminal business" on behalf of the Crown includes all process necessary to bring the prisoner to trial and the prisoner's election for or against a speedy trial is a part of such process.

The King v. Jodrey (N.S.), 9 Can. Cr. Cas. 477, 38 N.S.R. 142.

—Commitment—Imprisonment in penitentiary — Form of warrant—Venue — Commencement of sentence.] — The certified copy of sentence is sufficient warrant for the imprisonment of a convict in the penitentiary and it is not necessary that it should contain every essential averment of a formal conviction. Where the venue is mentioned in the margin of a commitment, in the case of an offence which does not require local description, it is not necessary that the warrant should describe the place where the offence was committed. A warrant of commitment need not state the time from which the term of imprisonment shall begin to run, as under the seventh sub-s. of s. 955 of the Criminal Code, terms of imprisonment commence on and from the day of the passing of the sentence.

Ex parte Smitheman, 35 Can. S.C.R. 189, 490, 9 Can. Cr. Cas. 10, 17.

—Commitment for want of distress.]—(1) A warrant of commitment for want of distress upon a summary conviction is invalid and will be quashed, if it recites only default in payment of the fine, and does not show on its face either a return of the distress warrant, and that no sufficient distress was found or that a distress was dispensed with under Code s. 875 upon an adjudication thereunder. (2) An affidavit of the gaoler verifying a copy of the warrant claimed as the cause of detention may

be accepted as a return to a writ or order of habeas corpus.

The King v. Skinner, (N.S.), 9 Can. Cr. Cas. 558.

—Arrest under warrant—Commitment in absence of prisoner.]—(1) A commitment to gaol by a magistrate of a woman, arrested under a warrant, made without having her brought before him, upon a verbal unsworn statement that she had shown signs of insanity, and in order that a medical examination might be had, is illegal. (2) The first duty of a magistrate dealing with a person arrested upon his warrant is to have such person brought before him as soon as practicable, and then make out such order as the case requires. The express enactment of the Criminal Code (s. 567), must be followed in this respect, although the form of remand in connection with it has no mention of the presence of the prisoner. The failure to conform to the above rule will entitle the prisoner on petition for habeas corpus, to have the commitment quashed and to be discharged from custody.

Ex parte Sarrault, 15 Que. K.B. 3 (Hall, J.), 9 Can. Cr. Cas. 448.

—Search warrant—Information on which based—Causes of suspicion.]—The proceedings upon which a search warrant is issued and the warrant itself may be brought before the Court on certiorari and if the warrant is deemed to have been improperly issued, it may be quashed. The information necessary to justify the issuing of such warrant must disclose facts and circumstances showing the causes of suspicion, which tended to the belief of the commission of the alleged offence, with regard to which the warrant is deemed essential. The information herein being defective in this respect the warrant was directed to be quashed, but on condition that no action should be brought against the police magistrate who issued it, or the officer who executed it.

Rex v Kehr, 11 O.L.R. 517 (D.C.).

11 Can. Cr. Cas. 52.

—Particulars — Preliminary investigation before magistrate — Scope of inquiry.] — Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or Court dealing with the proceedings sought to be prohibited. The defendant having been arrested and brought before a police magistrate charged with conspiracy under s. 394 of the Criminal Code objected to the sufficiency of the charge and asked for particulars of the deceit, etc., charged with dates and names. The magistrate overruled the objection and refused the particulars on the ground that the proceeding before him was an investigation, whereupon the defendant applied for prohibition which was refused.

The King v. Phillips, 11 O.L.R. 478 (Boyd, C.), 11 O.L.R. 89.

—Summary conviction—Warrant of arrest in first instance — Information — Evidence substantiating.]—A sworn information stating that the complainant has just cause to suspect, and does suspect and believe that the party charged had committed an offence against the Canada Temperance Act triable under ss. 558, 559 and 843 of the Criminal Code, 1902, will not authorize a justice to issue a warrant to arrest in the first instance. It is the duty of the justice before issuing a warrant to examine upon oath the complainant or his witnesses as to the facts upon which such suspicion and belief are founded, and to exercise his own judgment thereon. Ex parte Boyce, 24 N.B.R. 347, followed.

The King v. Mills; Ex parte Coffon, 37 N.B.R. 122; Ex parte Coffon, 11 Can. Cr. Cas. 48.

—Prosecutor bound over to prefer indictment—Right to appear before grand jury—Security for costs.]—(1) When a person preferring a charge requires the magistrate, who has discharged the accused, to bind him over to lay and prosecute an indictment and does submit such an indictment to the grand jury, at the following sitting of the Court, he has no right to appear, by himself or through counsel, before the grand jury, without the permission of the Court. The rule being, though not express, established by the hitherto unchallenged practice of the Court a violation of it affords a ground for a motion to quash the indictment after a true bill has been found; but, when the question arises for a formal decision for the first time, and no injustice appears to have been caused by the irregularity, the motion will be discharged and the indictment allowed to stand. 2. The right of the accused to security for his costs, under § 4, s. 595 Criminal Code, will be enforced, upon motion, after the finding of a true bill under the circumstances stated above.

The King v. Hoo Yoke, 14 Que. K.B. 540 (Hall, J.), 10 Can. Cr. Cas. 211.

—Imprisonment in default of payment of fine and costs—Tender to deputy keeper of gaol—Reasonable time.]—A warrant of commitment commanded the keeper of a common gail to receive the defendant into his custody in the common gaol, there to imprison him for 30 days unless the amount of a fine and costs were sooner paid to the keeper. The defendant was apprehended under this warrant and received by the gaoler on the 12th March. His agent, on the 14th March, at 10 minutes before 8 o'clock in the afternoon, tendered the proper amount of the fine and costs to the person in charge, the deputy keeper, who refused to receive the money, on the ground that there was a rule of the gaol that no person would or could be released, on payment of his fine after 5 o'clock in the afternoon until the next morning:—Held, that there was no power,

statutory or common law, to make such a rule, and that the tender having been made at a reasonable time and to the proper person, the prisoner should have been released; and having been improperly detained after the tender, he was entitled to be discharged upon habeas corpus.

Rex v. Colahan, 14 O.L.R. 379, 12 Can. Cr. Cas. 283.

—Proceedings against corporation—Serving notice of charge—Leave of Attorney-General to prefer charge.]—In the province of Alberta which has no grand jury system, a corporation may be compelled to answer to an indictable offence (ex gr. conducting a lottery scheme) by a formal written charge in lieu of an indictment, such charge being laid by the Attorney-General or by his direction or with the consent or order of a Judge and notice thereof being served on the corporation under s. 918 of the Revised Code.

The King v. Standard Soap Company, 12 Can. Cr. Cas. 290.

—Commitment after repeal of special statute—Duty not to delay commitment ordered by conviction.]—(1) The issue of a warrant of commitment in execution of a summary conviction is a ministerial and not a judicial act. (2) Where a summary conviction has been made under a special statute and the statute is afterwards repealed, a commitment in execution may be issued notwithstanding the repeal. (3) It is the duty of a magistrate making a summary conviction and imposing a penalty of imprisonment to follow up his judgment with a commitment, and it is doubtful whether he has any discretion to suspend the issue of the warrant of commitment.

Re Thomas Lynch, 12 Can. Cr. Cas. 141.

—Change of venue — Balance of convenience.]—The principle on which a change of venue in a criminal case will be ordered is, that there is fair and reasonable probability of partiality and prejudice in the district, county or place, within which the indictment would otherwise be tried. On a motion to change the venue, notwithstanding that a strong case was made out for the change if the balance of convenience alone was to be considered, still, as it was not shown that there was or was likely to be any prejudice against the accused and certainly no more where the indictment was found than in the place to which it was proposed to change the venue, the motion was refused.

Rex v. O'Gorman, 14 O.L.R. 102, 12 Can. Cr. Cas. 230.

—Indictment — Attempt — Stating the offence.]—Where the accused was indicted for "concealing himself with intent to escape from the penitentiary:"—Held, that as the criminal act consists in an attempt to commit an offence, doing something with intent to commit the offence is not necessarily sufficient to constitute an attempt. Where the accused pleads guilty to a charge, and it is disclosed that the indictment alleges only a fact which might or might not, according to the circumstances, be sufficient to prove an offence, the plea of guilty will be struck out.

Rex v. Labourdette, 13 B.C.R. 443, 13 Can. Cr. Cas. 379.

—Bail before committal for trial—Amount.]—(1) A Superior Court has jurisdiction to admit the accused to bail while the preliminary enquiry is pending before the magistrate. (2) In making an order for bail pending the preliminary enquiry a Judge of a Superior Court may impose the condition that the proposed bail shall not only make affidavits of justification but attend before a magistrate for examination as to their qualification.

The King v. Hall, 12 Can. Cr. Cas. 492.

—Law stamps on judicial proceedings — Proceedings by the Crown.]—(1) No law stamp is required in the Province of Quebec on a warrant of arrest in a criminal matter where the proceedings are instituted by the Crown. (2) The omission to affix a law stamp to a warrant of arrest would not affect the validity of the proceedings subsequent to the execution of the same, the defect, if any, being cured by s. 669 of the Criminal Code, 1906.

The King v. Hamelin, 16 Que. K.B. 501, 13 Can. Cr. Cas. 333.

—Proceedings by Crown—Law stamps.] — The Crown is not obliged to place law stamps on its proceedings. The accused who has pleaded to the information, given security for his appearance and asked for a speedy trial cannot attack the legality of his arrest on the ground that the warrant does not bear stamps.

The King v. Rodrigue, 9 Que. P.R. 122, 13 Can. Cr. Cas. 249.

—Arrest on Sunday — Taking bail and fixing day.]—M. was arrested on Sunday on a warrant issued for an offence against the Canada Temperance Act. When brought before the magistrate he applied to be admitted to bail, and was permitted to make a deposit in lieu of bail. The case was set down for hearing on a week day and M. was discharged from cutsody. M. appeared at the time appointed and secured a further adjournment upon his agreeing to leave the amount of the deposit as bail for his appearance. On the day last mentioned he appeared and objected to the legality of his arrest on Sunday and to the action of the magistrate in taking bail and fixing a day:—Held (1), S. 564, sub-s. 3 of the Code was made applicable to the case by the Canada Temperance Act, s. 107, and that the warrant could be executed on Sunday. (2) Per Graham, E.J., Meagher, J., and Russell,

J., assuming that the releasing on bail and fixing a day for the hearing were illegal, that the arrest being legal there was a negligent escape and nothing to prevent the defendant from being retaken, and that the magistrate had jurisdiction to proceed with the case. (3) For such a defect as that contended for in the procedure prohibition was not the proper remedy. Per Townshend, J.:—The taking of bail and fixing a day was not illegal, but an act done in connection with the arrest.

R. v. McGillivray, 41 N.S.R. 321, 13 Can. Cr. Cas. 113.

—Bail—Prisoner found guilty of murder — New trial—Conviction reversed on appeal.] —(1) When a prisoner, charged with wilful murder, has been tried, found guilty and sentenced to death, but, upon appeal, has obtained a reversal of the conviction on technical grounds, and stands committed for a second trial, he should not be admitted to bail unless there has been an unreasonable and unjust delay on the part of the Crown in bringing on the second trial. (2) In an application by the Crown to postpone a criminal trial because of the absence of Crown witnesses, the Court may accept the statement of the Crown counsel that reasonable efforts were made to procure their attendance without requiring proof upon oath.

McCraw v. The King, 16 Que. K.B. 505, 13 Can. Cr. Cas. 337.

—Adjournment of preliminary examination —Discretion of magistrate.]—Accused was one of 16 Chinamen charged with the same offence on similar evidence. Fourteen, including accused, were remanded pending decision of the other two as test cases. Upon resumption of proceedings, evidence similar to that on which the two first cases were committed for trial was put in, whereupon a remand of a week was granted to permit the procuring of further evidence. At the end of that time a second remand was granted. Upon application for a mandamus requiring the magistrate forthwith to commit the accused for trial:—Held, that a writ of mandamus will not issue directing a magistrate to commit prior to his adjudication of the case. That it is the duty of the magistrate to take the evidence of all concerned, and that the Court must not interfere with the discretion of the magistrate as to remands when that discretion is being exercised legally and in good faith.

In re Ying Foy, 14 B.C.R. 254, 15 Can. Cr. Cas. 14.

—Admission by offending party—Summons issued thereon—Committal for trial without sworn information.]—A constable before the expiration of his term of imprisonment released from custody an Indian who had been convicted and sentenced to fourteen days' imprisonment. The constable then went before one of the convicting magistrates and told him that acting upon instructions from the Superintendent of Indian Affairs at Ottawa he had released the Indian. The magistrate thereupon had a summons issued and served upon the constable calling upon him to appear in answer to a charge of unlawfully releasing the Indian. The constable appeared before two justices of the peace upon said charge and by his counsel objected that the magistrates had not jurisdiction to deal with the matter as there was no sworn information. The magistrates overruled the objection, held a preliminary enquiry, and committed the accused for trial.

In re Thompson, 14 B.C.R. 314; R. v. Thompson, 15 Can. Cr. Cas. 162.

—On speedy trial of indictable offence without a jury.]—

See SPEEDY TRIAL.

—On summary trial by magistrate under Criminal Code.]—

See SUMMARY TRIAL.

—In summary conviction matters.]—

See SUMMARY CONVICTION.

—Prosecutions under liquor laws.] — See CANADA TEMPERANCE ACT; LIQUOR LAW.

—Speedy trial.]—

See that title.

—Summary trial.]—

See that title.

—Summary conviction.]—

See that title.

CROWN.

Provincial government—Grant of land—Validity.]—The Vancouver Island Settlers' Rights Act, 1904, defines a settler as a person who, prior to the passing of the British Columbia Statute, c. 14 of 47 Vict., occupied or improved lands situate within that tract of land known as the Esquimault and Nanaimo Railway land belt with the bona fide intention of living thereon, and s. 3 of said Act provides that upon application being made to the Lieutenant-Governor in Council with twelve months from the coming into force of the Act, showing that any settler occupied or improved land within the said land belt prior to the enactment of said c. 14 with the bona fide intention of living upon the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant in fee simple in such land shall be issued to him or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler. The lands within the said belt had been conveyed by the

province originally to the Dominion for the purposes of the railway, and by the Dominion transferred to the railway company, which in giving grants or conveyances of portions thereof, reserved the minerals. Defendant, who held from her predecessor in title, applied for and obtained a grant under said s. 3:—Held, on appeal, that the railway company was entitled to be heard upon such application. Held, further, that a grant issued without such opportunity being given to the railway company to be heard on the application, was a nullity, and that the defendant should be restrained from making use of it. Held, further, that one of the conditions in the statute was that the claims of applicants thereunder should be passed upon by the Lieutenant-Governor in Council, and the absence of compliance with such condition was fatal, but held, further, that in the circumstances here the defendant should be permitted, on giving notice to the railway company, to proceed with her application and that the Crown need not be a party to the action.

Esquimalt and Nanaimo Railway Co. v. Fiddick, 14 B.C.R. 412.

—Military reserve—License from Crown to use lands as public park.]—On the 8th of June, 1887, a portion of land near the City of Vancouver, and known as Stanley Park, was handed over to the municipality for an indefinite period for use as a public park. The land, which had been an Imperial military reserve, had been transferred to the Dominion on the 7th of March, 1884. The city's petition, presented in 1886 to the Dominion, asked for "that portion of land (described as within the city limits) known as the Dominion Government military reserve near the First Narrows . . . bounded on the west by English Bay and on the east by Burrard Inlet." Adjacent to the peninsula known as Stanley Park, and within Vancouver harbour, is a small island, and there was some evidence that at certain stages of the tide during the year, there was bare land between the island and the peninsula. Shortly prior to the 8th of June above mentioned, the city's boundaries, by an amendment to the charter, were stated so as to extend down to low water mark. It was contended for the city that this made the island a portion of the park. But in all charts and maps the land was shown as an island. The city assumed to use the island as a portion of the park, and built out to it a foot-bridge, which afterwards was allowed to fall into disuse and decay. Plaintiffs' predecessor, in 1898, applied for a lease of the island, and although the city was notified of such application, no reply was given until when, in February, 1899, an order was passed authorizing the Minister of Militia to grant a lease for 25 years, the city protested and asserted a right to possession of the island under the terms of the order of the 8th of June, 1887 A question then arose between the Province and the Dominion as to the ownership of the island (see (1901), 8 B.C.R. 242; (1904), 11 B.C.R. 258; [1906] A.C. 552), resulting in favour of the Dominion. In consequence, the city opened negotiations with the Dominion for a lease of Stanley Park, and sought to have Deadman's Island specifically included in such lease. Eventually a lease was executed of "all that portion of the City of Vancouver (and the foreshore adjacent thereto, bounded by the western limit of district lot 185, group 1, New Westminster District, as shown on the official plan thereof filed in the Land Registry office at Vancouver) and the low water mark of the waters of Burrard Inlet, the First Narrows and English Bay, and being all that peninsula lying to the west and north of said district lot 185, known as "Stanley Park." " The lease was also "subject, until their determination, to any existing leases of portions of said land." Two small portions of Stanley Park were leased to athletic clubs:—Held, that, in all the circumstances, the city's lease granted in 1908 embraced only the portion of the reserve set out in the peninsula. Held, also, that the plaintiffs' lease was a valid one. Judgment of Morrison, J., 13 W. L.R. 75, reversed.

Vancouver Lumber Co. v. City of Vancouver, 15 B.C.R. 432 (C.A.).

—Railway ties—Inspection—Inspector exceeding authority in respect of acceptance.]—The suppliant, in reply to an advertisement calling for tenders for ties for the use of the Intercolonial Railway, offered to supply ties to the Crown for such purpose. The Crown expressed its willingness to purchase his ties provided they answered the requirements of the specifications mentioned in the advertisement for tenders. D., an inspector appointed by the Government, in excess of his authority and contrary to his instructions, undertook on behalf of the Crown to accept ties not up to the said specifications. On this becoming known to the Crown, D.'s inspection was stopped, and other persons were appointed to re-inspect the ties, who rejected a portion of those which D. had undertaken to accept. The suppliant claimed the price of the ties so rejected:—Held, confirming the report of the Registrar, as referee, that the Crown was not liable for the price of the ties which D., as inspector, wrongfully and in excess of his authority, had undertaken to accept.

Michaud v. The King, 13 Can. Exch. R. 147.

— National Transcontinental Railway — Services connected with construction of eastern division.]—A petition of right will not lie in the case of a disputed claim

founded upon a contract entered into with the Commissioners of the National Transcontinental Railway for services connected with the construction of the Eastern Division of such railway. Under the provisions of 3 Edward VII. c. 71, the Commissioners are a body corporate, having capacity to sue and be sued on their contracts. Action, therefore, upon such a claim should be brought against the Commissioners and not against the Crown.

Johnston v. The King, 13 Can. Exch. R. 155.

—National Transcontinental Railway—Lands taken by Commissioners—Compensation.]—Section 13 of 3 Edw. VII., c. 71, reads as follows: "The Commissioners may enter upon and take possession of any lands required for the purpose of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown saving always the lawful claim to compensation of any person interested therein":—Held, that, under the terms of s. 15 of the above Act (read in connection with the provisions of the Railway Act, R.S. 1906, c. 37), when lands have been taken and become vested in the Crown as provided by s. 13, and the Commissioners cannot agree with the owner thereof as to compensation for the same, such compensation must be ascertained by a reference to arbitration, and not by proceedings taken in the Exchequer Court for such purpose. National Transcontinental Ry.; Ex p. Bouchard, 38 N.B.R. 346, not followed.

The King v. Jones, 13 Can. Exch. R. 171.

—Liability of Crown for negligence of servant.]—

See NEGLIGENCE.

—Negligence in operation of Government railway.]—

See RAILWAY.

—Vancouver Island Settlers' Rights Act, 1904—Provincial Government—Grant of land — Validity — Grant of minerals and timber by Dominion Government.]—

Esquimault & Nanaimo Ry. Co. v. Fiddick, 7 W.L.R. 778 (B.C.).

—Pre-emption of land—Laches—Abandonment—Petition of right—Contract of Crown with pre-emptor.]—

Cartwright v. The King, 3 W.L.R. 47 (B.C.).

—Government of Yukon Territory—Liability for acts or omissions of officers or servants—Respondeat superior — Government highway—Subsidence—Injury to private property.]—

Re Binette, 12 W.L.R. 730 (Y.T.).

—Pre-emption of land—Laches—Abandonment—Petition of right—Contract of Crown with pre-emptor.]—

Cartwright v. The King, 1 W.L.R. 103 (B.C.).

—Crown lands—British Columbia Land Act—Holder of pre-emption record—Occupation.]—The 30 days' notice required by s. 13 of the British Columbia Land Act is for the benefit of the pre-emption holder, who can waive it, wholly or in part if he so desires; and, if he does so, the commissioner has jurisdiction to adjudicate and cancel the pre-emption record before the 30 days have elapsed. And held, that the pre-emption holder had waived the notice by requesting the commissioner to give an earlier hearing and by attending thereon with counsel without objection. The pre-emptor obtained his record on the 8th January, 1909, and was on the land for the first time thereafter on the 6th March, staying 3 days. He was there again in March, but for no length of time. He next went upon it for 2 nights in May, and again in July —for how long did not appear. After that he was absent from the land continuously to the date of hearing, the 15th February, 1910:—Held, that, in view of the spirit of all the sections of the Land Act dealing with pre-emptions, and especially ss. 14 and 16, it was impossible to hold that the commissioner was wrong in finding that the pre-emption holder had not complied with the provisions of the Act as to occupation.

Re Haselwood, 15 W.L.R. 52 (B.C.).

Breach of contract by servant—Sureties —Discharge.]—The defendants were sued as sureties for the performance of a contract to deliver hay to the N. W. M. Police. The defendants claimed they were relieved from liability because the police authorities failed to carry out their part of the contract in material particulars, viz. (1) By using a quantity of hay before it had been inspected by a board of officers as provided by the contract. (2) By allowing a portion to be carried off by some of the constables, and another portion to be destroyed by cattle before the hay was weighed or measured, as provided by the contract. (3) By measuring instead of weighing the hay, as provided by the contract; the result by weighing being much in favour of the defendant's principal:—Held, that the third objection offered a good defence. Held, also, that the Crown was responsible for breaches of contract resulting from the acts or omissions of its servants, though not for their torts. The

Queen v. McFarlane, 7 S.C.R. 217, and The Windsor & Annapolis Ry Co. v. The Queen, 11 A.C. 607, considered.

The Queen v. Mowat, 1 Terr. L.R. 146.

—Contract—Liability of agent—Extrinsic evidence.]—The defendant, the principal of an industrial school, an employee of the Dominion Government, entered into and signed in his own name a written agreement engaging the plaintiff for a certain period in a certain employment. The factory in which the plaintiff was employed being destroyed by fire, and the plaintiff thrown out of employment, he sued the defendant for wrongful dismissal: —Held, that evidence of the capacity in which the defendant entered into the agreement and the other surrounding circumstances was admissible. It appearing that the defendant acted merely as agent for the Government. Held, that the defendant was not liable.

Boez v. Hugonnard, 4 Terr. L.R. 69.

—Suit in any court—Prerogative of—R.S. B.C. 1897, c. 52, s. 64.]—It is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open, either because of the defendant not residing in or of the cause of action not arising in the district.

The King v. Campbell, 8 B.C.R. 208.

—Military reserve—Deadman's Island — Recitals in private Acts—Whether binding on the Crown.]—The statement in the Vancouver Incorporation Acts which are private in their nature, that certain land was a "Government Military Reserve" is not conclusive on the Crown in right of the province, and held, on the facts that it was not shown that Deadman's Island was a military reserve called into existence by properly constituted authority and, therefor, that it belongs to the province and not to the Dominion. Remarks as to the powers of Governor Douglas and as to what constituted a "reserve."

Attorney-General of British Columbia v. Ludgate and the Attorney-General of Canada (Deadman's Island Case), 8 B.C.R. 242 (Martin, J.).

—Prerogative—R.S.B.C. 1897, c. 52, s. 64.] —Action brought in the County Court of Westminster against defendant, who resided in the County Court District of Yale, for damages for the conversion of timber growing on Dominion lands in Yale district. Defendant objected to the jurisdiction of the Court as the case did not come within s. 64 of the County Courts Act, inasmuch as he did not reside in Westminster district, and the cause of action did not arise either wholly or partly in that district:—Held, that it is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open, either because of the defendant not residing, or of the cause of action not arising in the district.

The King v. Campbell, 38 C.L.J. 54 (Harrison, Co. J.).

—Payment of interest by Crown—Wrongful act of Crown's servant.]—(1) The Crown is not liable to pay interest except upon contract therefor, or where its liability therefor is fixed by statute. (2) In the absence of statutory provision in such behalf, the Crown is not liable to answer for the wrongful act of its officer or servant.

Algoma Central v. The King, 7 Can. Exch. R. 239.

—Liability for costs.]—Section 62 of the Supreme Court and Exchequer Court is to be construed as applicable to the Crown, and costs may be given thereunder for or against the Crown.

Lovitt v. Attorney-General for Nova Scotia, 33 Can. S.C.R. 350.

—Claim for services rendered as commissioner under R.S.C. c. 115—Payment—Public office.]—(1) A person appointed under the provisions of c. 115, Revised Statutes of Canada, as a commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown cannot recover against the Crown payment for his services as such commissioner, there being no provision for such payment in said enactment or otherwise. (2) The service in such a case is not rendered in virtue of any contract, but merely by virtue of appointment under the statute. (3) The appointment partakes more of the character of a public office than of a mere employment to render a service under a contract express or implied.

Tucker v. The King, 32 Can. S.C.R. 722, affirming 7 Can. Exch. R. 351.

—Crown officer—Discretionary functions—Injunction.]—The Court has no jurisdiction at the suit of a subject to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign.

Attorney-General (Ont.) v. Toronto Junction Recreation Club, 8 O.L.R. 440 (Anglin, J.).

— Negligence—Common employment—Defence by Crown—Workmen's Compensation Act.]—The Manitoba Workmen's Compensation Act does not apply to the Crown. In Manitoba the Crown as represented by the Government of Canada may in an action for damages for injuries to

an employee, rely on the defence of common employment.

Ryder v. The King, 36 Can. S.C.R. 462.

—Reference to Court of Appeal by Government—Chose jugée.]—The advice given to the Government by the Court of Appeal on a matter referred to under 61 Vict. c. 11, is only an opinion which has not the force of chose jugée; nor is it a compromise, a transaction nor an arbitration seeing that the matter is not referred to the court by consent of parties, but on the initiation of the Government alone.

Galindez v. The King, Q.R. 26 S.C. 17 (Sup. Ct.).

—Public work—Collision with entrance pier to canal—Negligence in construction.]—One of the entrance piers to a Government canal was so constructed that a substructure of masonry rested on crib work. The base of the pier was set back three feet from the edge of the crib work, which left a step or projection under water between the masonry and the side of the crib work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then, taking a sheer and getting out of control, swung over and came in collision with this pier:—Held, that upon the facts proved the accident was caused by the vessel being caught in a current or eddy and so carried against the pier. 2. That as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision.

British and Foreign Marine Insurance Company v. The King, 9 Can. Exch. R. 478.

—Negligence — Freight elevator in post office—Use of by employees—City by-law.]—The suppliant, an employee of the post office in the city of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the post office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators; but the suppliant contended that as the lift was allowed to be used by certain employees in going from one floor to another it should have been provided with guards or something to prevent anyone from falling from it, as the suppliant did while passing from the first floor to the basement:—Held, that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was. 2. In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge. 3. The by-law of the city of Montreal respecting freight and passenger elevators passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the post office at Montreal, which building constitutes part of the public property of the Dominion, and so was within the exclusive legislative authority of the Parliament of Canada.

Finigan v. The King, 9 Can. Exch. R. 472.

—Attorney-General — Action to avoid Crown mining leases—Misrepresentation—Jurisdiction—Discretion of Attorney-General.]—Where an action was brought by the Attorney-General of the province to avoid mining leases of public lands as having been granted by the Crown through representation and fraud on the part of the defendants, and the latter set up in their defence matter attacking the plaintiff's status as suing not in the interest of the public, but at the private solicitation of interested individuals:—Held, affirming the Master-in-Chambers, that this portion of the defence was objectionable and should be struck out, because the discretion of the Attorney-General, as representing the Crown in the commencement and conduct of litigation, is not subject to investigation or control by the Court. A "caution" under the Lands Titles Act, R.S.O. 1897, c. 138, amounts to no more than the notice of an adverse claim equivalent to a lis pendens, and expires by lapse of time or otherwise, as be directed by the Court in an action. It does not form a blot on the title, and no pleading is necessary to have it vacated. Matter proper for Petition of Right cannot be set up by way of counterclaim.

Attorney-General of Ontario v. Hargrave, 11 O.L.R. 530.

—Duty of responsible ministers of the Crown—Refusal to submit petition of right—Tort—Right of action.]—Under the provisions of the Crown Proceeding Act, R.S.B.C. c. 57, an imperative duty is imposed upon the Provincial Secretary to submit petitions of right for the consideration of the Lieutenant-Governor within a reasonable time after presentation and failure to do so gives a right of action to recover damages. After a decisive refusal to submit the petition has been made, the right of action vests at once

and the fact that a submission was duly made after the institution of the action is not an answer to the plaintiff's claim. In a case where it would be open to a jury to find that an actionable wrong had been suffered and to award damages, the withdrawal of the case from the jury is improper and a new trial should be had. The Supreme Court of Canada reversed the judgment appealed from (12 B.C. Rep. 476), which had affirmed the judgment at the trial withdrawing the case from the jury and dismissing the action and allowing the plaintiff his costs up to the time of service of the statement of defence, costs being given against the defendant in all the Courts and a new trial ordered. Davies and Maclennan, JJ., dissented and, taking the view that the refusal, though illegal, had not been made maliciously, considered that, on that issue, the plaintiff was entitled to nominal damages, that, in other respects, the judgment appealed from should be affirmed, and that there should be no costs allowed on the appeal to the Supreme Court of Canada.

Norton v. Fulton, 39 Can. S.C.R. 202; affirmed Fulton v. Norton, [1908] A.C. 51.

—Prescription — Grant of land by the Crown as a town site—Part becoming submerged—Reversion.]—(1) A party who claims a title to property by thirty years' prescription can rely only on his own possession or on his own and that of anterior possessors from whom he holds a valid title to the property in the nature of a demise. (2) When a piece of land is set apart or granted by the Crown as a site for a town, any part of it that becomes unfit or useless for the purpose (v. g. by submersion) reverts to the Crown.

The Chicoutimi Pulp Co. v. The King and Price, 16 Que. K.B. 142.

—Action by Attorney-General—Payment of costs by relator or Attorney-General.]—In an action by the Attorney-General at the relation of a private individual, the Crown sues as parens patriæ, and the only object of inserting the name of the relator in the proceedings is to make him responsible for costs. The Act 18 and 19 Vict. c. 90 (Imperial), is not in force in British Columbia, and the machinery by which the Act is to be worked out could not be applied here.

Attorney-General ex rel. Kent v. Ruffner, 12 B.C.R. 299.

—Knowledge—Breach of trust—Purchase of debentures out of Common School Fund—Estoppel against the Crown.]—In an action by the Crown against the Quebec North Shore Turnpike Road Trustees to recover interest upon debentures purchased from them by the Government of the late Province of Canada (with trust funds held by them belonging to the Common School Fund), the defendants pleaded that the Crown were estopped from recovery inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust and with the intention of misapplying the proceeds towards payment of interest upon other debentures due by them in violation of a statutory prohibition:—Held, affirming the judgment appealed from (8 Ex. C.R. 390), that, there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust or misapplication by the advisers of the Crown could not be set up as a defence to the action.

Quebec North Shore Turnpike Road Trustees v. The King, 38 Can. S.C.R. 62.

—Government railways — Freight rates—Regular and special rate—Agent's mistake—Estoppel.]—A freight agent on the Intercolonial Railway, without authority therefor and by error and mistake, quoted to a shipper a special rate for hay between a certain point on another railway and one on the Intercolonial, the rate being lower than the regular tariff rate between the two places. The shipper accepted the special rate and shipped a considerable quantity of hay. Being compelled to pay freight thereon at the regular rate he filed a petition of right to recover the difference between the amount paid and that due under the special rate:—Held, that as the claim was based upon the negligence or laches of an officer or servant of the Crown, for which there was no statutory remedy, the petition must be dismissed.

Gunn & Company v. The King, 10 Can. Exch. R. 343.

—Provincial legislature—Contract authorized by resolution—Modification of, by Order-in-Council—Executive Government.]—The Government of the Province of Ontario through its Inspector of Prisons, entered into a contract authorized and approved of by a resolution of the Legislature, for the manufacture of twine in the Central Prison, utilizing prison labour, which contract was assigned to a company with the consent of the Lieutenant-Governor-in-Council. After the assignment and during the currency of the contract, the workshops and machinery were destroyed by fire and the work stopped. A new agreement with the company was then entered into, authorized by orders-in-council, but not approved of by the Legislature, for the furnishing of new machinery, etc. On the trial of a petition of right, in which the company claimed balances due after a termination of the contract:—Held, that while any answer of the Court would be wholly inoperative, so far as any pay-

ment to the contractor of the amount found due was concerned, unless the Legislature should appropriate the money; the original agreement was within the authority of the Executive Government of the province and did not require the ratification of the Legislature to give it contractual validity, and that the later agreement was a new agreement, which also was within the authority of the Executive Government, as well as any changes or modifications in either. Held, also, on the evidence, that after accounts had been taken on a certain basis occasioned by a change in the contract, it was too late to re-open them. 2. That parties are not entitled to interest as a matter of right, and as in the transactions between the parties here, interest was not charged by the Government, as they now sought to charge it, that claim could not be allowed. 3. That although insurance was not provided for in the agreement and the machinery was purchased by the company, it was subsequently to become the property of the Government, and so was substantially a purchase by the Government, and as insurance had been allowed to the company in the accounts, it was too late to object to such allowance now. 4. That accounts rendered, checked and entered in the prison books, there being no fraud or concealment, should not be disturbed. 5. That the contract did not call for the payment of additional men supplied beyond the original number contracted for, and there was no implied contract for their payment as on a quantum meruit. While not necessary to determine the case, the Court was of opinion that the resolution of the Legislature ratifying the contract did not give the contract the force of a statute of the province, and there was no intention it should, and even if it did, that the Executive Government had power to modify it.

Independent Cordage Company v. The King, 13 O.L.R. 619 (Meredith, C.J.C.P.).

—Costs—Indemnity — Vancouver Island Settlers' Rights Act, 1904.]—In a statute declaring certain settlers entitled to mineral rights on their lands, there was a provision that any action attacking such rights should be defended by and at the expense of the Crown. On action taken by plaintiff company to test the statute, judgment was given in favour of the defendant. The company appealed and the appeal was dismissed:—Held, as to costs, that defendant was not in a position to claim any costs against plaintiff company as his rights were being asserted by and defended at the expense of the Crown.

Esquimalt and Nanaimo Railway Co. v. Hoggan, 14 B.C.R. 49.

—Yukon territory year-book—Publication by private individual—Authority of commissioner to bind Dominion Government.]—The Commissioner of the Yukon Territory on the 24th November, 1903, had no authority to bind the Crown, as represented by the Government of Canada, by a contract entered into with a private individual for the printing and publication of a year-book relating to the Yukon Territory.

Pattullo v. The King, 11 Can. Exch. R. 263.

—Government steam dredge—Boiler explosion.]—B., an employee on board of a dredge belonging to the Dominion Government, was charged with the duty of keeping the boilers supplied with water, the condition of the boilers being indicated to him by means of water-gauges. Those gauges demanded unremitting attention owing to the peculiar character of the boilers. B. was instructed by the engineer and fully understood that these gauges demanded his unremitting attention, and that it was dangerous for him to leave except momentarily, a position which gave him a view of some of the gauges. B. left such a position for about ten minutes, going to another part of the dredge, and during his absence one of the boilers exploded and he was fatally injured. Upon a petition of right by his widow for damages:—Held, that the accident was attributable to B.'s own neglect, and that the petition must be dismissed. Quære, Whether the dredge was a "public work" within the meaning of s. 20 (c) of the Exchequer Court Act.

Massicotte v. the King, 11 Can. Exch. R. 286.

—Government railway.]—See RAILWAY.

—Public work.]—See PUBLIC WORK.

Patent — Locatee — Improvements — Claim for.]—On an application being made for the patent to certain lands, a claim was made by the defendant, who had married the widow of the locatee, and had improved the land, to be allowed the value of such improvements, whereupon the Commissioner of Crown Lands directed that before the patent issued the amount, if any, payable to the defendant for his improvements and work on the land, after proper deductions, should be ascertained. A consent judgment was obtained referring it to the Master to enquire and report as to what sum, if any, the defendant was entitled to for permanent improvements and work done upon the land; for maintenance of the family of the locatee; and for any advances made to them, after making all proper deductions:—Held, that while the consent judgment was silent as to the principle to be applied in ascertaining the amount payable to

the defendant for the improvements, etc., having regard to the object of the Crown Lands Department, the proper mode was to award such sum as in foro conscientiæ the defendant ought to receive.

Highland v. Sherry, 32 Ont. R. 371.

—Contract for grant of part of public domain—Breach of—Remedy—Jurisdiction—Declaration of right.]—The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament. 2. Such a claim may be prosecuted by a Petition of Right. 3. Where the Court has jurisdiction in respect of the subject-matter of a Petition of Right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If on the other hand, there is no jurisdiction, no such declaration should be made. Clark v. The Queen, 1 Can. Exch. R. 182, considered.

The Qu'Appelle, Long Lake and Saskatchewan Railroad and Steamboat Company v. The King, 7 Can. Exch. R. 105.

— Petition of right — Kaslo and Slocan railway subsidy.]—Suppliant applied to be allowed to purchase certain lands under s. 31 of the B.C. Land Act, tendering the proper amount therefor. The application was refused on the ground that the lands had been granted to the railway company. The suppliant alleged that such grant was illegally issued and void, and the Crown allowed a Petition of Right to be brought:—Held, that the suppliant had no locus standi to obtain any relief.

Hall v. The Queen, 7 B.C.R. 480, affirming 7 B.C.R. 89.

—Grant made in error—Adverse claim — Cancellation.]—The provisions of the Quebec Statute respecting the sale and management of public lands (32 Vict. c. 11, R.S.Q. Art. 1299) do not authorize the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist.

The King v. Adams, 31 Can. S.C.R. 220.

—Timber licenses—Sales by local agent—Location ticket — Suspensive condition—Title to lands.]—During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown Lands Agent made a sale of a part of the lands covered by the license and issued location tickets or licenses of occupation therefor under the provisions of Arts. 1263 et seq. of the Revised Statutes of Quebec, respecting the sale of Crown Lands. Subsequently the timber license was renewed, but, at the time the renewal license was issued, there had not been any express approval by the Commissioner of Crown Lands of the sale so made by the local agent as provided by Art. 1269 R.S.Q.:—Held, affirming the judgment of the K.B. Quebec, appealed from, Taschereau and Davies, JJ., dissenting, that the approval required by Art. 1269, R.S.Q. was not a suspensive condition the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question was still ungranted lands of the Crown for which the timber license had been validly issued.

Leblanc v. Robitaille, 31 Can. S.C.R. 582.

—Location ticket—Cancellation—Prescription against the Crown.]—Held (confirming the judgment of the Superior Court, district of Ottawa, Rochon, J.):—1. Under the terms of a sale from the Crown in 1857, the grantee was obliged to perform all the obligations contained in ordinary location tickets, and without residence and clearance upon the lot the grantee could not become the incommutable owner nor acquire letters patent. 2. Prescription does not run against the Crown, which always has the right to cancel a location ticket.

Kealy v. Regan, 23 Que. S.C. 305 (C.R.).

—Land subsidy in the N. W. Territories—Mines—Reservation in grant—Dominion Lands Act.]—By the Act 53 Vict. c. 4, the suppliant railway company, among others, was authorized to receive a grant of Dominion lands of 6,400 acres for each mile of its railway, when constructed. Under the provisions of s. 2 the grants were to be made in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees, respectively, of the cost of survey of the lands, and incidental expenses. The Act came into force on the 16th of May, 1890. On that date there were certain regulations in force, made on the 17th September, 1889, under the provisions of the Dominion Lands Act, which provided that all patents for lands in Manitoba and the Northwest Territories should reserve to the Crown all mines and minerals which might be found to exist in such lands, together with the full power to work the same. Orders in council authorizing the issue of patents, for the lands in question, to the suppliant railway company were passed from time to time, according to the number of miles of railway constructed. There was no reference in these orders to the regulations respecting the reservation of mines and minerals of 17th September, 1889:—Held, that the regulations reserving mines and minerals applied to all grants of lands made under

the provisions of the Act. 53 Vict. c. 54, and that the omission of reference to such regulations in the orders in council authorizing patents to be issued did not alter the position of the suppliant company under the law. Semble, that where Parliament grants a subsidy of lands in aid of the construction of a railway, and nothing more is stated, the grant is made under ordinary conditions, and subject to existing regulations concerning such lands.

Calgary & Edmonton Railway Co. v. The King, 8 Can. Exch. R. 83.

—Transfer from Dominion to Provincial Government—Swamp lands—Selection.]—By the statute 48-49 Vict. (Can.) c. 50, R.S.C. c. 47, s. 4, it was provided that in certain territory all Crown lands which may be shown to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses:—Held, that the section did not operate as an immediate transfer to the province of any swamp lands or of any profits arising therefrom, but only from the date of the order in council made after survey and selection as prescribed by the statute. Meanwhile the Dominion and not the province was entitled to the profits arising from the lands for the public uses of the Dominion.

Attorney-General (Man.) v. Attorney-General (Can.), [1904] A.C. 799.

—Crown grant—Party in possession by permission—Estoppel.]—In an action to recover land, plaintiffs relied upon a grant from the Crown dated March 14th, 1891. Defendants limited their defence to a portion of the land claimed, and as to that portion, depended upon title acquired in 1893, from H., who entered as a servant of plaintiffs, and by their permission, erected a house on the land in 1890:—Held, that the possession of H. was not sufficient to prevent the Crown from granting to plaintiffs. Also, that H. having entered by plaintiffs' permission, both defendants and H. were estopped from denying plaintiffs' title. Also that if the Crown was misled by the omission of plaintiffs to disclose in their petition that the land was in the occupation of H. that objection could not be raised by a third party, in collateral proceedings, but must be raised in a proceeding to be taken before the Governor-in-Council to have the grant vacated. Also that the case was not within the provisions of R.S. (5th series), c. 9, and that the occupancy, being that of a person in possession by permission of plaintiffs, did not require to be disclosed.

Lakeview Mining Co. v. Moore, 36 N.S. R. 333.

— Settlement of Manitoba claims—Operation of grant—Transfer in praesenti—Condition precedent—Ascertainment and identification of swamp lands—Revenues and emblements.]—The first section of the "Act for the Final Settlement of the Claims of the Province of Manitoba on the Dominion" (48 and 49 Vict. c. 50) enacts that "all Crown Lands in Manitoba which may be shown, to the satisfaction of the Dominion Government, to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses":—Held, affirming the judgment appealed from (8 Ex. C.R. 337) Girouard and Killam, JJ., dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General-in-Council, and that, in the meantime, the Government of Canada remained entitled to their administration and the revenues derived therefrom enured wholly to the benefit and use of the Dominion.

Attorney-General for Manioba v. Attorney-General for Canada, 34 Can. S.C.R. 287.

—Scire facias—Annulling letters patent.]—The information of the Attorney-General for annulling letters patent is simply the statement of the claim with conclusions as in the declaration in an ordinary action. (2) Summons in matters of scire facias or actions to annul letters patent is made by writ issued in the usual manner, without affidavit of petitioner, order of a Judge or fiat of the Attorney-General. (3) Want of authorization, by the Attorney-General, of the attorneys signing the information for him is not a ground of exception. If necessary, the Attoney-General may file a disavowal of the attorneys ad litem.

Gouin v. McManamy, Q.R. 28 S.C. 216 (Sup. Ct.).

—Land in British Columbia—Military reserve—Title of the Dominion—Transfer by Imperial Government—British North America Act, 1867, ss. 108, 117.]—The land in suit, called Deaoman's Island, was de facto a "reserve" by the Government of British Columbia under paragraph 3 of the proclamation of 1859, and, according to the evidence, a military reserve:—Held, that it remained Imperial property at the time of the British North America Act, 1867, and was transferred to the Dominion by special grant, dated March 27, 1884. It did not, therefore, fall to the colony in virtue of s. 117 of the Act, nor to the Dominion in virtue of s. 108. Appeal from decision in Attorney-General v. Ludgate, 11 B.C.R. 258, dismissed.

Attorney-General of British Columbia v

Attorney-General of Canada, [1906] A.C. 552.

—Crown land in New Brunswick—Adverse possession for less than sixty years—Grant by the Crown during adverse possession valid—Rights of grantee.]—In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of fifty-six years down to a date about seven years prior to the date of action:—Held, that judgment was rightly entered for the defendant. Occupation against the Crown for any period less than the sixty years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against its grantee in actual possession. The Act 21 Jac. I. c. 14, only regulates procedure, and its effect is that if any information of intrusion is filed and the Crown has been out of possession for twenty years, the defendant is allowed to retain possession till the Crown has established its title. Where no information has been filed, there is nothing to prevent the Crown or its grantee from making a peaceable entry and then holding possession by virtue of title. Decisions by the Courts of New Brunswick and Nova Scotia to the effect that when the Crown has been out of actual possession for twenty years it could not make a grant until it had first established its title by information of intrusion, overruled. Decision in Maddison v. Emmerson, 34 Can. S.C.R. 333, affirmed.

Emmerson v. Maddison, [1906] A.C. 569.

CURATOR.

Service upon heirs of person deceased—Art. 135 C.C.P.]—(1) The general rule of Art. 135 C.C.P., authorizing service upon the heirs of a person deceased within the previous six months, without mentioning their names or residences, by leaving the document for them at the former domicile of the deceased, does not apply to heirs who are not capable of pleading, e.g. minors, and who, moreover, at the time of the service were not actually interested, their tutrix having renounced the succession of the deceased in their behalf. (2) The fact that the curator to the vacant succession may have had knowledge of the service of the writ and made no objection, cannot be taken as equivalent to a service nor avail to support an ex parte judgment obtained without legal service. Turcotte v. Dansereau, 27 Can. S.C.R. p. 583, followed.

Marion v. Brien, 23 Que. S.C. 45 (Archibald, J.).

CUSTOM.

Trade custom—Art. 1016 C.C.]—A party to an action on a contract may rely on a custom of trade not only when the terms of the contract are ambiguous, but also when it does not plainly appear from the circumstances of the transaction what was the intention of the parties.

Prior v. Atkinson, 19 Que. S.C. 210 (S.C.).

CUSTOMS DUTIES.

Customs—Reference of claim.]—Where, in the case of a customs claim referred to the Court under the provisions of s. 179 of the Customs Act (R.S. 1906, c. 48), the judgment was mainly based on evidence which, though it was in their possession at the time, the claimants had neglected to produce to the Minister of Customs when the claim came before him, the claimants were not allowed the costs of the reference.

Red Wing Sewer Pipe Co. v. The King, 12 Can. Exch. R. 230.

—Smuggling—Being on board smuggling vessel—Knowingly concerned.]—1. It is essential to the offence of participation in smuggling operations by being on board a boat engaging therein that the defendant should have been knowingly concerned in the prohibited acts and such guilty knowledge must be charged and proved by the prosecutor. 2. The words "if he has been knowingly concerned" contained in s. 216 of the Customs Act, R.S.C. c. 48, constitute a condition precedent to the completion of the offence and are not merely an exemption, exception or proviso not necessary to be alleged under Code s. 717 (amendment of 1909). 3. Where the charge to which the prisoner pleaded guilty did not allege that he had been "knowingly concerned" in the prohibited acts, a warrant of commitment in like terms is insufficient and the prisoner is entitled to be discharged on habeas corpus.

The King v. McDonald, 16 Can. Cr. Cas. 505 (N.S.).

—Importation of jewellery in Canada—Exemption.]—Where unsatisfactory statements with respect to certain articles of jewellery imported into Canada were made by the owner to the customs authorities who had seized the goods, but the Court, on a reference of the claim, found that upon the evidence before it there was no intention on the part of the claimant to evade the law, the goods were ordered to be restored to the claimant; but he was not allowed his costs.

Greenspan v. The King, 12 Can. Exch. R. 254.

Keeping or concealing goods imported without payment of lawful duties—Pen-

alty.]—Section 197 of the Customs Act of Canada as amended in 1888 is to be construed as making the punishment of fine or imprisonment, therein provided, to be "in addition to any other penalty," applicable as well where the goods unlawfully imported into Canada are found and are thereupon liable to be forfeited and seized, as where they are not found, in which latter event the offender forfeits the value thereof.

O'Grady v. Wiseman, 3 Can. Cr. Cas. 332, 9 Que. Q.B. 169.

—Importation of steel rails—Return of duties paid under protest—Interest.]—The suppliants had imported at different times during the year 1892-1893 large quantities of steel rails into the port of Montreal to be used by them as contractors for the construction of the Montreal Street Railway. The Customs authorities claimed that the rails were subject to duty, and refused to allow them to be taken out of bond until duties, amounting in the aggregate to the sum of $53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council of the case of the Toronto Railway Co. v. The Queen [1896] A.C. 551, and some time during the year 1897, the Customs authorities returned the amount of the said duties to the suppliants. The suppliants claimed that they were entitled to interest on the same during the time it was in the hands of the Crown, and they filed their petition of right therefor:—Held, 1. That as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec. 2. That on the particular question as to interest at issue in this case the law of the Province of Quebec is the same as the laws of the other provinces of the Dominion. 3. That as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for interest claimed it could not be made liable by the institution or commencement of an action. Laine v. The Queen, 5 Ex. C.R. 128, and Henderson v. The Queen, 6 Ex. C.R. 39, distinguished.

Ross v. The King, 7 Can. Exch. R. 287.

—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Repetition—Presumption as to good faith—Arts. 1047, 1049 C.C.]—The Crown is not liable, under the provisions of Articles 1047 and 1049 C.C., to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act. Wilson v. The City of Montreal (24 L.C. Jur. 222) approved, Strong, C.J., dubitante. Per Strong, C.J.:—The error of law mentioned in Arts. 1047 and 1049 C.C. is the error of the party paying and not that of the party receiving. Money paid under compulsion is not money paid under error within the terms of those articles. The Toronto Railway Co. v. The Queen, 4 Can. Ex. C.R. 262; 25 Can. S.C.R. 24; [1896] A.C. 551, discussed. Judgment appealed from (7 Can. Ex. C.R. 287) affirmed.

Ross v. The King, 32 Can. S.C.R. 532.

—Duties on goods—Foreign-built ships — Customs' Tariff Act, 1897, s. 4.]—A foreign-built ship owned in Canada, which has been given a certificate from a British consul and comes into Canada for the purpose of being registered as a Canadian ship is liable to duty under s. 4 of the Customs' Tariff Act, 1897. A taxing Act is not to be construed differently from any other statute.

The King v. The Algoma Central Railway Co., 32 Can. S.C.R. 277, reversing 7 Ex. C.R. 239.

—Foreign-built ships.]—A foreign-built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4.

Algoma Central Railway Co. v. The King, [1903] A.C. 478.

—The Customs Act—Infraction—Smuggling—Preventive officer—Salary—Share of condemnation money.]—The suppliant had been empowered to act as a preventive officer of customs by the Chief Inspector of the Department of Customs. The appointment was verbal, but a short-hand writer's note of what took place between the Chief Inspector and the suppliant, at the time of the latter's appointment, showed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share allotted to seizing officers; and if you have informers, an award to your informers and you must depend wholly upon the seizures." Certain regulations in force at the time provided that, in case of condemnation and sale of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively:—Held, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the Court could not interfere with the Minister's discretion.

Bouchard v. The King, 9 Can. Exch. R. 216.

—Customs Act—Infringement by importation of cattle without payment of duty—Intention.]—(1) Where cattle are liable to the payment of duty upon importation into Canada, the bringing of such cattle to a point within two or three miles south of the boundary line between Canada and the United States whence they may stray into Canada, constitutes an element in the offence of smuggling. (2) Where cattle are brought into Canada for pasturage, or to a point from which they themselves may stray into Canada for pasturage, if the owner in Canada exercises any control over them, a contravention of the Customs Act is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle.

Spencer v. The King, 10 Can. Exch. R. 79, affirmed 39 Can. S.C.R. 12.

—Smuggling—Penalties—Averments in information.]—In an information for smuggling, laid under the provisions of s. 192 of the Customs Act, it is a sufficient averment to allege that "the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon said dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the Custom house." It is not necessary to charge the defendant with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section. 2. In such an information where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found." The offender is only liable to forfeit twice the value of the goods, when the goods are not found but their value has been ascertained. 3. The penalty "not exceeding two hundred dollars and not less than fifty dollars," mentioned in s. 192 of the Customs Act as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace," cannot be sued for in the Exchequer Court of Canada. Barraclough v. Brown [1897] A.C. 615 referred to. 4. While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under s. 240 of the Customs Act, where the goods have been seized by a Customs officer, such seizure is to be deemed a commencement of the proceeding within the meaning of s. 236.

The King v. Lovejoy, 9 Can. Exch. R 377.

—Customs Act—Penalty under—To whom payable.] — A penalty imposed by the police magistrate of the city of Saint John for harbouring smuggled goods under section 197 of the Customs Act (Rev. Stat. Can. c. 32) forms part of the consolidated revenue of Canada, and is payable to the receiver-general, and not to the chamberlain of the city of Saint John, under 52 Viet. c. 27, s. 50.

The King v. McCarthy, 38 N.B.R. 41.

—Importation in original packages—False entry—Burden of proof.]—Where a seizure is made of goods imported into Canada, on the ground that while the goods were stated in the entry papers to be imported in the original packages, they were not so imported in fact, if the claimant declines to accept the minister's decision confirming the seizure and obtains a reference of his claim to the Court the burden of proof is upon the claimant to show the bona fides of the entry in dispute.

Crosby v. The King, 11 Can. Exch. R. 47.

DAMAGES.

Conditional promise to favourably consider a proposal.]—A written promise by the appellants that if satisfied with the respondent as a customer they would favourably consider any application by him to renew a subsisting contract between them on its expiration does not impose a legal obligation to grant it.

Montreal Gas Company v. Vasey, [1900] A.C. 595.

—Under Lord Campbell's Act.]—See LORD CAMPBELL'S ACT.

—Ships and shipping.]—See SHIPPING.

—Railways.]—See RAILWAY; ELECTRIC RAILWAY.

—In negligence actions generally.] — See NEGLIGENCE.

—Proof—Compensation—Arts. 1136, 1189 C.C.—Arts 215, 217 C.C.P.] — Damages which can be proved only by a long contradictory enquete cannot be regarded as clear and liquidated and to be opposed en compensation and a plea to that effect will be dismissed en droit.

Canadian Breweries v. Yasinowsky, 4 Que. P.R. 464 (Sup. Ct.).

—Assessment—Estimating by guess—Concurrent findings.]—The evidence being insufficient to enable the trial Judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could

be obtained by sending the case back for a new trial and, therefore, allowed the appeal and dismissed the action, thus reversing the concurrent findings of both Courts below. Armour, J., however, was of opinion that the proper course was to order a new trial.

Williams v. Stephenson, 33 Can. S.C.R. 323.

—On sale of goods.]—See SALE OF GOODS.

—On sale of lands.]—See SALE OF LANDS; DECEIT.

—Continuing damages—Expropriation — Res judicata—Right of action.]—A lessee of premises used as an ice house recovered indemnity from the city for injuries suffered in consequence of the expropriation of part of the leased premises and, in his statement of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice house during the unexpired term of the lease:—Held, affirming the judgment appealed from, that the reservation in the first action did not preserve any further right of action in consequence of the expropriation, and, therefore, the plaintiff's action was properly dismissed by the Courts below, as, in such cases, all damages capable of being foreseen must be assessed once for all and a defendant cannot be twice sued for the same cause. The City of Montreal v. McGee, 30 Can. S.C.R. 582, and The Chaudière Machine and Foundry Co. v. The Canada Atlantic Railway Co., 33 Can. S.C.R. 11, followed.

Anctil v. City of Quebec, 33 Can. S.C.R. 347.

—Speculative damages — Publishing company—Contract to supply books, etc., for a fixed period—Liquidation of company—Damages for residue of period.]—On payment of a subscription fee to a publishing company, certificates were issued by the company to the subscribers, guaranteeing to such purchasers the privilege for five years of purchasing all books, magazines and periodicals and other printed matter at the price quoted in the company's catalogues and bulletins, but subject to ordinary trade fluctuations, and undertaking to act for such subscribers as purchasing agents, at the lowest possible prices, for books, etc., not contained in such catalogue. The certificates were not transferable, and were only available to subscribers for their personal and family use and benefit. Before the expiry of the above period a liquidation order was obtained for the winding-up of the company, whereupon certain subscribers claimed to be placed on the list of contributors for damages alleged to have been sustained by them through the company's failure to supply them with books, etc., during the residue of the term:—Held, that only nominal damages were recoverable, for beyond this they were of too speculative or conjectural a character to be ascertained, nor could any part of the subscriptions be recovered back on the ground of it being unearned. Village of Brighton v. Austin (1892), 19 A.R. 305, referred to.

Re Publishers' Syndicate; Greig's, Park's and Connery's Cases, 7 O.L.R. 223 (C.A.).

—Remoteness.]—See LORD CAMPBELL'S ACT.

—Contract—Breach—Measure of damages —Burden of proof.]—In an action claiming damages for breach of contract the measure of damages is the profit which plaintiff might reasonably look for in performing his contract, had he not been prevented from doing so. Plaintiff gave evidence that he estimated his profit at from 15% to 20% on the total amount of the contract, or from $75 to $80, but on cross-examination he failed to give any data by which the accuracy of his estimate could be tested, while the person who actually did the work gave evidence that his profit was about $35:—Held, that the burden was on the plaintiff to show grounds which would would justify the Court in adopting his estimate, and that, in the absence of such evidence, the amount of damages allowed must be reduced from $70, at which it was fixed by the trial Judge, to $35. The trial Judge added to plaintiff's estimated profit an allowance for plaintiff's time while the contract existed. Held, that he was wrong in doing so as time was one of the elements forming the basis upon which the profit was to be calculated. Held, also, as to material provided by plaintiff for the purpose of carrying out his contract, that he could only be allowed damages in so far as the material was shown to be useless for any other purpose.

Lowe v. Robb Engineering Co., 37 N.S.R. 326.

—Employer's liability.]—See MASTER AND SERVANT.

—Contract—Substituted contract—Consideration—Measure of damages.]—In an action to recover an amount claimed under a contract to provide material required for re-seating a church, plaintiff's right to recover depended upon whether the words "seat" and "lining" in the contract should be read with a comma or a hyphen between them. In the former case plaintiff would be bound to furnish the seats complete, and, in the latter case,

he would only be bound to furnish the material of which the seats were to be constructed. The trial Judge decided in favour of the reading contended for by the defendant (the comma, as in the contract) on the ground that to admit plaintiff's construction would be to ignore the actual reading, and to give an unusual and improper meaning to the word "lining," and to materially vary the terms of the contract:—Held, that it was not possible to dissent from this contruction. The performance by a contractor of that which he is already bound to do under the terms of his contract will not, in itself, be consideration for a promise to pay for the work was done as extras. Quære, whether the settlement in this way of a bona fide dispute between the parties, as to the meaning of the terms used, would constitute sufficient consideration for the alleged promise to pay. Semble, that if the plaintiff relied upon a new promise made by defendant after breach, defendant would be entitled to counter-claim for breach of the original contract, and that the measure of damages would be the amount which plaintiff would be entitled to recover under the amended contract. Held, that there was no reason for sending the case back for trial on a theory which neither party seemed to have considered.

Dempster v. Bauld, 37 N.S.R. 330.

—**Reduction—Consent—New trial.**]—The Court of Appeal pronounced judgment on the 4th April, 1905, dismissing the defendant's appeal except upon the question of damages. It was held that the damages assessed by the jury were excessive, and a new trial was ordered unless the plaintiff would consent to a reduction. The certificate of this judgment not having issued, the Court on the 2nd June, 1905, reconsidered the matter, and, acting under Rule 786, directed a new trial confined to the question of the amount of damages:—Held, following Watt v. Watt, [1905] A.C. 115, that the Court has no jurisdiction, without the defendant's consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages.

Hockley v. Grand Trunk Ry. Co., 10 O.L.R. 363 (C.A.).

— Deceit — **Sale of mining locations — Measure of damages.**]—See MINING.

Syndicat Lyonnais v. Barrett, 36 Can. S.C.R. 279.

— Verdict — **Excessive damages — Setting aside.**]—See SLANDER.

McLean v. Campbell, 37 N.S.R. 356.

—**Nervous shock—Impact.**]—The plaintiffs were driving on a highway in an enclosed vehicle which owing, as was found, to the negligence of the defendants, was struck by a moving car of the defendants, pushed a short distance sideways, and struck on the other side by another car moving in the opposite direction. The plaintiffs suffered no visible bodily injuries except slight bruises, but complained of mental or nervous shock, and a jury assessed damages therefor:—Held, that damages of this kind were not recoverable notwithstanding the impact and the bodily injuries. Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, and Henderson v. Canada Atlantic Ry. Co. (1898), 25 A.R. 437, followed.

Geiger v. Grand Trunk Ry. Co., 10 O.L.R. 511 (D.C.).

—**Measure of damages—Natural gas leases—Reservation.**]—By agreement and conveyance executed in April, 1891, by the plaintiffs and one of two appellant companies, and afterwards in 1894 assigned to the other of them, the plaintiffs, who carried on an extensive business of quarrying stone and burning lime on their property, sold, and the two companies successively acquired, various gas leases, gas grants, and gas wells theretofore held by the plaintiffs. These gas leases conferred on the holders the exclusive right to explore and drill the lands to which they related, but which were not demised thereby, for subterranean or natural gas which had been discovered to be useful both as an illuminant and as fuel, and to set up and use the necessary machinery for reducing the said gas into their possession and control. The transaction included the following clause: "It is understood that the parties of the first part reserve gas enough to supply the plant now operated or to be operated by them on said property." Shortly after the assignment of 1894 the assignee company cut off the supply of gas theretofore enjoyed by the plaintiffs under the said reservation clause and refused further supply; and the plaintiffs thereupon procured the gas required for their plant by the acquisition from independent sources of other gas leases and by the construction of works necessary to obtain the same. In an action for damages caused by the deprivation of gas against both companies:—Held, that on the true construction of the reservation clause the companies were successively bound to supply from the gas obtained by them to the plaintiffs a sufficient amount to operate their plant, varying according to its requirements:—Held, also, overruling the Court below, that the measure of damages recoverable by the plaintiffs was the cost of procuring the gas to which they were entitled and not the price at which the substituted gas when procured could have been sold; and that, as they had sold the leases and works used in procuring the substituted gas for more than they cost, they were entitled only to nominal damages. Le Blanche v. London and North Western Ry. Co. (1876), 1 C.P.D. 286, approved.

Erie County Natural Gas and Fuel Company v. Carroll, [1911] A.C. 105.

—Injury to property—Future damages — Indemnity.]—The plaintiff in an action claiming damages to his property from the adjoining owner by construction of a new house cannot require the defendant to agree to indemnify him against future damages and to execute a hypothec in his favour for the purpose, especially when he does not allege and prove that he is entitled to the same by operation of law or by special contract.

Onofrio v. La Patrie Publishing Co., 8 Que. P.R. 365 (Loranger, J.).

—Fraud and misrepresentation — Measure of damages—Difference between purchase-price and fair value—Loss of profits in operation.]—The plaintiffs alleged that they were induced to purchase from the defendant two creameries, relying upon certain representations of the defendant and his agent as to the output, expenses, and profits of the creameries for the year 1904-5, which were, as they alleged, false and fraudulent. By the judgment in the action, a reference was directed to ascertain and state what damages, if any, the plaintiffs had sustained by reason of the fraud referred to in the pleadings:—Held, that the true measure of the damages was the difference between the purchase-price of the creameries and their actual value at the time they were purchased; and that damages for the loss sustained by the plaintiffs in the operation of the creameries should not have been allowed by the Master upon the reference. The purchase-price of the creameries was $4,830, and the Master found that their fair value at the time of the purchase was $900, and he assessed the damages (irrespective of loss in operation) at $3,930, the difference between these two sums, and interest thereon from the date of payment of the purchase-price. Held, upon the evidence, that the creameries had no value as creameries at the time they were sold to the plaintiffs, and that there was no reason to differ from the finding of the Master that $900 was the fair value of the land, buildings, and machinery. Held, also, upon the evidence that, instead of a profit as was represented, there was a considerable loss in operating the creameries in 1904-5. To show this, the plaintiffs were not obliged to trace to the last pound the quantity of butter that went out from the two creameries; there would have been no doubt as to that matter, had the books of the defendant not been destroyed; and the plaintiffs were warranted in invoking the maxim omnia præsumuntur contra spoliatorem. Report of the Master affirmed, except as to the damages for loss in operation.

Lamont v. Wenger, 22 O.L.R. 642.

—Breach of contract—Fraud—Exemplary damages.]—Where there has been a fraud committed in the breach of a contract the injured party has a right of action for the recovery of all damages resulting therefrom, whether or not they could have been reasonably foreseen at the time of the contract. (2) Damages ought not to be refused merely on account of difficulty in fixing the exact amount, in the absence of precise proof; in such a case, it is the duty of the Judge to make an assessment of the damages in accordance with his appreciation of the evidence.

Zurif v. Great Northern Telegraph Co., Q.R. 29 S.C. 460.

DEBENTURES.

Negotiation of, without authority and without value received—Negligence—Innocent holder for value.]—A debenture of the defendants, payable to bearer, sealed with their corporate seal and signed by their chairman and secretary, was allowed to get into circulation without the authority or knowledge of the defendants, and without their receiving any value therefor. It was finally purchased by the plaintiff before maturity, who took it in good faith and gave full market value for it. In an action brought upon two of the interest coupons attached to the debenture, the learned Judge who tried the cause asked the jury the two following questions (among others) which were answered in the affirmative: "Did the bond come into the hands of the plaintiff as an innocent holder for value through the carelessness and neglect of the defendants, or those of their officers whose duty it was to have the bonds properly executed and issued, and in which hands or custody the bonds should be detained until delivered to bond fide purchasers?" "Do you find that the board of school trustees, or their officers, were guilty of such negligence in connection with this bond, as that in your opinion it would be inequitable and unjust that the defendants should be permitted as against the plaintiff to set up a defence that the bond was not duly executed, or the issue thereof authorized by the board?" A verdict was thereupon entered for the plaintiff:—Held, that the verdict was rightly so entered.

Robinson v. School Trustees of St. John, 34 N.B.R. 503.

—Of company.]—See COMPANY.

DECEIT.

Fraud and misrepresentation — Sale of farm and horses—Condition and value—Reliance of purchaser on representations

of vendor.]—The plaintiff transferred to the defendant the stock in trade and goodwill of his business as a merchant, and received as consideration therefor a section of land, with the horses and implements thereon, and a sum of money. The plaintiff sued for damages for deceitful representations in regard to the land and the chattels:—Held, upon the evidence, that the transaction was not one in which the parties were equally ignorant of the conditions and value of what they were getting, and understood that they were taking chances and dealing at their peril; the plaintiff had never seen the land, and had no independent information about it; the defendant did make certain representations about it, and the plaintiff acted upon some of them at least. The representations alleged were: 1. That the land was first-class farm land; 2, that it was all fit for cultivation; 3, that it was all good heavy soil, except 40 acres, which was rough, but first-class pasture land; 4, that, with the exception of wells, there was no water on the land. Held, that the first and third representations were in regard to matters of opinion and were mere commendation, not justifying an inference of fraudulent intent; but the second and fourth representations were untrue and in regard to matters of such moment that they must be regarded as fraudulent. Held, also, that misrepresentations alleged as to the condition, age, and value of 6 horses upon the land, could not be regarded as proved; value is a matter of opinion; the plaintiff must have understood what their condition was; and, if their ages were misrepresented, it was hardly material, in view of all the circumstances. Damages assessed for land not at present fit to be cultivated and for water on the land in excess of what was represented.

Strome v. Craig, 15 W.L.R. 197 (Man.).

—New trial—Excessive damages—Conspiracy—Fraudulent representations.]—Where on the trial of an action claiming damages for injuries suffered by reason of an alleged conspiracy on the part of defendants to injure plaintiffs in reputation and otherwise, the jury awarded damages to one of the plaintiffs which were clearly excessive, and awarded to the other plaintiff damages including elements which had no relevancy to the cause of action, the Court ordered the verdict set aside and a new trial, unless both parties consented to a reduction of damages. There was evidence which, if submitted to the jury, would show an agreement to which all of the defendants were parties, in pursuance of which fraudulent representations were made to one of the plaintiffs to induce her to abandon the employment in which she was then engaged and accept an engagement in connection with an enterprise of a fictitious character:—Held, that this embraced all the elements necessary to an action for deceit, and complied with the definition of a conspiracy, and that the means used need not be criminal, it being enough if they involved the commission of an actionable wrong.

Cullen v. The Canadian Detective Bureau, 44 N.S.R. 322.

—Fraud and misrepresentation—Sale of creameries—Measure of damages.] — A Master was directed to ascertain and state what damages, if any, the plaintiffs had sustained by reason of the fraud referred to in the pleadings. The fraud was in respect of two creameries which, the plaintiffs alleged, they were induced to purchase relying upon representations of the defendant as to the output, expenses, and profits of the creameries for 1904-5, which were, as they alleged, false and fraudulent. The purchase-price was $4,830. The Master found that the value of one creamery was $367.50 and of the other $532.50, and allowed as damages the difference between the aggregate of these two sums and the purchase-money, viz., $3,930, with interest, and also allowed as damages $3,440.14, which he ascertained to be the loss sustained by the plaintiffs in the operation of the creameries after the purchase:—Held, that the true measure of damages was the difference between the purchase-price and the actual value at the time of purchase; and that the report, in so far as it allowed damages for the loss sustained by the plaintiffs in the operation of the creameries, must be set aside.

Lamont v. Wenger, 1 O.W.N. 177.

—Sale of hotel as going concern—False representations as to receipts and profits—Action for deceit—Evidence—Damages—Measure of.]—

Hand v. Rosen, 9 W.L.R. 375 (Man.).

Demurrer—Action of deceit—Misrepresentation as to future event.]—In an action of deceit it is not sufficient for the plaintiff to allege a misrepresentation by defendant as to something to take place in the future, as, for example, that a store to be leased by the plaintiff from the defendant would be vacant at a certain date; and, if, in such a case, the plaintiff's inability to get possession of the store at such date was caused by the defendant having given a prior lease to another party, the statement of claim should specifically allege the concealment of such prior lease as the ground of action.

Smythe v. Mills, 17 Man. R. 349.

—Misrepresentation—Damages.]—The only damages recoverable in an action of deceit based upon false representations inducing the plaintiff to purchase property are the difference between the price paid for

the thing purchased and its real value, and when the plaintiff has sold the property at a profit he can recover no damages, although he has failed to realize the profit he could reasonably have expected if the representations had been true.

Rosen v. Lindsay, 17 Man. R. 251, and Steele v. Pritchard, 17 Man. R. 226.

—Damages—Costs of uselessly defending suit.]—The plaintiffs, according to the findings of fact, had been induced by the misrepresentations and fraud of the defendants to purchase a horse for $1,200 and to give the defendants their promissory notes therefor, but such notes had been indorsed for value to the Bank of Hamilton before maturity, so that the plaintiffs had no defence to the bank's claim on the notes, and they had ample means of informing themselves on that point. They, however, defended the bank's suit, but unsuccessfully:—Held, that in this action, which was brought to recover damages for the defendant's misrepresentations, the plaintiffs could not add their costs of needlessly defending the bank's suit to their other damages, but must be limited to the amount due on the promissory notes together with the costs of the present action only.

Morwick v. Walton, 18 Man. R. 245.

DEED.

See SALE OF LAND; REGISTRATION.

DEFAMATION.

See LIBEL; SLANDER.

DEFAULT.

Delays—Art. 164 C.C.P.]—Although Art. 164 C.C.P. provides that a preliminary motion must be presented to the Court as soon as possible after expiration of the delay allowed to the opposite party, it does not follow that it must be presented immediately after the delay has expired, on pain of dismissal, seeing that the Court has a discretionary power to decide whether or not the party has respected the intention of the law and has acted with reasonable diligence, and so as not to prejudice the plaintiff.

Dugas v. Paradis, 4 Que. P.R. 444 (Sup. Ct.).

—Failure of plaintiff to proceed at trial —Refusal of application to postpone—Application to trial Judge to re-open case.]—

Burke v. Nolin, 8 W.L.R. 830 (Sask.).

—Equitable action—Default judgment—Appearance after time limited.]—Plaintiffs as heirs of L., claimed as against defendants, who were also heirs of L., partition of certain lands granted by the Crown to L. in 1805, or, in the alternative, a sale of the property and a division of the proceeds. Also a declaration that a grant of the same lands from the Crown to defendants, dated on or about the 23rd August, 1890, was inoperative and void. Shortly after the issue of the writ plaintiffs' solicitor was informed by F., a solicitor, that he had been consulted by defendants, and had advised them that they had no defence, and that the only thing to be done was to have the property divided as cheaply as possible. No appearance having been entered, judgment by default was entered against three of the defendants on June 6th, 1899. Subsequently on the 26th February, 1900, appearance was entered on behalf of all the defendants by G., another solicitor, and a defence was filed and served. Notice of trial was given on behalf of the defendants for the first day of the September sittings of the Supreme Court at A., and notice was given on behalf of plaintiffs, for the same time, of a motion to set aside the notice of trial, and entry of the same on the docket, on the grounds, among others, that default had been marked for want of appearance before an appearance was filed or served, and that the solicitor G., had no authority to appear and defend the action. The latter motion was dismissed with costs, and as the trial was not proceeded with by the plaintiffs, defendants' solicitor obtained an order "that the action be, for want of prosecution, dismissed with costs, to be taxed against plaintiffs, and that judgment be entered for defendants with costs, unless plaintiffs paid the costs of their motion to set aside the notice of trial, to be taxed, and unless plaintiffs gave to defendants security in the sum of $200, by a bond to respond, defendants' costs to be incurred, said bond to be approved of by defendants' counsel, etc." Per Ritchie, J., Graham, E.J., concurring:—Held, that the proceeding being one of an equitable nature to have a grant declared void, as well as for partition, plaintiffs were not entitled under any practice of the Court prevailing immediately prior to October 1st, 1884 (the date at which the Judicature Act, 1884, came into force) to obtain a judgment by default against the defendants as at common law. Held, that the suit must be governed by the same practice as any other equitable action not provided for in O. xiii., Rr. 11 and 13. Held, that the defendants could appear at any time before judgment, although the time limited in the writ for their appearance had elapsed. Held, in any case, that

so far as the defendant against whom judgment by default had not been entered was concerned, the appearance and defence were unobjectionable, and he could appear at any time although not served. Held, that the appearance and defence being good, the notice of trial and entry on the docket were regular, and the trial Judge was right in dismissing the motion to set them aside, and that the appeal on this point must be dismissed with costs. Semble, that even if the appearance and defence were irregular, the motion should have been to set them aside, and not the notice of trial and entry on the docket which followed them. Held, that the notice of trial, given by defendants' counsel, was regularly given under O. xxxiv., R. 11, and that the defendants, having appeared when the cause was called for trial, and plaintiffs having failed to appear, the action was properly dismissed under R. 23, of the same order by compliance with which plaintiffs were enabled to retain their suit, although unusual, were such as it was within the province of the trial Judge to impose. Held, that the order should be amended by adding recitals showing that the cause had been called for trial, and that defendants had appeared, and that plaintiffs had not appeared; and that the appeal from the order should be dismissed, but without costs, the difficulty having been created by want of care on the part of plaintiffs' solicitor in drawing up the order. Held, also, that the action should be dismissed with costs in case the conditions imposed were not complied with. Per Weatherbe, J., and Graham, E.J.:—Held, that the trial Judge was wrong in requiring the bond to be given for costs, to be approved of by defendants' solicitor, and that the order should be varied in that respect.

Duyon v. LeBlanc, 34 N.S.R. 215.

—Want of prosecution—Judgment as in case of a nonsuit—Joinder of issue served but not filed.]—An application for a judgment, as in case of a nonsuit, was refused in a case where it appeared that the plaintiff had omitted to file a joinder of issue, though the same had been served.

Gallagher v. Wilson, 35 N.B.R. 238.

—Dismissal of bill—Want of prosecution—Form of motion.]—An objection on a motion to dismiss for want of prosecution a bill by a shareholder and the company, which subsequently to the commencement of the suit went into liquidation, that the motion should have been for an order that, unless the plaintiff obtained leave to proceed within a limited time, the bill should stand dismissed, overruled.

Partington v. Cushing, 3 N.B. Eq. 322.

DEMOLITION.

Destructive fire—Demolition of buildings—Precaution.]—A fire at St. Roch, in the city of Quebec, threatened to assume large proportions and to destroy a valuable part of the city. It was deemed necessary, in order to arrest its progress, to demolish the respondent's house. Circumstances justified this as a measure of prudence and for the public safety in this part of the city. It happened, however, that the fire was extinguished before it reached the house so demolished:—Held, that the demolition was an allowable and lawful act; that the city corporation was obliged to indemnify the respondent for the demolition of his house which would not have been reached by the fire.

City of Quebec v. Mahoney, 10 Que. K.B. 378.

DEMURRER.

—Capias—Exception to the form.]—A demurrer to a capias will not be dismissed on exception to the form, the defendant being at liberty to adopt that proceeding instead of a petition to quash.

Todd v. Murray, 3 Que. P.R. 521.

—Special answer changing nature of action—"Res inter alios acta."]—The female plaintiff alleged that in another suit, in which her husband was defendant, the present defendant purchased at sheriff's sale certain immovables subject to a right of usufruct in her favour during her life, but that the defendant has entered into possession of the property and deprives her of the usufruct; and she asked that defendant be ordered to give up the possession of the property to her, and render her an account of the rents and profits. The defendant, by his plea, admitted that a clause existed in the sheriff's deed, to the effect that the property was sold subject to a right of usufruct in favour of the female plaintiff during her life, but such clause was of the nature of res inter alios acta, and had never been accepted by the female plaintiff, and that the defendant had since protested against the clause and repudiated it,—the female plaintiff not being, in fact, entitled to the immediate usufruct, but only from the death of her husband who was still living. The defendant further pleaded that previous to the sheriff's sale he became hypothecary creditor upon the property in question, by obligations granted to him by the male plaintiff, in which the female plaintiff intervened and renounced all her rights upon the property in favour of the defendant. To this the female plaintiff answered that it was the defendant himself who arranged for the sheriff's sale and contrived that the pro-

perty should be sold subject to the female plaintiff's rights as expressed in the sheriff's deed, his object being to keep bidders away and acquire the property much below its value. The defendant inscribed in law against this part of the answer:—Held, 1. (on the demurrer) That the inscription in law was well founded, the allegations of fraud not being properly urged by answer to plea, in an action on a contract, but being grounds rather to support an action to set aside the sheriff's sale. 2. (on the merits). The clause in the sheriff's deed relating to the female plaintiff's right of usufruct was res inter alios acta, and could not avail her without acceptation by her, which had not been done before the clause was repudiated by the defendant.

Hope v. Leroux, 18 Que. S.C. 556.

—Demurrer and answer to whole bill—Amendment—Waiver of objection to demurrer.]—A defendant may not answer and demur respectively to the whole bill, for thereby the demurrer is overruled, notwithstanding s. 47 of Act 53 Vict. c. 4. Consequently where a demurrer professed to be to a part, and the answer professed to be to the residue, of a bill, but the demurrer was extended to the whole prayer of the bill, it was held that unless the answer were withdrawn, for which purpose leave of Court was given, the demurrer should be overruled with costs, but that if the answer were withdrawn, the demurrer being successful on the merits should be allowed with costs. In an answer and demurrer the defendant ought to specify distinctly what part of the bill it is intended to cover by the demurrer. The objection that an answer and demurrer are respectively to the whole bill, is not waived by the plaintiff setting the demurrer down for argument under s. 41 of Act 53 Vict. c. 4. A defendant cannot demur ore tenus where there is no demurrer on the record, as where the demurrer on the record is overruled by the answer.

Abell v. Anderson, 2 N.B. Eq. 136.

—Demurrer—Striking out of one or more words of a paragraph.]—It is not competent on a demurrer to a whole paragraph of a plea to strike out one or more words of it.

Gravel v. Ouimet, 8 Que. P.R. 240.

DENTISTRY.

Dentistry Act, B.C.—Whether retrospective.]—Section 39 of the B.C. Dentistry Act, empowering the council of the College of Dental Surgeons to erase the name of a practitioner guilty of infamous or unprofessional conduct, applies to acts committed by a member before registration under the Act.

G——— v. College of Dental Surgeons of British Columbia, 14 B.C.R. 129.

—Practising dentistry without registration.]—

R. v. Austin, 10 W.L.R. 387 (Alta.).

—"Unprofessional conduct"—Dentistry Act, B.C.]—Where a professional class is governed by a statute applying specifically to that profession, and such statute prescribes the manner in which the members of the profession shall carry on their business, it is unprofessional conduct to carry it on otherwise.

Re Moody and The College of Dental Surgeons, 14 B.C.R. 206.

DEPORTATION.

See ALIEN; CHINESE IMMIGRATION.

DEPOSITIONS.

See CRIMINAL LAW; DISCOVERY; EVIDENCE.

DETINUE.

Detinue — Demand — Evidence — Onus.]—The plaintiff sold to the defendant two horses and took a lien note for the price, which was not paid at maturity. The defendant retook the horses under his lien note, but that was after this action had been brought for unlawful detention of the horses:—Held, that, to succeed in the action of detinue, the plaintiff must show that the defendant detained the horses after the plaintiff made a demand; the onus was on the plaintiff; the evidence did not show a demand; and the action was dismissed with costs.

Macleod v. Scramlen, 14 W.L.R. 262 (Sask.).

—Pleading.]—A plea of non detinet puts in issue only the fact of a detention adverse to or against the will of the plaintiff. It does not put in issue the fact of a detention.

Massey v. Pierce, 3 Terr. L.R. 253.

Demand and refusal after action.]—The plaintiff left her husband, the defendant, on the 21st October, 1902, and brought this action for certain chattels of hers which remained upon his land, and for pecuniary damages for the detention thereof. On the 27th November, 1902, after the action had been begun, she went to his house and demanded her property. He said in effect, that he did not wish her

to take her things away, because he was anxious that she should go back to live with him, and did not consent to her removing the articles, but that she might remove or leave them as she saw fit:—Held, that this did not show such a refusal of her demand as would enable her to sustain the action, if a demand and refusal after action were sufficient in detinue, as to which quære. Semble, that, if the action had been for the conversion of the plaintiff's property, nothing was shown from which the inference that there had been a conversion before action could properly be drawn.

Lintner v. Lintner, 6 O.L.R. 643 (D.C.)

—**Demand and refusal—Evidence.**]—In an action of detinue as distinguished from an action for conversion, a proof of demand and refusal is essential, if the detention be denied.

Gray & Smith v. Guernsey, 5 Terr. L.R. 439 (Richardson, J.).

DEVOLUTION OF ESTATES.

See EXECUTORS; SUCCESSION; WILLS.

DIES NON.

Easter Monday.]—Easter Monday is not a non-juridical day, and the Court refused to set aside a conviction made on that day for an offence against the Canada Temperance Act.

The King v. Kay; Ex parte Cormier, 38 N.B.R. 231.

DISAVOWAL.

Action in disavowal—Power of attorney—Form.]—The power of attorney to be furnished by the plaintiff need not be in authentic or legal form.

Leclerc v. Bernard, 8 Que. P.R. 332.

DISCONTINUANCE.

After counterclaim—Cause of action—Jurisdiction.]—Where the plaintiff discontinues his action after the defendant has delivered a counterclaim, the defendant may proceed with his counterclaim as if it were an action; the plaintiff will then be in the same position as a defendant served with a writ of summons; and if the counterclaim is one which the defendant could assert only by virtue of the plaintiff having come into the jurisdiction and sued the defendant, he should not be allowed to proceed with it as a term of permitting the plaintiff to discontinue.

Dominion Burglary Guarantee Co. v. Wood, 3 O.L.R. 365.

—**Nolle prosqui entered as to certain defendants before trial.**]—Where a nolle prosequi had been entered as to certain defendants before trial, and a verdict was afterwards obtained against the remaining defendant, the Judge, who tried the cause, under section 373 of the Supreme Court Act, granted a certificate depriving such first-mentioned defendants of their costs:—Held, that the certificate was authorized by the section in question.

Mellon v. Municipality of Kings, 35 N. B.R. 291.

—**Discontinuance of action—Notice—Service.**]—

O'Brien v. O'Brien Brewing & Malting Co., 10 W.L.R. 694 (Y.T.).

—**Without offer to pay costs.**]—A discontinuance not accompanied by an offer to pay the costs is insufficient and ineffective.

Moon v. Bullock, 6 Que. P.R. 59 (Doherty, J.).

—**Desistment from action by party without attorney's consent.**]—A desistment from an action filed by a party without his attorney's knowledge or consent, will not be rejected on motion if no fraud is proved against the parties.

Gauvreau v. Computing Scale Company, 6 Que. P.R. 448 (Curran, J.).

—**Intervention in action for damages in quasi-delicts.**]—(1) As long as a judgment is not entered upon a discontinuance, third parties can intervene to protect their rights. (2) If a widow who sued for damages for her husband's death according to Article 1056 C.C. desists from her action, the mother of the deceased has the right to intervene in the case.

Gaze v. Dominion Bridge Co., 8 Que. P.R. 181.

—**Discontinuance by plaintiff of action as to principal.**]—(1) A plaintiff in an hypothecary action cannot, on production of a plea by the defendant that he is not in possession of the hypothecated immovable, file a discontinuance as to his principal demand and move for costs against the defendant on the ground that at the date of the institution of the action, the latter was, according to the cadastre, the apparent proprietor in possession of the property. This fact must be established in the regular way and the plaintiff must therefore proceed to trial for that purpose. (2) Nor can the defendant, by motion, seek a condemnation for costs against the plaintiff who files a discontinuance under the above circumstances.

Piton v. Cantin, 31 Que. S.C. 51.

—Motion for dismissal—Reservation.] — When the plaintiff has abandoned his action a motion for its dismissal will be granted with the reservation in favour of the plaintiff of the right to sue again.

Lacroix v. Probst, 8 Que. P.R. 315 (Pelletier, J.).

—Inscription for proof and hearing.]—A party who has filed a discontinuance of certain paragraphs, against which his opponent had made an inscription in law, cannot inscribe the case for proof and hearing before acte is given of his discontinuance.

McKeown v. Wright, 8 Que. P.R. 137.

—Abandonment of action—Service—Costs.] —Personal service on defendant of the abandonment of an action before the day on which the writ is returnable is ipso facto valid as it precedes the appearance of the defendant and the instance belongs exclusively to the plaintiff. Demand by plaintiff of acte of his abandonment is not one of the conditions imposed by the Code on its validity as no special formality is prescribed and the party on whom it is served cannot demand its embodiment in a judgment. If the plaintiff has by his action occasioned any costs not taxable under the tariff and which cannot be settled at this stage of the proceedings (before the return of the writ) the defendant can recover the amount as damages by a direct action against the plaintiff.

Lussier v. Tellier, 9 Que. P.R. 113 (Sup. Ct.).

—Renunciation to judgment—Costs.]—(1) If a plaintiff desists from a judgment based upon grounds not set up in his declaration, the parties stand in the same position which they occupied prior to the reddition of said judgment. Plaintiff may then ask the Court for permission to amend his declaration. The costs of such amendment will be determined by the final judgment. (2) The word "proceeding" as used in Art. 255 C.P. concerning discontinuance of suit refers to and includes any procedure adopted by any party to a suit; a defence is included in that word. (3) It is not absolutely necessary that a party should embody in his declaration of discontinuance, that it is made subject to the payment of costs, inasmuch as that is the condition imposed by law upon which alone it can be made.

Bessette v. Equitable Mutual Fire Insurance Co., 10 Que. P.R. 201.

—Abandonment—Judgment.] — When the plaintiff abandons his action and tenders the costs to defendant the latter is entitled to enter up judgment if it does not appear that the tender was accepted and the costs paid or the amount deposited in Court.

Turgeon v. Sévigny, Q.R. 36 S.C. 304.

—Partial confession of judgment—Right of plaintiff to discontinue in part.]—When an in part conditional confession of judgment is not accepted by plaintiff, said confession does not limit or disturb plaintiff's control over his action, which he may discontinue in whole or in part.

Moreau v. Jodoin, 10 Que. P.R. 353.

—Want of prosecution.]—See that Title.

DISCOVERY.

Examination of officer of corporation—"Right-of-way agent."]—An officer of an incorporated company who is liable to be examined for discovery is one who is engaged in such a capacity that the primary purpose and effect of his engagement is to delegate to him a portion of the company's authority and to constitute him its agent to deal with third parties within the scope of his authority; and if the delegation of the authority is a mere incident in the performance of his duties he may not be examined. Under Rule 201 an officer of the company liable to examination may not be examined beyond the jurisdiction. Order made for the examination of a railway "right-of-way agent" within the jurisdiction, if service within the jurisdiction could be effected.

Powell v. Edmonton, Yukon & Pacific Ry. Co., 2 Alta. R. 339.

Examination of officer of defendant companies.]—Plaintiffs supplied gas to their customers in Hamilton. Defendants were three companies, also operating in Hamilton, and plaintiffs alleged, supplying or using electricity. Plaintiffs complained that defendants, by allowing electricity to escape, had set up electrolytic action and damaged plaintiff's gas pipes, etc., and claimed damages and an injunction. Plaintiff examined for discovery one Hawkins, as an officer of all three defendant companies, and upon the examination Hawkins refused to answer several questions, and plaintiffs moved for an order compelling him to answer. Riddell, J., held, that Hawkins should disclose who his employers were and the terms of his employment; give information as to kind, conductivity, etc., of defendant's wires, number of cars run, their average mileage, and generally all information that would enable an expert to compute or determine the amount, tension, etc., of electrical current; and the means adopted to prevent the escape of electricity; that plaintiffs were entitled to all the information defendants had, and the officer examined must inform himself. Harris v. Toronto Electric Light Co., 18 P.R. 285; Clarkson v. Bank of Hamilton, 9 O.L.R. 317, followed. That, if he did not know, he should say who did, that that person might be examined,

he should tell what instructions he gave to his subordinates, and who they were. That information should also be given as to whether a measurement had been made of the current, as to the sectional area and conductivity of the wires of defendant street railway, as to tracks and bonding, etc., and information should be given as to what were necessary and proper precautions taken by the defendants to confine the electric current to their own wires and apparatus.

Ontario Pipe Line Co. v. Dominion P. & T. Co. 16 O.W.R. 294, 1 O.W.N. 807.

—Member of Waterworks and Electric Light Commission of town.]—A member of the Waterworks and Electric Light Commission of a town, constituted by by-law passed under Municipal Light and Heat Act, R.S.O. (1897), c. 234, and Municipal Waterworks Act, R.S.O. (1897), c. 235, is a servant of the municipality, and as such is liable to examination under Con. Rule 439a.

Young v. Gravenhurst, 17 O.W.R. 96, 2 O.W.N. 118.

—Articulated facts—Default of defendant—Notice to attorney.]—A party who has been served with a subpoena for discovery and a summons on articulated facts is bound to appear and answer at the time specified, even if his attorney has not received notice of said proceedings.

Tremblay v. Hénault, 12 Que. P.R. 81.

—Examination for discovery—Refusal to answer — Attachment.]—An examination for discovery should be confined to the matters in question in the action, and should be governed by the rules of evidence. Any evidence that may be material on any question arising for the decision of the tribunal trying the cause is a proper subject for examination. Where the refusal to answer a question on an examination for discovery raises a more or less fine point of law, such party should be ordered to attend and answer before attachment proceedings are taken.

Adams v. Hutchings (No. 1), 3 Terr. L.R. 181.

—Production of documents—Document relating solely to defendant's case—Refusal to produce.]—

Von Ferber v. Enright, 11 W.L.R. 648, (Man.).

—Examination of party—Relevancy of questions—Trespass—Placarding hotel with notice of contagious disease.]—

Wedin v. Robertson, 7 W.L.R. 72 (Alta.).

—Action to revoke probate of will in favour of earlier document—Leave to defendant to photograph document produced by plaintiff.]—

Foulds v. Fowler, 7 W.L.R. 517 (Man.).

—Examination of defendant—Action to establish partnership—Question as to profits.]—

Vanderlip v. McKay, 3 W.L.R. 232 (Man.).

—Books of bank—Bank Act—Fraud—Preliminary issue—Appointment of accountant as agent to inspect books.]—

Canadian Bank of Commerce v. Wilson, 8 W.L.R. 266.

—Examination of officer of defendant company—Examination of president—Attempt to examine secretary-treasurer.]—

Brown v. London Fence, 11 W.L.R. 411 (Man.).

—Examination of officer of defendant company—Information not in personal knowledge of officer—Memorandum prepared by others—Refusal to vouch for accuracy—Duty of officer to investigate.]—

Fraser v. Canadian Pacific Ry. Co. 4 W.L.R. 525 (Man.).

—Interrogatories administered to officer of defendant municipal corporation—Examination of another officer—Refusal to furnish information supplied by servants of corporation.]—

Decarie Manufacturing Co. v. City of Winnipeg, 11 W.L.R. 102 (Man.).

—Physical examination.]—See that title.

—Production of documents—Evidence exclusively in support of case of party producing.]—A party to an action is not entitled to discovery of the evidences in the possession of the opposite party which exclusively relate to the case of the latter, and the truth of a statement to that effect respecting any particular document made in the affidavit on production of documents sworn to by one party cannot be questioned on an application by the opposite party to compel production of that document.

Von Ferber v. Enright, 19 Man. R. 383.

—Right of a defendant to examine another defendant.]—A defendant who, in his defence, submits completely to the relief sought by the plaintiff, neither denying nor admitting the allegations of the statement of claim, is not a "party adverse in point of interest" to another defendant, who disputes the plaintiff's rights, within the meaning of Rule 387 of the King's Bench Act, and the latter, therefore, cannot, under that Rule, examine the former for discovery, as the pleading do not raise any issue between them. Moore v. Boyd (1881), 8 P.R. 413, not followed.

Fonseca v. Jones, 19 Man. R. 334.

—Officer of corporation.]—Held, that the plaintiff could not, after examining an

officer of the defendant corporation for discovery under Rule 387 of the King's Bench Act, require another officer of the corporation to attend for a similar examination when the information desired could have been obtained from the first officer examined. Dill v. Dominion Bank (1897), 17 P.R. 488, not followed.

Brown v. London Fence Limited, 19 Man. R. 138.

—Examination for—Interrogatories.]—A party may be required to answer interrogatories delivered pursuant to Rule 407B of the King's Bench Act, as enacted by s. 2, of c. 17 of 5 & 6 Edw. VII., notwithstanding that he has also been ordered to attend and be examined for discovery under Rule 387. Dobson v. Dobson (1877), 7 P.R. 256, followed.

Timmons v. National Life Assurance Co., 19 Man. R. 139.

—Interrogatories upon articulated facts.]—An articulated fact reading as follows: "If you don't recognize to owe the said amount, state how much you recognize to owe" is irregular and contrary to Art. 365 C.P.

Comet Motor Co. v. Dominion Mutual Fire Ins. Co., 11 Que. P.R. 297.

—Improbation.]—A petition in improbation need not set forth the reasons of improbation.

Letang v. Decarie, 11 Que. P.R. 263.

—Officer of corporation.]—In an action against a city corporation for damages occasioned by the negligence of an employee of the waterworks department of the city in discharging his duty of examining a water meter in the plaintiff's premises, the plaintiff has a right, under Rule 387 of the King's Bench Act, to examine for discovery a water meter inspector of the city as an officer of the corporation.

Shaw v. City of Winnipeg, 19 Man. R. 551, 13 W.L.R. 706.

—Interrogatories—Service — Absentee.]—Art. 85 C.P.Q. which provides that in any case in which one of the parties to an action has, pending the proceedings, left the province or has no domicile therein, any order, notice or other document can be served on him at the prothonotary's office does not apply to a summons to reply sur faits et articles. Thus, interrogatories sur faits et articles will not be considered as admitted by, or established against an absentee if they have been served on him at the prothonotary's office especially if his residence is known.

Klipstein v. Eagle Mining Co., 11 Que. P.R. 411 (K.B.).

—Insolvent company—Examination of liquidator.]—The manager of a company in liquidation who has been appointed liquidator cannot be examined on discovery if he has not been made a party to the action.

Comet Motor Co. v. Dominion Mutual Fire Ins. Co., 11 Que. P.R. 307.

—Ordering particulars.]—See PARTICULARS.

Defamation— Justification — Immorality —Disclosure of name of paramour.]—The defendants having in their newspaper charged the plaintiff with immorality, he sued them for libel, and the defendants pleaded that the charge was true. The plaintiff having required particulars, the defendants set forth that he lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars:—Held, that the plaintiff was bound to disclose the name, although such disclosure might injure her.

Macdonald v. Sheppard Publishing Co., 19 O. Pr. 282.

—Examination for—Second trial—Ont. Rule 439.]—A party to an action may be orally examined before the trial touching the matters in question: Rule 439:—Held, that a trial which has proved abortive by the disagreement of the jury or by the granting of a new trial is not a trial within the meaning of the Rule. Leitch v. Grand Trunk Railway Co. (1888-90), 12 P.R. 541, 671, 13 P.R. 369, considered. Where the defendant had not been examined before the first trial, and the judgment thereupon had been set aside, and a new trial ordered, the plaintiff was allowed to examine the defendant before the second trial. Semble, that if there had been an examination of the defendant before the first trial, a second examination might be an abuse of the process of the Court.

Clarke v. Rutherford, 1 O.L.R. 275.

—Examination of plaintiff resident abroad —Place of examination within jurisdiction —Order—Discretion.]—The plaintiff resided at Cleveland, in the State of Ohio, and the defendant and solicitors for both parties in the county of Oxford, Ontario, where also the cause of action arose:—Held, that the local Judge for that county had jurisdiction under Rule 477 to make an order, upon the application of the defendant, requiring the plaintiff to attend for examination for discovery at Windsor, Ontario; that it was unnecessary for the defendant to show special circumstances to obtain such an order; that it was a proper exercise of discretion to name Windsor,

as a place "just and convenient" for the purpose; and that the local Judge properly took judicial notice of the geographical situation of Windsor.

Lick v. Rivers, 1 O.L.R. 57.

—Examination of plaintiffs—Specific performance—Denial of contract—Tender — Financial means.]—In an action for the specific performance of an alleged contract for the sale and purchase of a vessel for $5,000, one-half of which was to be paid in cash at the execution of the bill of sale and delivery of the vessel, and credit given for the remainder of the purchase money without any security upon the vessel or otherwise, the plaintiffs alleged a tender to the defendants of $2,500 in payment of the down instalment. Defences in denial of the contract and of fraud were among others, set up:—Held, that as the defendants absolutely refused to carry out the contract, and denied their obligation to do so, the question whether there had been a tender in fact was immaterial, in an equity action such as this; and, therefore, the plaintiffs were not obliged upon examination for discovery to answer questions as to the source from which they had obtained the money alleged to have been tendered. The defendants also sought to examine the plaintiffs as to their means to show that they were persons of no means, which, it was contended, would be a circumstance to induce the Court to refuse to adjudge specific performance, even if the contract were proved. Held, that the defendants were not entitled to such discovery, no such issue being raised upon the record, and it not being alleged that the contract was entered into upon the belief or representation that the plaintiffs were persons of means. Certain parts of the statements of defence stating the plaintiffs' want of means and that the alleged tender was only a pretended one, were considered irrelevant, but were not struck out, because the plaintiffs had pleaded over.

Bentley v. Murphy, 2 O.L.R. 665.

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

Reid v. Walters, 19 O. Pr. 310.

— Action for maintenance—Criminating answers.]—Maintenance is an indictable offence in this province; and in an action to recover damages for maintenance, the plaintiff is not entitled to obtain from the defendants upon examination for discovery such answers as would tend to subject them to criminal proceedings. In such an action no discovery of the matters charged could be had which would not involve the defendants in matters leading up to the offence; and therefore the examination should not be allowed to take place at all.

Hopkins v. Smith, 1 O.L.R. 659.

—Documents relating to plaintiffs' title—Protection.] — The plaintiffs' manager made an affidavit on production of documents in which he objected to produce a certain agreement (referred to in the statement of claim) between the plaintiffs and their assignors whereby the property in question in the action was assigned to the plaintiffs, on the ground that such document "relates exclusively to the title of the plaintiffs and to the case of the plaintiffs in this action, and not to the case of the defendants, nor does the said document tend to support the defendants' case, nor does it, to the best of my knowledge, information, and belief, contain anything impeaching the case of the plaintiffs":—Held, not sufficient to protect the document from production. Combe v. Corporation of London (1842), 1 Y. & S.C.C. 621, followed. Quilter v. Heatly (1883), 23 Ch. D. 42, specially referred to.

Diamond Match Co. v. Hawkesbury Lumber Co., 1 O.L.R. 577.

—Examination of ex-officer of corporation —Reading depositions at trial.]—If an appointment is taken out for the examination for discovery of an ex-officer of a corporation, and the corporation's solicitor does not attend, and gives notice that he will object to the deposition being received at the trial:—Held, following Osler, J., in Leitch v. Grand Trunk Railway Company (1890), 13 P.R. 369, that it should not be received.

Bank of B. C. v. Oppenheimer, 7 B.C.R. 448.

—Examination of ex-officer of corporation —Reading depositions at trial—Practice.]

—On an examination for discovery of an ex-officer of a corporation, the corporation's counsel attended and objected to certain questions being put:—Held, that the deposition was admissible at the trial.

Walkley v. City of Victoria, 7 B.C.R. 481.

—Examination for discovery—Nature of—Whether or not cross-examination allowed.]—Upon the examination for discovery of the defendants certain questions were objected to on the ground that they were in the nature of cross-examination. The examination was adjourned for the purpose of bringing the matter before a Judge in Chambers, and on May 30th, 1900, Martin, J., made an order requiring the defendants to answer the questions objected to. The defendants appealed to the full Court. Owing to some doubt as to the construction to be placed on the rules for examination for discovery, on the 15th of June, 1900, Rule 703 was amended expressly sanctioning cross-examination. The appeal was argued before the full Court on the 17th September:—Held, dismissing the appeal, that the examination for discovery under Rule 703 (even before the amendment) was in the nature of a cross-examination, but limited to the issues raised in the pleadings. Carroll v. The Golden Cache Mines Company (1899), 6 B.C. 354; 35 C.L.J. 208, overruled. The amendment of 15th June, 1900, is retroactive.

Bank of British Columbia v. Trapp, 7 B. C.R. 354; 37 C.L.J. 45 (S.C.B.C.).

—Examination of ex-officer of corporation —Reading at trial.]—An examination for discovery of an ex-officer of a corporation is not inadmissible at the trial merely because the person examined was not such officer at the time of examination.

B. C. Electric Co. v. Manufacturers Insurance Co., 7 B.C.R. 512.

—Examination of opposant—Dismissal of opposition—Art. 651 C.P.]—Held, that a motion merely asking for the examination of the opposant, without asking for the dismissal of the opposition after such examination, will not be granted.

Hogue v. McConnell, 3 Que P.R. 387.

—Action for wrongful dismissal and libel — Relevancy.]—The plaintiff had as a member of the medical board of the defendants, recommended a certain woman as nurse, and she was employed by the defendants. Subsequently the defendants having been informed that the plaintiff had introduced the woman under an assumed name and had previously been living in adultery with her, dismissed the plaintiff from their medical board, and withdrew permission to him to deliver lectures to the nurses, by a resolution of their board of directors, in which the grounds of their action were stated to be that the plaintiff had "recommended as a nurse a woman who was not a fit and proper person for the position, and had in doing so done injury to the hospital, and for other reasons" not specified in the resolution. The plaintiff sued for wrongful dismissal and for libel. In their defence the defendants set up that the alleged libel was privileged and that they had received information to the effect that the plaintiff had been living in adultery with the woman in question some time previous to his appointment. Upon his examination for discovery, the plaintiff was asked several questions as to his former relationship with the woman. These he refused to answer. Upon an application to compel him to answer:—Held, that the plaintiff was bound to answer all questions the answers to which tend to show whether or not the woman in question was or was not a fit and proper person to be employed as a nurse, even though the facts sought to be proven had occurred previously to the plaintiff's appointment, and that evidence tending to show that the woman had been living in adultery or leading an immoral life was evidence bearing on that issue, especially as the adultery was alleged to have been committed with the plaintiff himself, and he would therefore be aware of it, and of the fact that the woman was not a fit and proper person when he recommended her appointment.

Ings v. Calgary General Hospital, 4 Terr L.R. 58.

—Examination for discovery—Non-production—Attachment.]—(1) Before an attachment can be issued for contempt in not producing documents for inspection on an examination for discovery, an order for production for inspection has to be made. (2) An order for production of books for inspection must state the time, or time after service thereof, within which the books are to be produced, and the copy thereof served must be endorsed with notice of the consequence of neglect or refusal to obey the same.

Smith v. McKay, 4 Terr. L.R. 202.

—Copyright—Production of documents.]—In an action against some of the members of an unincorporated musical society for infringement of the copyright of a musical composition, the secretary-treasurer, one of the members sued, stated in his examination that he had taken minutes of meetings of the members of the society, at which proceedings took place relating to the performance of the composition in question, and that he had handed these and other documents referring to the same matters to the advocate for all the de-

fendants.—Held, that this defendant was bound to produce them. It is not a ground for resisting production that a person, not before the Court, has an interest in the document.

Carte v. Dennis, 4 Terr. L.R. 357 (Richardson, J.).

—Quo warranto—Public official—Interrogatories—Arts. 331, 990, 997 C.P.Q.] — The candidate elected to a public office cannot be compelled on proceedings by quo warranto to answer interrogatories respecting his ability to read or write.

St. Arnaud v. Barrette, 4 Que. P.R. 102 (S.C.).

—Interrogatories—Failure to answer — Domicile—Art. 364 C.P.Q.]—A party failing to answer interrogatories sur faits et articles may, by motion and on payment of costs incurred by his default, demand to be examined under a commission of inquiry as to his new domicile outside the province.

Burelle v. Palardy, 4 Que. P.R. 73 (S.C.).

—Liquidator—Production of documents — Arts. 286-289 C.P.Q.]—An official liquidator of a company defendant in an action to set aside a deed for fraud may be examined on discovery and compelled, under subpœna, to produce the books of the company in his possession.

Ward v. Montreal Cold Storage and Freezing Co., 4 Que. P.R. 47 (S.C.).

—Interrogatories sur faits et articles — Secretary of company—Authority—Delay.] —Answers of the secretary of a company to interrogatories sur faits et articles will be struck out of the record if the secretary had no authority from the company to answer; a delay will be granted to enable the secretary to repeat his answers after the necessary authority has been procured.

Dumont v. College of Physicians and Surgeons of Quebec, 4 Que. P.R. 81 (S.C.)

—Interrogatories—Order ex parte.] — An order for leave to deliver interrogatories under B.C. County Court, Order XIII., Rule 6, may be made ex parte.

Daily Co. v. B.C. Market Co., 8 B.C.R. 1.

—Examination for—Appointment—Attendance on—Voluntary taking oath—Refusal to answer questions.]—A party to an action who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn:—Held, that she was precluded from setting up, as a ground for her refusal to answer questions submitted to her, that she had not been served with a subpœna.

Cooke v. Wilson, 3 O.L.R. 299.

—Examination for—Railway company — Engine driver—Consolidated Rule 439.]—An engine driver in the employment of a railway company is an officer thereof within the meaning of Consolidated Rule 439, and may be examined for discovery under the provisions of that Rule.

Morrison v. Grand Trunk Railway Co., 4 O.L.R. 43 (Div. Ct.).

—Books, documents, etc., in possession of debtor—Art. 289 C.P.]—There is no provision of the Code of Civil Procedure whereby a debtor, contesting a demand of assignment made upon him can be ordered to exhibit and give communication, to a creditor, of his books of account, letterheads or any documents or books of whatsoever nature.

Wistar v. Dunham, 5 Que. P.R. 79.

—Affidavit on production—Dual relationship of solicitor — Privilege.]—Where it appeared that certain letters had passed between the defendant in an action and his solicitors therein, who had also acted as his real estate agents, and that in his affidavit on production, he had claimed privilege for such letters:—Held, that the plaintiff was entitled to a further affidavit, setting forth and distinguishing what communications had taken place between him and his solicitors as such, and as real estate agents, in order to claim privilege for the former, as the latter were not privileged. Moseley v. The Victoria Rubber Co. (1896) 55 L.T.N.S. 482, followed.

Clergue v. McKay, 3 O.L.R. 63.

—Affidavit on production of documents—Materiality—Examination of parties — Scope of—Contents of Document—Costs of lengthy examination.]—The plaintiff alleged a contract of partnership between him and the defendant J. for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, etc., and that the defendants R. and C. had maliciously caused a breach of the partnership contract; and the plaintiff claimed a partnership account, and damages for such breach and for conspiracy. It appeared from the examination for discovery of the defendant R. that he obtained written agreements from various companies, either in his own name, or in the names of himself and the defendant C., or in the names of other persons; that these agreements, or some of them, were afterwards assigned to a company which was then incorporated (not a party to this action). The plaintiff alleged that these agreements were,

in fraud of his rights, substituted, with variations, for certain agreements previously entered into between the same companies and the defendant J., who was alleged to be the plaintiff's partner in the transactions. The plaintiff also alleged that the defendants R. and C. paid $20,000 to the defendant J. to induce him to act with them, instead of with the plaintiff, in completing the purchase of the agreements; and it appeared from R.'s examination that he and C. drew a cheque upon their bank account in favour of the defendant J., which was paid:—Held, that the agreements and the cheque and also a certain memorandum prepared by the defendant R. were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits on production of documents. 2. That the defendants R. and C. ought not, as a matter of discretion, to be ordered to disclose, upon their examination for discovery, facts which would become material only when the plaintiff should have established his right to recover damages. 3. That the plaintiff was entitled to discovery from the defendants R. and C. as to whether they paid money to J., whether it was their own money or that of other persons, and if the latter, of what persons; and for what it was paid. 4. That the plaintiff was entitled also to discovery as to the amount paid by R. and C. to the M. company for the bicycle branch of their business; it being alleged by the plaintiff that he and J. had obtained an option to purchase it, and that the defendants had substituted a new option therefor. 5. That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them. Semble, that where an examination is unnecessarily long, the costs of it should be entirely disallowed. Decision of Meredith, C.J., varied.

Evans v. Jaffray, 3 O.L.R. 327.

—Production of documents—Affidavit — Privilege—Confidential communications — Solicitor and client.]—Where an affidavit on production of documents claims privilege for a correspondence between a solicitor and his client, it must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged. Where the solicitors were acting as agents for the sale of the defendant's land in question in this action shortly before the first of the letters for which the defendant claimed privilege was written:—Held, that the defendant in order to protect the correspondence should give some more definite description of it than that it was written "in reference to the matters which are now in question in this action." Gardner v. Irvin (1878), 4 Ex. D. 49; O'Shea v. Wood, [1891] P. 286, and Ainsworth v. Wilding, [1900] 2 Ch. 315, followed. Hoffman v. Crerar (1897), 17 P.R. 404, commented on.

Clergue v. McKay, 3 O.L.R. 478.

—Production—Correspondence between solicitor and client — Common grantor — session of letters by defendant.]—Letters passing between a solicitor and his client, who was the common grantor of the plaintiff and defendant, in respect to the property in dispute, and which had passed into the possession of the defendant from the executor of the client after his decease, were held not privileged from production.

Platt v. Buck, 4 O.L.R. 421.

—Insolvency—Examination of third party —Prothonotary—Review of judgment — Arts. 33, 882-3 C.C.P.]—Under Art. 883 C.C.P. a Judge cannot order a third party to appear before him, or before the prothonotary, to be examined on oath respecting the liquidation of an insolvent estate, but the third party can only be summoned and examined, under Art. 882 C.C.P., as to the schedule and the state of the insolvent's business. An order of summons granted by the prothonotary in the absence of the Judge, under Art. 33 C.C.P., on an application which does not conform to the very terms of Art. 882 C.C.P. is subject to review.

Smith v. Proulx, 4 Que. P.R. 385 (Sup. Ct.).

— Examination for discovery — Both parties—Precedence—Arts. 286, 288, 310 C.C.P.—62 Vict. c. 52, s. 3 (Que.).]—If the two parties to a cause are summoned, each by his adversary, for examination on discovery, and each objects to be examined first, it is for the one on whom lies the burden of proof to proceed first to examine the other.

De Martigny v. Bienvenu, 21 Que. S.C. 317 (Sup. Ct.).

—Production of documents.]—If a plaintiff on return of his action, does not file the documents invoked in support of his claim, the defendant may move for an order that they may be filed and particulars given.

Hubalt v. Poulin, 21 Que. S.C. 126 (Sup. Ct.).

—Examination for—Assignment—Interest of assignor—Nominal plaintiff.]—In an action on an assignment the defence alleged that plaintiff was only a nominal plaintiff and no consideration had been given for the assignment, and plaintiff on his examination for discovery objected to answer questions relating to the consideration and to the interest of the assignors:—Held, by the full Court, affirming Drake, J., that the questions should be answered.

Boggs v. Bennett Lake and Klondike Navigation Co., Ltd., 8 B.C.R. 353.

—Miners' Union—Witness in dual capacities—One subpœna—Conduct money—Objection as to sufficiency of.]—A miners' union entered an appearance in an action and by statement of defence raised the objection that it was not shown that the defendant was a legal entity capable of being sued:—Held, that the defendant by so pleading must be deemed, before the trial of the action to be a corporation for the purposes of the litigation, and so compellable to make discovery. Where it is sought to examine for discovery in his dual capacity, one of the defendants in an action, who is also secretary of another defendant, two subpœnas are not necessary. On an examination for discovery, if the witness has an objection, such as the payment of insufficient conduct money, he should take the objection before the examiner, and he will not be allowed to raise it on an application to compel his attendance to answer questions which he has refused to answer.

Centre Star Mining Co., Ltd., v. Rossland Miners' Union, 9 B.C.R. 190.

—Examination for—Admissibility against co-defendant.]—See COPYRIGHT.

Carte v. Dennis, 5 Terr. L.R. 30.

—Infant—Evidence—Examination for discovery.]—An infant suing by a next friend may, in the absence of special incapacity, be examined for discovery. Arnold v. Playter (1892), 14 P.R. 399, approved. Judgment of Meredith, C.J., C.P., affirmed by Divisional Court. An order for the examination of an infant for discovery should not give to the examiner a discretion to determine the capacity of the infant; the proper manner of raising any question as to the capacity of the infant is by motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be considered by the Court itself.

Flett v. Coulter, 4 O.L.R. 714.

—Evidence — Discovery — Production — Patent of invention.]—In an action for damages for the infringement of a patent of invention, the defendants pleaded, among other defences, that the invention was in public use prior to the application for letters patent; that the patent was void for want of novelty; that the patent was not at the commencement of the action a valid and subsisting patent; that the plaintiff had not since the expiration of two years from the date of his patent commenced, and after such commencement continuously carried on in Canada the manufacture of the patented invention; that the plaintiff had after the expiration of one year from the granting of the patent imported or caused to be imported into Canada articles made in accordance with the patent:—Held, that the defendants were entitled to the fullest discovery from the plaintiff, and that he was bound to give information as to agreements and transactions made and carried on between him and certain agents employed by him for the manufacture and sale of the patented invention, especially as to the time at which and the terms upon which the patented invention was manufactured in Canada under the patent; and the plaintiff having refused upon his examination for discovery to answer questions relating to these maters, was ordered to attend for re-examination at his own expense. The plaintiff was also ordered to make and file another affidavit on production, and to produce for inspection statements received by him from such agents.

Parramore v. Boston Manufacturing Co., 4 O.L.R. 627.

—Damages for accident—Railway company—Reports—C.P. 334.]—A company sued in damages on account of an accident may be compelled to produce at the trial all reports of the accident made by its employees in the ordinary course of their business, or of their duty, but not its reports made at the request or instance of its solicitor, in answer to inquiries made to the latter, with a view to and in contemplation of anticipated litigation.

Stocker v. Canadian Pacific Railway Co., 5 Que. P.R. 117.

—Examination—Attendance before special examiner—Duty to remain until examined.]—A party to an action subpœnaed for examination for discovery before a special examiner, and who has been paid his conduct money for the day, may be "compelled to attend and testify in the same manner . . . as a witness." One of four defendants, all of whom were subpœnaed for half past ten in the morning and attended, after being excluded from the examiner's chambers, waited while the others were being separately examined until after two in the afternoon, when, without communicating with the examiner, he went away and did not attend for ex-

amination:—Held, that he was rightly ordered to attend again for examination.

Campbell v. Scott, 5 O.L.R. 233 (Meredith, J.).

—Identification of documents—Sufficiency of description.]—An affidavit of discovery should sufficiently identify documents referred to, as to enable the Court to order their production; the convenient and safe course being to letter or number each document. Where, therefore, an affidavit referred to two sealed parcels of letters marked A and B, and as containing correspondence between named dates, it was held insufficient.

The Cushing Sulphite Fibre Company, Limited, v. Cushing (No. 2), 2 N.B. Eq. 466.

—Production abroad—Power of Court—Inspection—Demand for, previous to application to Court.]—While the Court may have power to order production abroad of documents here, it will not exercise it except in special circumstances. Where inspection of documents was had by consent, an objection on a summons for an order for inspection subsequently taken out, that a demand in writing for inspection was required by s. 62 of Act 53 Vict. c. 4, to be first made, was overruled as technical—the Court declining to express an opinion upon its correctness—and as entailing costs, while without benefit to the suitors—a result avoided by the Court where possible.

The Cushing Sulphite Fibre Company, Limited, v. Cushing (No. 3), 2 N.B. Eq. 469.

—Immateriality—Issue in suit.]—An affidavit on production was ordered to be made by defendant of books showing profits on sales by him to the plaintiff company while its managing director, in a suit for accounting of such profits, to which the defence was set up that the sales were at a price fixed by an agreement with the company, and though the production of the books might not be ordered until the title of the company to relief was established at the hearing.

The Cushing Sulphite Fibre Company, Limited, v. Cushing (No. 4), 2 N.B. Eq. 472.

—In action for equitable execution—Right to attack judgment.]—In an action brought by a judgment creditor against the judgment debtors and one L. for the recovery, by way of equitable execution of moneys claimed to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances, under which the judgment was recovered, cannot, in the absence of fraud and collusion in the recovery thereof, be insisted upon. A motion that one of the plaintiffs, who, on examination for discovery, had refused to answer questions relating to such circumstances, should be compelled to attend and be examined at his own expense, was therefore refused.

Smith v. McDearmott, 5 O.L.R. 515 (M.C.).

— Examination for — Postponement till prior questions disposed of—Fiduciary relationship — Account.]—The statement of claim displayed a single cause of action based upon the proposition that the individual defendants, under the circumstances of the transactions detailed in it, stood in a fiduciary relation to the defendant company, which prevented them from making any profit out of their purchase of certain businesses afterwards transferred by them for a large sum to the company, and claimed an account, and payment by them of the difference between the aggregate of the price paid by them and what was paid to them. It was admitted that the individual defendants had made a large profit on the sale to the company, and the only matter really in controversy was the fiduciary relationship with the company, and their liability to account for such profit, and if liability existed, the amount for which they were answerable:—Held, that discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account had been established.

Bedell v. Ryckman, 5 O.L.R. 670 (D.C.).

—Examination for—Officer of company — Engine driver.]—On application for leave to examine an engine driver for discovery under Consolidated Rule 439, as an officer of the defendants, in an action under R.S.O. 1897, c. 166, the Fatal Accidents Act:—Held, reversing the decision reported 4 O.L.R. 43, that, inasmuch as the engine driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control of the train, so as to make him responsible to the defendants, except for the management of his engine, he was not an officer of the company examinable under that rule.

Morrison v. The Grand Trunk Railway Co., 5 O.L.R. 38 (C.A.).

—Written evidence—Motion for production of writings.]—A person claiming to be owner on an immovable without alleging title or written proof in support of such allegation, cannot be obliged to produce titles to the property, on motion to that effect, and there cannot be a stay of proceedings to cause him to make such production.

Molson v. City of Montreal, 5 Que. P.R. 339.

—Examination of officer of company.] — Plaintiffs sued "The Tanners' Association," a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies. One of the companies appeared and defended in their own name "sued as the Tanner's Association":—Held, that the agent of the association or syndicate could not be examined by the plaintiffs for discovery as an officer of the association or of the company defending.

Ahrens v. Tanners' Association, 6 O.L.R. 63.

—Preliminary examination—Hearing—Art. 286 C.C.P.]—Held, following decision at Q.R. 14 S.C. 150, that the preliminary examination of a party may be had after the case has been inscribed.

Bourassa v. Lambert, 5 Que. P.R. 375.

—Production of documents—Act 53 Vict. (N.B.), c. 4, ss. 59, 61.]—Where inspection is sought of documents in the possession of the opposite party, an order should be obtained under s. 59 of Act 53 Viet. c. 4, for discovery by affidavit as to what documents are in his possession, when an order may be made under s. 61 for their production and inspection. Hegan v. Montgomery, 1 N.B.R. Eq. 247, followed.

The Cushing Sulphite Fibre Company, Limited, v. Cushing, 2 N.B. Eq. 458.

—County Court—Practice — Discovery — Oral examination.]—A County Court Judge has no jurisdiction to grant an order for an oral examination for discovery except in the case of a failure to answer interrogatories.

Roberts v. Fraser, 9 B.C.R. 296 (Martin, J.).

—Examination for discovery — Manitoba King's Bench Act, Rule 379—Disclosing names of witnesses.]—On an examination of a plaintiff for discovery under Rule 379 of the King's Bench Act, he cannot be compelled to disclose the names of his witnesses, or to answer questions as to whether he has received from persons or corporations, not parties to the action, assistance or promise of assistance or indemnity as to the costs of the action, or as to whether he consulted before action with such other persons as to bringing the suit.

Gibbins v. Metcalfe, 14 Man. R. 364 (Richards, J.).

—Examination for—Nature of—B.C. Rule 703.]—The examination for discovery under Rule 703 (B.C.) is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be relevant to the issues.

Hopper v. Dunsmuir (No. 2), 10 B.C.R. 23.

—Controverted Elections Ordinance—Examination for discovery.]—Section 18 of the Controverted Elections Ordinance, C. O. 1898, c. 4, provides as follows:—"The said petition and all proceedings thereunder shall be deemed to be a cause in the Court in which the said petition is filed, and all the provisions of the Judicature Ordinance in so far as they are applicable and not inconsistent with the provisions of this ordinance, shall be applicable to such petition and proceedings:"—Held, 1. That the provisions of the Judicature Ordinance respecting examinations for discovery come within the above section. 2. That where particulars of the charges had been ordered the examination could not be compelled until after the delivery of the particulars.

Leblanc v. Maloney (No. 1), 5 Terr. L.R. 341 (Scott, J.).

—Action for penalties.]—It is improper in an action to recover penalties under the Extra Provincial Corporation Act, 63 Viet. c. 24 (O.), to issue the usual præcipe order for production of documents by the defendants. Such an order having been issued, it was held that the defendants were not bound to file an affidavit and claim privilege, but were entitled to have the order set aside.

Johnston v. London and Paris Exchange, 6 O.L.R. 49 (Cartwright, M.C.).

—Production of documents—Place of production.]—Where an order has been made for the production of documents, the documents should be produced in the city or town in which the writ was issued, but a Judge has a discretionary power to order production somewhere else to prevent inconvenience and prejudice to a party's business operations.

Davies, Sayward Co. v. Buchanan, 10 B.C.R. 175.

—Inspection of movable in dispute—C.P. 290.]—Held (by Andrews, J.):—1. That when an action is brought to revendicate a machine which the defendant says is in his factory, but which the bailiff charged with the writ has been unable to find or seize, the Court is without power to order the defendant to exhibit the machine in his premises, because Art. 289 C.P., does not authorize a compulsory entry on the premises of a party. 2. That the Court will not, in such a case, order the defendant to bring the machine to Court, because such a course would subject him to expense which he is not bound to bear. Held (by Routhier, J., on a subsequent application):—3. That nevertheless an order for inspection will be granted in such a case ordering the defendant to bring the machine to Court, when the

plaintiff has deposited an amount sufficient to cover the expense of removal.

United Shoe Machinery Company v. Caron, 6 Que. P.R. 100.

—Discovery — Opposition pending—Art. 590 C.P.Q.]—A debtor cannot be summoned for examination after judgment when an opposition to the seizure is pending.

Duplessio v. Quinn, 6 Que. P.R. 222.

—Production—Membership roll of recreation club—Action for revocation of charter on ground of breach of criminal law.]—In an action against the defendants, an incorporated club, for a declaration that they were using their premises as a common betting house contrary to the provisions of the Criminal Code, 1892, and for a revocation of their charter:—Held, that "The Evidence Act" of Ontario, R.S.O. 1897, c. 73, s. 5, applied, and that the president of the club was not bound to produce the membership roll of the club as he stated under oath that its production might lead to a criminal prosecution against him. D'Ivry v. World Newspaper Company of Toronto (1897), 17 P.R. 387, and Hopkins v. Smith (1901), 1 O.L.R. 659, followed. Held, further, that as the forfeiture of the defendants' charter was claimed in the action on this ground also a refusal to produce the roll was justifiable.

The Attorney-General of the Province of Ontario v. Toronto Junction Recreation Club, Limited, 7 O.L.R. 248.

—Discovery—Examination for — Amended pleadings—Second examination—Order for —Limitation of.]—Where pleadings have been amended raising matters not before suggested in the original pleadings, after examination for discovery, an order may be made in a proper case for a further examination, limited to the matters raised by the amendment.

Standard Trading Co. v. Seybold, 7 O.L.R. 39.

— Interrogatories — Answers — Exceptions.]—The bill alleged that a testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son, who were living at the date of the will; that the plaintiff was one of the children, and a beneficiary under the will. The defendants, trustees under the will, to interrogatories whether the plaintiff was not one of the four children of the son mentioned in the will, and living at the date thereof, and beneficially entitled thereunder to some and what interest in the estate, after admitting the will, answered that they did not know that the plaintiff was one of the children of the said son, or that she was living at the date of the will, or that she was beneficially entitled to an interest in the estate, although they were so informed and believed:—Held, sufficient. Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference. Where some exceptions were allowed, and others overruled, costs were allowed to each party.

Crosby v. Taylor, 2 N.B. Eq. 511.

—Interrogatories — Service.]—Interrogatories sur faits et articles should be addressed to the corporation in the suit and not to one of its officers.

Lambe v. Electric Fire Proofing Co. of Canada, 6 Que. P.R. 397 (Sup. Ct.).

—Examination of person for whose benefit action defended.]—Rule 440, providing that a person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination, is difficult of application where the plaintiff seeks to examine a person for whose benefit it is said that the action is defended. Where the action was for infringement of a patent of invention for a certain heater, and the statement of defence denied the infringement and set up that the right to manufacture the heater was acquired by the defendants from C. & Co., and it did not appear that anything had been done by C. & Co. in reference to the action before or after it was brought:—Held, that the members of the firm of C. & Co. were not persons for whose immediate benefit the action was defended; at the most, a successful defence might relieve them from a possible liability to the defendants.

Moffat v. Leonard, 8 O.L.R. 519 (M.C.).

—Interrogatories—Service out of province —Art. 352 C.P.Q.]—Sub-s. 6 of C.S.L.C. c. 83, s. 63, is repealed. A party who, in Ontario, receives service de faits et articles and at the same time accepts his travelling expenses, thereby consents to appear and answer interrogatories and cannot oppose a motion to take the faits et articles pro confessis if he fails to do so. Faits et articles may be secured, in an action accompanied by a writ of capias, immediately after the petition to quash the capias is filed.

Carbonneau v. Bernard, 6 Que. P.R. 309 (K.B.).

—Examination of former officer or servant.]—There is no power now under Con. Rule 439 (a) as substituted by Con. Rule 1250 for Con. Rule 439 (1) to make an order for the examination of a former officer or servant of a corporation for discovery.

Cantin v. News Publishing Company, 8 O.L.R. 531 (M.C.).

—Examination of persons for whose immediate benefit defended—Action against assignee for creditors—Examination of assignor.]—This action being at issue all all matters were referred to be tried before a referee pursuant to s. 29 of the Arbitration Act, R.S.O. 1897, c. 62:—Held, Meredith, J., dissenting, that the reference being before trial and the cause being referred for the purpose of trial, the referee had power to direct one who was a party, or one for whose immediate benefit the action was prosecuted or defended, to be examined for discovery. The action was brought against an assignee for the benefit of creditors to establish the right of the plaintiff to rank upon the estate, which was in fact insolvent. Held, Meredith, J., dissenting, that the assignor was a person for whose benefit the action was defended within the meaning of Rules 440 and 466, and was to be regarded as a party for the purpose of examination and for the purpose of discovery.

Garland v. Clarkson, 9 O.L.R. 281 (D.C.).

—Prete-nom.]—When the plaintiff in an action is only a prête-nom and not familiar with the facts of the case the party really interested may be examined on discovery.

Barbeau v. Viau, 7 Que. P.R. 151 (Sup. Ct.).

—Officer of company—Conductor of railway train.]—The plaintiff's claim being that, while employed as a brakeman on one of the defendants' trains, he went under one of the cars, by order of the conductor in charge, for the purpose of adjusting some chains, and that, while so engaged, the train was started without warning to him, and caused him injury:—Held, that the conductor, under the circumstances, was an officer of the railway company within the meaning of Rule 387 of "The King's Bench Act," and must attend and submit to be examined as to his knowledge of the matter in question. Moxley v. Canada Atlantic Railway Co. (1887), 15 S.C.R. 145; Leitch v. G. T. R. (1890), 13 P.R. 369, and Dixon v. Winnipeg (1895), 10 M.R. 663, followed.

Gordanier v. Canadian Northern Railway Co., 15 Man. R. I. (Richards, J.).

—Examination of officer of corporation—Rule 439 (2).]—Where a corporation is a party to an action, and discovery is sought, it is reasonable and convenient that the corporation should suggest for examination the officer or servant best qualified to give the desired information, who should prepare himself for obtaining knowledge of all relevant facts. In an action to set aside a chattel mortgage brought against an incorporated bank the examination of the general manager and inspector disclosing that they were not conversant with the facts, an order was made under Rule 439 (2) for the examination of the local manager, who was present when the mortgage in question was given.

Clarkson v. Bank of Hamilton, 9 O.L.R. 317 (M.C.).

—Officer of corporation—Railway company—Station agent—Section foreman—Chief clerk in office of general superintendent.]—A station agent is an officer of a railway company within the meaning of Rule 201 and liable to be examined for discovery. A section foreman is not such an officer, nor is the chief clerk in the office of a general superintendent.

Eggleston v. C. P. R., 5 Terr. L.R. 503 (Scott, J.).

—Examination of officer of society—Head office and local office.]—An organization consisted of a head office called the "Head Camp," and a number of local branches called "subordinate camps," the Head Camp being composed of a delegate from each subordinate camp, and having eleven officers elected therefrom, while the subordinate camps had similar officers elected from their members, the Head Camp having absolute jurisdiction over all members. The members' dues were payable annually to the clerk of the subordinate camp, and handed to the banker, and remitted to the Head Camp, but no clerk or banker could be installed until they had given security to the satisfaction of the head managers of the Head Camp:—Held, that the clerk of a subordinate camp was an officer of the organization, and therefore subject to examination for discovery.

Readhead v. Woodmen of the World, 9 O.L.R. 321 (M.C.).

—Foreign company—Examination—Officer residing out of jurisdiction.]—An order will not be made for the examination for discovery of an officer residing in a foreign country of a foreign corporation, although such corporation has attorned to the jurisdiction of the Courts of this Province.

Perrins v. Algoma Tube Works, 8 O.L.R. 634 (M.C.).

—Breach of agreement—Question as to breach before proof of agreement.] — Where the plaintiff, in his statement of claim, set up an agreement whereby the defendant was to devote his whole time, during a stated period, to the plaintiff's service, and alleging, as breach thereof, his failure to do so, and the defendant by his statement of defence, while denying the making of any such agreement, stated that if there were such an agreement it had been duly performed, the

defendant on his examination for discovery, was held liable to answer questions directed to the alleged breach without the agreement itself having been first established.

Sheppard Publishing Co. v. Harkins, 8 O.L.R. 632 (M.C.).

—Examination—Privileged documents — Reports of officials to company respecting accidents.]—(1) Reports made by the employees of a railway company to their superior officers in accordance with its rules concerning an accident resulting in death, and immediately thereafter, are not privileged from production in an action against the company for damages arising out of the accident, if they were made in the discharge of the regular duties of such employees and for the purpose of furnishing to their superiors information as to the accident itself and were not furnished merely as materials from which the solicitor of the company might make up a brief, and an officer of the company who has made an affidavit on production of documents, must, on his examination on such affidavit, answer questions as to whether such reports were made, who received them, and how they came to be made, and generally furnish such information concerning them that the Court may be in a position to decide, on a further motion, whether they are privileged or not. Wooley v. North London Railway Co., (1869), L.R. 4 C.P. 602; and Anderson v. Bank of British Columbia (1876), 2 Ch.D. 644, followed. (2) If any of the information sought on such examination, and to which the plaintiff is entitled, is not within the knowledge of the deponent, he must ascertain the facts and give the information. Harris v. Toronto Electric Light Co. (1899), 18 P.R. 285, followed. (3) That the names of some of the defendants' witnesses would be disclosed if the questions were answered is not a sufficient reason for refusing to answer. Marriott v. Chamberlain (1886), 17 Q.B.D. at p. 165, and Humphries v. Taylor (1888), 39 Ch.D. 693, followed. (4) Questions as to whether reports had been sent in as to the condition of the locomotive before the accident, and as to repairs thereto, must also be answered.

Savage v. Canadian Pacific Ry. Co., 15 Man. R. 401 (Perdue, J.).

—Order for interrogatories—Amendment.]—An order for interrogatories on faits et articles signed by the prothonotary can only be amended by him.

Tougas v. Quinn, 7 Que. P.R. 34 (Sup. Ct.).

—Interrogatories—Answer—Reference to answer of co-defendant.]—To an interrogatory to set out particulars of a claim of debt by the defendant against the defendant company, the defendant answered that he believed that schedules (which contained the information sought) attached to the answer of the defendant company were true:—Held, allowing an exception for insufficiency, that the interrogatory relating to a matter within the defendant's knowledge, he should have made positive oath of the correctness of the schedules, or that they were correct to the best of his knowledge, information and belief, accounting for his inability to swear positively to their correctness.

Lodge v. Calhoun, 3 N.B. Eq. 100.

—Estoppel—Plea of fraud.]—The doctrine of estoppel is not an answer to a demand for discovery when the parties seeking to set aside the documents plead fraud, public policy and duress. Whenever discovery is sought in aid of an issue which must be determined at the hearing, a plaintiff is entitled to it to help him prove the issue, but where it is sought in aid of something which does not form part of what he must prove at the hearing, but is merely consequential to it, the right is not absolute but discretional until the plaintiff has established his fundamental right at the hearing.

Canadian Bank of Commerce v. McDonald, 1 W.L.R. 506 (Craig, J.) (Yukon Terr.).

—Failure to indorse notice on order.]—Terr. Rule 330 applies to orders for discovery of documents, not only where the remedy sought for non-compliance is attachment, but also where the remedy sought is dismissal of the action for striking out of the defence. Where therefore a copy of such an order served was not indorsed, as provided, an application to dismiss the action for non-compliance with the order was refused.

Leadley v. Gaetz, 5 Terr. L.R. 484.

—Affidavit on production—Impeaching.]—An affidavit on production may be impeached on the examination of any examinable officer of the company on whose behalf it is filed, other than the officer who made it; and, where such examination discloses that it was the duty of the conductor, engine driver, roadmaster, division superintendent, and master mechanic of the defendant railway company, to make reports of the circumstances relating to the fire which burned the hay in respect of which the plaintiffs' action was brought, such reports, if made, are not exempt by privilege from production, being made in the regular course of duty.

Bain v. Canadian Pacific Railway Co. (Man.); 2 W.L.R. 235 (Mathers, J.).

—**Production—Affidavit of documents.**]—In an action to recover for services alleged to have been rendered in finding a purchaser for defendant company's property, etc., application was made at Chambers for an order that defendants answer or affidavit "stating what documents relating to any matter in question in this action are or have been in the possession of the defendants, etc." The application was dismissed with costs. It appearing that one of the defendants was a corporation, and must have under its control, all records, proceedings and correspondence, if any existed, relating to communications with the other defendant, and the Court, having regard to all the circumstances, being unable to say that discovery was not necessary, or might not be helpful on the trial; —Held, that the order should have been granted, and the appeal should be allowed with costs, the costs at Chambers to be costs in the cause.

Wood v. Dominion Lumber Co., 37 N.S. R. 250.

—**Order—Endorsement—Default of compliance.**]—In order that a party taking out an order for discovery may invoke the provisions of s. 184 J.O. 1893 (J.O. 1898, Rule 198), though only with the object of having a plaintiff's action dismissed or a defendant's defence struck out, the order must be endorsed in accordance with s. 311 (J.O. 1898, Rule 330).

Doidge v. Town of Regina (No. 2), 2 Terr. L.R. 337 (Richardson, J.).

—**Better affidavit on production.**]—When a party to an action has made and filed an affidavit on production of documents in the ordinary form in obedience to an order to produce served upon him, the opposite party must be satisfied with such affidavit unless he can show, from admissions or former statements on oath of the affiant that there is a reasonable suspicion that he has in his possession or power other documents relating to the matters in question. The party seeking discovery cannot get an order for a better affidavit merely by showing that there are in the possession or power of the opposite parties letters or other documents not mentioned in the affidavit which might contain relevant matter, in the face of the statement in the affidavit that there are none such.

Muir v. Alexander, 15 Man. R. 103.

—**Privilege—Documents secured in view of possible litigation.**]—Documents obtained by the solicitors of the plaintiffs to aid them in forming an opinion as to the legal rights of the plaintiffs in reference to a road, about which a dispute with the defendants had arisen, are privileged from production in an action brought as a result of the opinion formed by the solicitors, notwithstanding that an action was not expressly contemplated when the solicitors were instructed to obtain the necessary information and give the opinion. Learoyd v. Halifax Joint Stock Banking Co., [1895] 1 Ch. 686, followed.

Township of Elmsley v. Miller, 10 O.L. R. 343 (D.C.).

—**Defamation—Circular — Names of recipients — Source of information.**]—In an action for damages alleged to have been sustained by reason of the sending out by the defendants of a circular stating that they had been "advised that the plaintiffs had decided to discontinue their separator business," the manager was ordered to give on his examination for discovery the names of the persons to whom the circular had been sent and the name of the person who had "advised" the defendant of the fact alleged;—Held, affirming the decision of Mabee, J., 11 O.L.R. 227, that the order was proper, both items of information being relevant to the defence set up of qualified privilege, and the latter being also important on the question of damages.

Massey-Harris Co. v. DeLaval Separator Co., 11 O.L.R. 591 (D.C.).

—**Defendant resident out of Ontario.**]—The provision of R.S.O. 1897, c. 73, s. 16 (4), seems to contemplate only the attendance of witnesses at a trial and is not applicable to the examination of a party for discovery merely. A defendant resident in the province of Quebec cannot be compelled under Con. Rule 477 to attend for examination for discovery within the province of Ontario. Aliter where it is sought to examine a plaintiff. Meldrum v. Laidlaw, D.C. 12 December, 1902 (not reported), followed. Smith v. Babcock (1881), 9 P.R. 97, not followed.

Lefurgey v. Great West Land Co., 11 O. L.R. 617 (M.C.).

—"**Officer**"—**Member of a municipal council—Examination of.**]—A member of a municipal council, other than the head, is not examinable for discovery as an "officer" of the corporation under Con. Rule 1256, 439 (a).

Davies v. Sovereign Bank, 12 O.L.R. 577 (Teetzel, J.).

—**Libel—Absence of justification—Qualified privilege—Honest belief.**]—In an action for libel in which the defendant has pleaded qualified privilege to which the plaintiff has replied malice, the defendant although he has not pleaded justification, is not precluded, on examination of the plaintiff for discovery, from asking questions which are relevant to the issue of of defendant's honest belief as tending to show the absence of malice although

they may incidentally prove the truth of the libel.

McKergow v. Comstock, 11 O.L.R. 637 (D.C.).

—Examination of officer of company party — Refusal to answer—Remedy.] — The Master in Chambers has no power to strike out the defence of a company defendant for refusal of an officer to answer questions upon his examination for discovery, nor to order him to attend again to make answer; the plaintiff's remedy, if he wishes to have the questions answered, is by motion to commit the officer. Badgerow v. Grand Trunk Ry. Co. (1889), 12 P.R. 132, and Central Press Association v. American Press Association (1890), ib. 353, applied and followed.

McWilliams v. Dickson Co., 10 O.L.R. 639 (M.C.).

—Master and servant—Agreement to share profits—Statement furnished by master—Fraud.]—Held, by Anglin, J., in Chambers, that, notwithstanding the language of s. 3 of R.S.O. 1897, c. 157, a statement of profits furnished by a master to his servant, where there is an agreement to share profits, is impeachable for fraud; and fraud being alleged by the plaintiffs (servants) in an action (inter alia) for an account of profits, the plaintiffs were entitled to discovery of a document in possession of the defendant (master) showing the basis of the statement of net profits furnished by the defendant:—Held, by a Divisional Court, upon appeal, not passing upon the questions with regard to the statute, that production of the document was properly ordered, having regard to the general rules relating to discovery and the other claims made in the action.

Cutten v. Mitchell, 10 O.L.R. 734 (D.C.).

—Examination on affidavit as to documents—Officer of company—Privileged communications.]—(1) When an affidavit on production of document is made by an officer of a company, any other examinable officer of the company may be examined upon it, and his answers may be used to impeach the affidavit on an application to compel the filing of a further and better affidavit. (2) If such last-mentioned officer on his examination states that he does not know whether or not certain documents exist which, by the rules of the company, should be in existence, he will be ordered to inquire and obtain the information necessary to enable him to answer fully and explicitly. (3) Reports of the various officials and servants of a railway company upon the occurrence of a fire alleged to have been caused by sparks from a locomotive, and as to the condition of the locomotive, if made in the regular course of duty under the rules of the company, are not privileged from production. (4) The fire having occurred on the 20th day of the month, the officer was ordered to produce all reports on the condition of the locomotive from the first to the last day of the month.

Bain v. Canadian Pacific Railway Co., 15 Man. R. 544 (Mathers, J.).

—Letters — Solicitor and client.]—In an action on a policy on the life of the plaintiff's husband, the defendants filed an affidavit on production, but objected to produce certain letters between a local and the head office on the ground: "That they are privileged, being of a confidential nature and disclosing certain legal points in connection with the defence of this action." On a motion to compel production, the defendant's manager in an affidavit states that: "It is my custom in the course of business, frequently to write to the head office on matters involving points of law; the head office confer with their general solicitors, receive legal advice from them, and then communicate with me. The letters (in question) are of the same nature as those between solicitor and client, and are, as I am advised and believe, privileged for that reason:—Held, not sufficient, and that the affidavit should state that the letters "came into existence for the purpose of being communicated to the solicitor, with the object of obtaining his advice or enabling him to defend an action." The Southwark and Vauxhall Water Company v. Quick (1878), 3 Q.B.D. 315, followed.

Thomson v. Maryland Casualty Co., 11 O.L.R. 44 (M.C.).

—Next friend of infant plaintiff.]—The next friend of an infant plaintiff is not examinable for discovery.

Vano v. Canadian Coloured Cotton Mills Co., 13 O.L.R. 421.

—Seduction—Questions as to promise of marriage.]—In an action for seduction, questions as to promise of marriage made by the defendant, who admits the seduction, are not admissible in an examination for discovery.

Leroux v. Schnupp, 15 O.L.R. 91.

—Examination on discovery—Vestry — Cure.]—When the vestry (fabrique) of a parish is party to a cause the curé may be examined on discovery.

Coulombe v. Les Curé. etc., de Saint Joseph, 8 Que. P.R. 313 (Bruneau, J.).

—Affidavit of documents—Application for further affidavit.]—In an action on a guarantee, plaintiffs applied for an affidavit of documents. Defendant Rebecca

Levy (who carried on business as L. Levy & Co., with her husband L. Levy as manager) admitted that she had certain letters relating to the present action written subsequently to the 16th of February, 1904 (the date on which defendants notified plaintiffs that they, defendants, would no longer be responsible under their guarantee). Plaintiffs having had previous dealings with defendants on the strength of other guarantees given by them, obtained an order for further and better discovery generally. In her affidavit filed pursuant to this order, defendant Rebecca Levy swore that she had no entry in her books of cheques received on account of the previous transactions to that in question in this action; that if the cheques had been indorsed with the name L. Levy & Co. it was done wholly without authority, and she denied having any documents relating to the guarantees. Plaintiffs then obtained an order "that the defendants do within one week from the date hereof make full discovery on oath of all books of account, ledgers, journals, blotters, cash books, bank pass books, promissory notes, cheques, memoranda and other books of account, statements, or writings which now are, or were in use in the business of the defendants in the years 1902, 1903, 1904, 1905, 1906, with liberty to the plaintiffs to apply again as to the other matters mentioned in the notice of application filed and served herein on the 25th day of July, 1906." An appeal from this order was dismissed. Per Irving, J.:—The authority conferred by the County Court rules as to ordering discovery is subject to the same limitations as are imposed by the rules of the Supreme Court.

Empire Manufacturing Company v. Levy, 12 B.C.R. 378.

—Production of documents—Stay of proceedings.]—When a party to an action has obtained from the Court an order directing his adversary to produce certain documents, he should exercise diligence to have such order enforced and if he takes no steps to that end, a subsequent order for a stay of proceedings until the first is complied with is irregular and will be set aside.

Toronto Type Foundry Co. v. Mergenthaler Linotype Co., 8 Que. P.R. 279.

—Reports of officials of company respecting accidents.]—(1) In an action for damages resulting from a railway accident, when negligence is charged, reports of officials of the company as to the accident made before the defendants had any notice of litigation, and in accordance with the rules of the company, are not privileged from production, although one of the purposes for which they were prepared was for the information of the company's solicitor in view of possible litigation. (2) The fact that the reports sought to be withheld were written on forms all headed, "For the information of the solicitor of the company and his advice thereon," is not sufficient of itself to protect them from production. (3) When the officer of the defendants who made the affidavit on production was cross-examined upon it and as a result made a second affidavit producing a number of documents for which he had claimed privilege in the first, the examination on the first affidavit may be used to contradict the statements in the second, although there was no further examination. (4) An affidavit on production cannot be contradicted by a controversial affidavit; but, if from any source an admission of its incorrectness can be gathered, the affidavit cannot stand.

Savage v. Canadian Pacific Railway, 16 Man. R. 381.

—Production of books —Postponement — Profit-sharing contract.]—In an action to recover a share of the profits of a business under an alleged agreement to share profits, the plaintiffs sought discovery of the books of the defendant:—Held, that the consideration of the matter should be postponed until it had been properly determined in the action, as a matter of law and not upon an interlocutory motion, first, whether the agreement alleged by the plaintiffs was within sections 3 and 4 of the Master and Servant Act, R.S.O. 1897, c. 157, and second, whether (if it was) the statement of profits declared by the defendant could be impeached for fraud, error, mistake or other like cause. Cutten v. Mitchell (1905), 10 O.L.R. 734, discussed.

Engeland v. Mitchell, 13 O.L.R. 184 (D. C.).

—Production—Accident—Negligent driving.]—In an action for injuries to the plaintiff and his carriage, alleged to have been caused by the defendant's servant driving "recklessly and negligently," on an examination of the defendant for discovery, he gave the names of his men who were with his wagon at the time of the accident, but he could not give the weight of the load without his books, which he declined to produce. After the examination was adjourned for the purpose of a motion to compel their production, his solicitors wrote a letter that the defendant's team was coming from a house on a certain street, and that the weight of the load and wagon together was not less than three tons. This the plaintiff declined to accept as sufficient:—Held, that as the plaintiff's case rested on "recklessly and negligently driving horses and a conveyance," which the defendant contended was impossible, on account of the weight

of the load; and as it might assist the plaintiff to find out what house the team was coming from and the weight of the load, the books must be produced.

Boyd v. Marchment, 13 O.L.R. 468.

—Examination—Officer of company—Attorney under Extra-Provincial Corporations Act.]—An attorney appointed to represent a foreign company in Ontario, in compliance with the Act respecting the licensing of Extra-Provincial Corporations, 63 Vict. c. 24 (O.), is an officer of the company within the meaning of Con. Rule 439a, and may be examined under that rule.

McNeil v. Lewis Brothers, Limited, 16 O.L.R. 652.

—Exhibits—Analysis of medicinal preparations produced by plaintiffs.]—In an action for an injunction restraining the defendants from passing off upon the public certain medicinal preparations manufactured and sold by them so as to deceive the public into the belief that they were the preparations of the plaintiffs, the defendants are not entitled to an order for the analysis of the samples of the preparations of the plaintiffs, though produced by them for all purposes, and although they contended that such analysis was necessary to test the claims made by the plaintiffs that their preparations were cures for cancer and other diseases. The defendants' object could be as well attained by an analysis of what might be freely purchased in the open market without the destruction of any of the plaintiffs' property.

Theo. Noel Co. v. Vitæ Ore Co., 18 Man. R. 46.

—Order to produce documents—Mode of enforcement—Motion to stay proceedings.]—The party in whose favour an order is made for the production of documents is not entitled to have the proceedings in the case stayed until it is complied with, but should use the means provided by law to have it enforced.

Toronto Type Foundry Co. v. Mergenthaler Linotype Co., 16 Que. K.B. 345.

—Supplementary interrogatories on articulated facts.]—A party can only once be examined upon interrogatories on articulated facts, except it be with the permission of the Judge or Court upon cause shown, and then only on new matter which was not referred to on the first interrogatories.

Holmes v. Woodworth, 9 Que. P.R. 311.

—Examination for — B.C. practice.] — The omission to include in the Supreme Court Rules, 1906, the amendment of June, 1900, to the old Rule 703, has not changed the examination for discovery from a proceeding having the nature of a cross-examination.

McInnes v. British Columbia Electric Railway, 13 B.C.R. 465.

—Examination for discovery—Service of appointment.]—The plaintiff's solicitor, desiring to examine the defendant for discovery, served upon his solicitor a copy of the examiner's appointment, relying on sub-rule (1) of Rule 391 (a), added to the King's Bench Act, R.S.M. 1902, c. 40, by 5 and 6 Edw. VII. c. 17, s. 2, and upon defendant failing to attend on the appointment, obtaining an order from the Deputy Referee directing the defendant to attend for examination at his own expense:—Held, on appeal from this order, that, as the sub-rule speaks of the service of an appointment upon the solicitor, service of a copy only was not sufficient without service also of a supœna on the defendant personally.

Foley v. Buchanan, 18 Man. R. 296.

—Engineer in charge.]—That the word "manager" in Art. 286 C.P. may be interpreted as being the manager of the works, and in an action in damages for accident the man that was in charge of the works when the accident took place can be examined on discovery on behalf of the victim of the accident.

Piti v. Atlantic, Quebec & Western Ry. Co., 10 Que. P.R. 162.

—Foot-note to interrogatories — Exceptions to answer.]—The plaintiffs omitted to add any foot-note to their interrogatories as provided by s. 44 of the Supreme Court in Equity Act, Con. Stat. (1903), c. 112. On a motion to set aside an order setting exceptions to the answer down for hearing:—Held, that by a proper construction of the section, such an omission was equivalent to a requirement that all the defendants should answer all the interrogatories. Where defendants, in answering interrogatories filed as part of the bill, neglect to state their belief, or, when required to set out a document at length, neglect to do so without assigning a sufficient reason, the answer is insufficient, and exceptions on that ground will be allowed. If, however, the interrogatories relate to matters which are altogether irrelevant, the exceptions will be overruled.

Golden v. McGivery, 4 N.B. Eq. 42.

—Exhibits—Motion for filing.]—Held:—In an action for the annulment of the registration of a mortgage, the defendant has the right to move that the plaintiff be ordered to produce a document referred to in the declaration as having been exhibited to the defendant and to which the latter was requested to affix his signature.

or an authentic copy thereof, in order that he may plead to said action.

Auger v. Auger, 10 Que. P.R. 366.

—Confidential report to company's attorney—Damages for accident.]—A company sued in damages on account of an accident cannot be compelled to produce at the trial a report made by an officer of the company to its solicitor, this report being a privileged communication between attorney and client.

Zaste v. Grand Trunk Railway Co., 10 Que. P.R. 270.

—Examination of parties.]—The examination of an officer of a corporation may be had without an order being specially made for that purpose.

Robinson v. McKenzie, 14 B.C.R. 220.

—Action against married woman—Examination of defendant's husband.]—When the defendant to an action, separated as to property, declares by her answers on articulated facts that she knows nothing of the facts set up in her pleas as her husband had managed all the business to which they relate; the Court will not permit the examination on discovery of the husband, who, the plaintiff claims, can give all the necessary information.

Gladu v. Hurtubise, 10 Que. P.R. 177.

—Ordering particulars.]—See PARTICULARS.

—Examination of parties—Officer of municipal corporation.]—A park commissioner, being a legislative functionary, and not subject to the control or direction of the municipal corporation, is not an officer of the latter body within the meaning of B. C. Order XXXIa., and is not examinable under said order before trial in proceedings against the corporation.

Anderson v. Vancouver, 14 B.C.R. 222.

—Interrogatories– Written answers.]—The party called upon to answer viva voce on articulated facts must give his answers orally and cannot write them out beforehand.

Allard v. Town of St. Pierre, 10 Que. P. R. 190.

—Copies of contracts, rules and regulations.]—In an action in damages against a railway contractor, the plaintiff may ask for the filing of, (a) a copy of the contract between the defendant and the railway company, (b) a copy of the contract between the plaintiff and defendant, (c) a copy of the regulations issued by the defendant's engineer concerning blasting operations, and (d) the pay list containing the name and the number of the plaintiff.

Piti v. New Canadian Co., 10 Que. P.R. 173.

—Production of documents—Striking out defence for non-production.]—A defendant should not have his defence struck out for non-production of documents which are not in any way in his custody or control, but are in the custody of the officials of an incorporated body, having its head office in a foreign country and not being a party to the action.

Vulcan Iron Works v. Winnipeg Lodge, 18 Man. R. 137.

DISMISSAL.

See DEFAULT; WANT OF PROSECUTION; JUDGMENT; APPEAL.

DISORDERLY HOUSE.

Taking betting customers to public street to make bets—Barber shop as a common betting house.]—1. A person with a fixed place of business at which other persons find him when desirous of making bets on foreign horse races is criminally liable in respect of betting arrangements there instituted, although the actual bargain of betting was made in each case on the public street adjacent to such place of business the participants purposely going to the street with the intention of making the bet elsewhere than in a common betting house as defined by s. 227 of the Criminal Code (1906). 2. Where the question reserved is whether there is any evidence upon which the defendant may legally be convicted, and there is some evidence upon which the conviction might be supported, the question whether the finding was reasonable or not, in view of the whole evidence, is not a question of law for the appellate Court. The King v. Moylett (1907), 13 Can. Cr. Cas. 279, distinguished.

The King v. Johnston, 16 Can. Cr. Cas. 379 (Ont.).

—Playing poker in hotel room—No exclusive proprietorship.]—1. A game of poker with incidental betting not conducted in a place declared to be a common gaming house under Cr. Code s. 226, is not illegal. 2. The playing of poker games with money stakes at various times by the same persons in a room ordinarily used for other purposes will not constitute the place a common gaming house under Code s. 226, if none of the players were exclusively bankers in the game, nor had exclusive rights to the room, nor were the chances of the game more favorable to one player than to another.

Rose v. Collison, 16 Can. Cr. Cas. 359 (Alta.).

And see POKER GAME.

Resorting for the purpose of gambling.]—(1) Proof that a game with cards, dice and "chips" was being played by several

people seated at tables, each player procuring the "chips" from the accused, the proprietor of the place, and handing over to him the money therefor and that the accused said that the game was "fan tan," and that he was "doing well out of it," is evidence that the game was a game of chance and that the place was being kept by the accused "for gain," under Code ss. 196 and 198. (2) Proof that persons other than those resident at or belonging to the house, room or place at which the proprietor operates for gain a game of chance or a mixed game of chance and skill, were in attendance there and participated in such game is evidence that such persons "resorted" to such place for the purpose of playing such game, and of the place being a common gaming house under ss. 196 and 198 of the Criminal Code.

The King v. Mah Kee, (N.W.T.), 9 Can. Cr. Cas. 47.

—Indictment, summary trial or summary conviction.]—(1) A prosecution against a keeper of a common bawdy house may be brought either by indictment or under the summary trials procedure, or the keeper may be charged as a vagrant under the summary convictions procedure, and neither the provision nor summary trial nor that for summary conviction abrogates the right of the Crown to bring an indictment. (2) The different methods of procedure with the varying penalties dependent upon the class of tribunal selected are not inconsistent but are alternative.

The King v. Sarah Smith, 9 Can. Cr. Cas. 338; 38 N.S.R. 148.

—Keeping common gaming house.]—(1) Code s. 738 (f) which confers the power of summary trial for the offence of keeping "any disorderly house, house of ill-fame or bawdy house," includes as a "disorderly house" a common gaming house. (2) The definition of the term "disorderly house" contained in Code s. 198 (Part XIV. "Nuisances") applies to the same term in Code s. 783 (Part LV. "Summary Trials") and the rule "noscitur a sociis" does not apply to the interpretation of sub-section (f) of section 783.

The King v. Flynn, (Y.T.), 9 Can. Cr. Cas. 550.

—Keeping a bawdy house—Evidence necessary to prove offence.]—(1) A woman living by herself in a house, cannot be convicted of keeping a bawdy house therein, unless it is shown that one or more other women resort to it for purposes of prostitution. Rex v. Young (1902) 14 M.R. 58, and Singleton v. Ellison, [1895] 1 Q.B. 607, followed. (2) In order to support a conviction for keeping a bawdy house, it is not sufficient to show the bad reputation of the house and its inmates and that men resorted to it in the night, but actual proof must be given of some act or acts of prostitution, though definite proof of one may be sufficient. Regina v. St. Clair, (1900), 3 Can. Cr. Cas. at p. 557 followed. (3) Section 195 of the Criminal Code, 1892, does not change the law, as it was before the Code, as to the essential ingredients of the offence of keeping a bawdy house, and it is intended merely to define the nature of the premises within which a bawdy house may be kept, and not to state what acts constitute such keeping.

Rex v. Osberg, 15 Man. R. 147, 9 Can. Cr. Cas. 180.

And see VAGRANCY OFFENCES.

—Disorderly house — Inmate—Pleading guilty—Form of conviction—Summary conviction or summary trial.]—A single Judge in the Territories has jurisdiction under 54-55 Vict. (1891) c. 22, s. 7, ss. 2, to hear and determine applications to quash summary convictions, whether the convictions have been brought into Court by certiorari or not. If the conviction has been returned to the clerk of the Supreme Court, by virtue of s. 102 of the N. W. T. Act, the issue of a writ of certiorari is unnecessary. The defendant pleaded guilty before a magistrate of being an inmate of a disorderly house, an offence punishable either under Part XV. of the Criminal Code (Vagrancy), where the fine on summary conviction is limited to $50, or under Part LV. (Summary Trials of Indictable Offences), where the fine and costs together must not exceed $100. A fine of $90, with $6.25 costs, was imposed, but the conviction was in the Form WW prescribed under Part LVIII. relating to summary convictions, and not the Form QQ prescribed under Part LV., and did not contain the words "being charged before me the undersigned," which appear in the latter form. On an application to quash the conviction was sustained as a good conviction under Part LV., as being of like effect to the form therein prescribed; the amount of the fine and the fact that the accused was not charged with or convicted of being a loose, idle or disorderly person, indicating the procedure adopted by the magistrate. The omission to recite that the accused had been charged with the offence before him, a fact which appeared from the proceedings, is a matter of form only and not sufficient to void the conviction.

The King v. Ames, 5 Terr. L.R. 492, 10 Can. Cr. Cas. 52.

—"Common bawdy house"—Woman living alone—Criminal Code, s. 195.]—Section 195 of the Criminal Code, 55-56 Vict. c. 29 (D), has not changed the law as to what constitutes the offence of keeping a com-

mon bawdy house; and a woman living by herself in a house is not within its scope, unless other women than herself resort to the house for purposes of prostitution.

Rex v. Mannix, 10 O.L.R. 303; 10 Can. Cr. Cas. 150.

—Keeping bawdy house—Warrant of commitment—Form of conviction—Statement of offence.]—The prisoner was convicted before three justices of the peace for being the keeper of a disorderly house, bawdy house, or house of ill-fame, or house for the resort of prostitutes—following the words of sub-s. (j) of s. 207 of the Criminal Code—and was committed to gaol for six months under a warrant signed by two of the justices. She obtained a writ of habeas corpus, and upon the return of it moved for her discharge, which was refused by a Divisional Court. She then appealed to the Court of Appeal, and, after the appeal had been argued and judgment reserved, the justices returned a further warrant of commitment signed by all three justices, which was received by the Court of Appeal. The offence was stated to have been committed in a city, for which there was a police magistrate. The warrant returned to the Court of Appeal was signed by all three justices, under their respective seals, and set forth a conviction by them, all acting in the absence of, and one at the request of, the police magistrate:—Held, that under s. 208 of the Criminal Code, as amended by 57 and 58 Vict. c. 57, one justice had jurisdiction to adjudicate upon the charge, and by R.S.O. 1897, c. 87, s. 7, had authority to act in the city in the absence of the police magistrate; and if authority be given to one justice it may be executed by any greater number, and the fact that others join in making the conviction does not invalidate the proceeding. Held, also, that the conviction and commitment, following the language of sub-s. (j) of s. 207 of the Code, properly set out and disclosed the offence: s. 846 (2) of the Code (63 and 64 Vict. c. 46).

Rex v. Leconte, 11 O.L.R. 408, 11 Can. Cr. Cas. 41.

—Being inmate of bawdy house — Vagrancy—Form of conviction.]—(1) A conviction by a city stipendiary magistrate for the offence of being an inmate of a bawdy house need not expressly state on its face that the accused is a vagrant. (2) A warrant of commitment following a conviction by a magistrate whereby three months' imprisonment was imposed, is not invalid because it directs detention "for three months or until delivery by due course of law." (3) The addition of the words "or until delivered in due course of law" is in such a case a contingent limitation upon the three months' term which would apply upon the quashing of the conviction or other like contingency.

The King v. Young, 12 Can. Cr. Cas. 109.

—Disorderly house—Gaming.]—The term "disorderly house" in Cr. Code s. 774 includes any house to which persons resort for criminal or immoral purposes and therefore includes a common gaming house.

Rex v. Four Chinamen, 13 B.C.R. 216; Rex v. Ah San, 12 Can. Cr. Cas. 538.

—Keeping house of ill-fame—Amending information—Evidence as to offence subsequent to issue of summons.]—Two justices dealing with a charge of keeping a house of ill-fame will be deemed to be acting under Part LV. of the Criminal Code, 1892, if they adopt the form of conviction provided by s. 786, and the form of conviction QQ. A defendant cannot be convicted of an offence alleged to be committed after the date of the issue of the summons, even though the information is amended and resworn:—Semble, that, if with a deposit of cash as security in proceedings to quash a conviction, a writing is filed, the condition should be that the applicant will prosecute the motion to quash the conviction, not merely the application for the writ of certiorari, and that such writing is bad if the condition is to prosecute such motion or writ of certiorari.

The King v. Earley (No. 3), 6 Terr. L. R. 269, 14 Can. Cr. Cas. 10.

—Common betting house—Betting on race course — Definition of "place."]—In order to constitute a "place" within the meaning of s. 227 of the Criminal Code, there must be a measure of fixity, localization and exclusive right of user. The defendants were two of a number of bookmakers who, on payment of the usual entrance fee, were admitted, along with the general public, to a fenced enclosure owned and controlled by the Ontario Jockey Club, an incorporated racing association. These bookmakers laid bets from day to day, through their assistants, with members of the general public attending the races. They did not use any desk, stool, umbrella, tent, or booth, or erection of any kind to mark any place where bets were made, and no part of the general enclosure was especially allocated to them, nor did they occupy a fixed position, but during each race stood as much as possible about the same spot within a radius of from five to ten feet. The betting operations were carried on in the same method as in the case of Rex v. Saunders, except that in that case the bookmakers used a wooden box, or booth, moved about on castors from one part of the grounds to another during the progress of the race meeting:—Held, that the defendants did not occupy a "house,

office, room or other place'' within the meaning of s. 227 of the Criminal Code, and were, therefore, not guilty of the offence of keeping a ''common betting house'' under s. 228 of the Code. Powell v. Kempton Park Racecourse Co., [1899] A.C. 143, followed. Rex v. Saunders (1907), 12 Can. Cr. Cas. 174, 38 S.C.R. 382, distinguished.

Rex v. Moylett, 15 O.L.R. 348, 13 Can. Cr. Cas. 279.

—Frequenter—Asking account of conduct.]—A police detective, in plain clothes, questioned accused as to what she was doing in a certain house. He did not inform her that he was an officer:—Held, that the officer should have first disclosed his authority, and then expressly asked the accused to given an account of herself.

Rex v. Regan, 14 B.C.R. 12, 14 Can. Cr. Cas. 106.

—Keeping a common gaming house—Evidence.]—On the premises of the accused a number of person unconnected with the premises had been observed playing games involving the use of money, dice and dominoes, and the accused had stated to the chief of police that he was having a game of fan-tan at his place, and that he was willing to pay for the privilege as he was doing well out of it:—Held, sufficient evidence to sustain a conviction for keeping a common gaming house.

The King v. Mah Kee, 6 Terr. L.R. 121, 9 Can. Cr. Cas. 47.

—Keeping common gaming house—Summary trial—Right of accused to elect to be tried by jury.]—A police magistrate has not absolute and summary jurisdiction under ss. 773 and 774 of the Criminal Code to try, without their consent, persons accused of keeping a common gaming house; such persons have the right to elect to be tried by a jury; the words ''disorderly house'' in s. 773 do not include ''common gaming house,'' but are limited by the words which immediately follow them, ''house of ill-fame or bawdy house.'' The Queen v. France (1898), 1 Can. Cr. Cas. 32, approved and followed. The accused having been illegally tried and convicted before a magistrate, their conviction was quashed, and it was directed that they should be accorded the right of election to be tried by or without a jury, and that they should be tried accordingly.

Rex v. Lee Guey, 15 O.L.R. 235, 13 Can. Cr. Cas. 80.

DISTRESS FOR RENT.

—Nonpayment of bailiff's expenses—Excessive distress to realize them—Collusive sale—Depriving of costs.]—

Gardner v. Simpson, 2 E.L.R. 90 (N.S.).

—By landlord.]—

See LANDLORD.

DIVISION COURT.

Splitting cause of action—Money lent—Separate loans.]—The plaintiff lent sums of money to the defendant on five different days, all within a short period. Each of the amounts was advanced as a separate and distinct loan, without any reference to a further advance or loan of any kind, and upon the defendant's promise to pay in each instance, and with an offer to give his promissory note for each sum, if desired. The plaintiff brought two actions in a Division Court to recover the money lent: the first for two of the sums lent, amounting together to $70; the second for the other three sums, amounting to $100:—Held, not a dividing of a cause of action into two actions for the purpose of bringing the same within the jurisdiction of a Division Court, which is forbidden by s. 79 of the Division Courts Act, R.S.O. 1897, c. 60. Re Gordon v. O'Brien (1886), 11 P.R. 287, and Re Clark v. Barber (1894), 26 O.R. 47, distinguished.

Re McKay v. Clare, 20 O.L.R. 344.

—Jurisdiction—Claim over $100—Promissory note—Production and proof of signature.]—Under s. 72, sub-s. (d), of the Division Courts Act, R.S.O. 1897, c. 60, and s. 72a (added by 4 Edw. VII. c. 12, s. 1), a Division Court has jurisdiction to entertain a claim upon a promissory note for over $100, but not exceeding $200; all that is necessary to make out the plaintiff's case being the production of the note and proof of the signature of the defendant; and the jurisdiction is not ousted because it appears that there were other dealings between the parties, and that the note is an item of an account which the plaintiff kept against the defendant and another, secured by a mortgage, even if it is necessary to investigate the account for the purpose of ascertaining whether the promissory note has been paid in whole or part.

Re Green v. Crawford, 21 O.L.R. 36.

—Demand for trial by jury—Motion for judgment.]—A general enactment is governed by a particular one. Section 116 of the Division Courts Act, allowing a plaintiff to move for summary judgment, prevails over the section under which a party who demands a jury has an absolute right to trial by jury. And a judgment under s. 116 was held to have been properly granted after the defendant had demanded a jury and the case had come on for trial with a jury and had been postponed; and prohibition was refused.

Re Tatham v. Atkinson, 1 O.W.N. 183.

—Action in County Court on Division Court judgment—Lack of finality.]—A

judgment of a Division Court cannot be enforced by action in a higher Court, because the obligation to pay thereby created is not an absolute obligation, but is subject to the discretion vested in the Judge to defer payment in certain circumstances; and the fact that a Division Court is now a Court of record makes no difference in that respect. Berkeley v. Elderkin (1853), 1 E. & B. 805, McPherson v. Forrester (1854), 11 U.C.R. 362, and Donnelly v. Stewart (1866), 25 U.C.R. 308, followed. Per Boyd, C., that the state of the law is unsatisfactory, but the earlier decisions, which have stood for more than fifty years, must be followed. Per Riddell, J., that a Court sitting in appeal from a County Court decision, being the final Court, is not bound by previous decisions; but the decisions of the Court of Appeal in England are binding (Trimble v. Hill [1879], 5 App. Cas. 342, at p. 344); and Berkeley v. Elderkin, 1 E. & B. 805, has been approved by the Court of Appeal in The Queen v. County Court Judge of Essex (1887), 18 Q.B.D. 704.

Crowe v. Graham, 22 O.L.R. 145.

Jurisdiction—Balance due on contract signed by defendant—Extrinsic evidence.]—In an action in the County Court for $37.50, balance due on a building contract of $475, signed by the defendant, where extrinsic evidence was required to show performance of the contract by the plaintiff, and for an open account for $27.35, and in which the defendant was allowed $25.00 for the defective work and material:—Held, that the Division Court had no jurisdiction, and that the plaintiff was entitled to his costs on the County Court scale. Kinsey v. Roche (1881), 8 P.R. 515, approved of; McDermid v. McDermid (1888), 15 A.R. 287, followed; Re Graham v. Tomlinson (1888), 12 P.R. 367, not followed.

Kreutziger v. Brox, 32 O.R. 418.

—Jurisdiction—Amount not ascertained by signature—Husband and wife—Sale of goods—Undisclosed principal — Judgment against husband and wife.]—A husband, as agent for his wife, purchased goods from the plaintiffs, who were ignorant that she was the purchaser. On becoming aware of it, and the goods not having been paid for, they sued both husband and wife, but on the husband giving a promissory note for $150, signed by him for part of the debt, and the wife paying the balance in cash, the action was not proceeded with. The note not having been paid at maturity, an action was brought in the County Court for the balance due on the goods, being the amount for which the note had been given, and judgment was entered against both husband and wife:—Held, on appeal, that the proper inference was that the husband's note was not taken in satisfaction of the debt, nor was it an election to look to him alone for payment; and the plaintiffs were therefore entitled to sue on the original cause of action, but that they could not have judgment against both husband and wife; and must elect as to which they desired to hold it, and that they could properly hold it against the wife, a recovery against her being now maintainable under "The Married Woman's Property Act," R.S.O. 1897, c. 168. Wagner v. Jefferson (1876), 37 U.C.R. 551, distinguished. Held, also that the debt was not cognizable by the Division Court, the claim not having been ascertained by the signature of the wife; that the note signed by the husband could not be treated as such, it not having been signed by the husband as her agent, but as his own promise.

Davidson v. McClelland, 32 O.R. 382.

—Jurisdiction—Evidence—Non-suit—Mandamus.]—The plaintiff claimed $212 for wages, and gave credit for payments thereon, suing for a balance of $58. The defendant, by counterclaim, alleged a large account of $744.58, and claimed a balance in his favour of more than $100. The Judge entered a non-suit after hearing the evidence of one witness, who disclosed the nature of the account:—Held, that the Judge at the trial having found that the evidence given showed that the case was beyond the jurisdiction of a Division Court, and ruled that further evidence should not be given, and the plaintiff having submitted to this, and a judgment of non-suit with costs having been entered, and the plaintiff having moved to set aside the non-suit and for a new trial, which was refused, an application for a mandamus did not lie. Regina v. Judge of Southampton County Court (1891), 65 L.T.N.S. 320, distinguished. That the plaintiff had no right of appeal in this case under the Division Courts Act, might be a defect of legislation, but it did not enlarge the remedy by mandamus.

Re Ratcliffe v. Crescent Mill and Timber Co., 1 O.L.R. 331.

—Garnishee—No garnishable debt—Jurisdiction—Primary debtor.]—Where an action is entered under s. 190 of the Division Courts Act R.S.O. 1897 c. 60 in the division where the garnishee resides, the primary debtor residing in another division and disputing the jurisdiction of the Court, there is jurisdiction to give judgment against the primary debtor even where the action is dismissed as against the garnishee. In re Holland v. Wallace, (1880), 8 P.R. 186, and Re McCabe v. Middleton (1896), 27 O.R. 170, considered with reference to subsequent legislation.

Re Lented v. Congdon and Canadian

Order of Chosen Friends, Garnishees, 1 O.L.R. 1.

—Transfer of action—Order issued under s. 90 instead of s. 91—Prohibition.] — Where an order was made by a Division Court Judge for the transfer of an action brought in that division, to the Division Court of another county, the order being made under the powers conferred by s. 90 of the Division Courts Act, R.S.O. 1897, c. 60, whereas, under the circumstances, the order should have been made under s. 91, an order for prohibition was made prohibiting the Division Court to which the transfer had been made from acting under the order of transfer, without prejudice to the right to apply for an order under s. 91.

In re Frost v. McMillen, 2 O.L.R. 303.

—Garnishee resident out of Ontario—Jurisdiction—Attornment.]—Only debts by persons residing or carrying on business in Ontario are subject to garnishee proceedings under s. 190 of the Division Courts Act, R.S.O. 1897 c. 60, and the acceptance of service of a summons on behalf of a garnishee residing out of the province by a solicitor in the province and his appearance at the hearing and raising no objection, does not confer jurisdiction on the Division Court. In re McCabe v. Middleton (1895), 27 O.R. 170, distinguished.

Wilson v. Postle, 2 O.L.R. 203.

—Jurisdiction—Foreign judgment on a promissory note—Recovery on.]—A foreign judgment against the maker of a promissory note represents a simple contract debt only and one not ascertained by the signature of the defendant; and prohibition was granted to restrain proceeding with a plaint in a Division Court on a foreign judgment for $232.37 recovered on such a note where the plaintiff abandoned the excess over $200, and sought to recover judgment for the balance.

Re McMillan v. Fortier, 2 O.L.R. 231.

—Landlord and tenant—Assignment for creditors—Acceleration clause—Forfeiture—Division Court Jurisdiction.]—The effect of s. 34 R.S.O. 1897 c. 170, "The Landlord and Tenants' Act," is to place the assignee, who has elected by notice in writing under his hand to retain the premises occupied by the assignor at the time of the assignment for the unexpired term of the lease under which said premises were held, in the same position as respects the lease, as the assignor would have been in had the assignment not been made; the landlord in such cases being entitled to the full amount of the rent reserved by the lease, but to nothing more; and where accelerated rent due for the unexpired term of a lease containing the usual forfeiture clause on an assignment for the benefit of creditors being made by the lessor, had been paid by his assignee for creditors, who had elected to retain the premises to the end of the term he was entitled to recover back a further sum for rent of the premises for a portion of the same period, which he had paid on demand of the landlord, under protest, to avoid distress. Rent payable under a lease of land is an incorporeal hereditament, and where the right or title to it comes in question, a Division Court has no jurisdiction in an action to recover it.

Kennedy v. MacDonell, 1 O.L.R. 250.

—Public school teacher—Action for salary—Jurisdiction of Division Court.] — An agreement between school trustees and the plaintiff, as teacher, gave either party a right to terminate it on one month's notice. The former notified the plaintiff of its termination pursuant to a resolution passed at a board meeting, notice of which, however, had not stated that this matter would be considered, of which some of the trustees were unaware, and two of them did not attend:—Held, that this was not a proper exercise of the option to terminate, and had not that effect. The plaintiff brought this action in the Division Court, claiming a balance of salary, and had recovered judgment for $132.03. Held, that the matters of difference between the parties fell within R.S.O. 1897 c. 292, s. 77, sub-s. 7, and the Division Court had jurisdiction.

Greenlees v. The Picton Public School Board, 2 O.L.R. 387.

—Division Court Act, ss. 84, 92—Action by bailiff—Debt or damages.]—The plaintiff was the bailiff of the 1st Division Court of the county. The defendant resided and the cause of action arose within the limits of the same division (1st division). The action was for damages, and was brought in the adjoining (6th) Division Court to that in which the plaintiff was bailiff. The question was: Had this Division Court jurisdiction to try the action?:—Held, that the words "debt due," in s. 92, could not be construed as including damages in tort, and that the 6th Division Court had no jurisdiction. Reference was made to Dwarris on Statutes, 193; Stroud's Jud. Dict., p. 184; in re Hill v. Hicks, 28 O.R. 393; Webster v. McDougall, 26 C.L.J. 85.

Spencer v. Wright, 37 C.L.J. 245.

—Appeals from.]—See APPEAL.

—Motion for immediate judgment—Service with summons—Regularity of—Computation of time—Holidays.]—A special summons issued out of a Division Court was served on the 8th of November, re-

turnable on the 12th of November, and with it was served a notice of motion for immediate judgment, also returnable on the 12th:—Held, that the notice was properly served, for there is nothing in s. 116 of the Division Courts Act, R.S.O. 1897, c. 60, which requires that before such notice is given the time for the filing of a dispute notice should have first expired. Con. Rule 343, whereby holidays are excluded from computation where a period of less than six days from or after any date or even is appointed or allowed for doing any act or taking any proceeding, does not apply to Division Courts. Prohibition refused.

Re McKay v. Talbot, 3 O.L.R. 256 (Meredith, C.J.).

—Prohibition—Post diem interest on mortgage—Splitting cause of action—Jurisdiction.]—Plaintiff, on November 2, 1901, brought an action in a Division Court for one year's interest due February 1, 1901, and for interest on that sum, amounting together to $81.50, due on a mortgage, the principal of which was some years overdue:—Held, that the interest sued for, being interest post diem, as to which there was no covenant to pay, was not due the plaintiff qua interest, but was recoverable only by way of damages, and the case did not come within the provisions of sub-s. (2) of s. 79 R.S.O. 1897, c. 60. Held, also, that the plaintiffs, if entitled to recover interest from February 1, 1900, were entitled to recover as damages interest down to the date of the issue of the summons amounting to about $140, which sum was divided for the purpose of suing in the Division Court, which is forbidden by s. 79. Prohibition granted.

Re Phillips v. Hanna, 3 O.L.R. 558.

—Orders for committal—Previous order for payment—Affidavit.]—The plaintiff recovered judgment against the defendant in a Division Court action for a debt contracted before the passing of the Act, 61 Vict. c. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith:—Held, that the Court had jurisdiction under sub-s. 5 of s. 247 of the Division Court Acts, R.S. O. 1897, c. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal, without a previous order for payment based upon such an examination and default thereunder. Where it appears that a judgment debtor has been examined before the Judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication as to that which must be made to appear to warrant the making of an order under sub-s. 5 of s. 247. Semble, that if the affidavit of the plaintiff required by s. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to raise an objection to the jurisdiction on that ground; and, the defect not appearing on the face of the proceedings, prohibition in such a case would not be granted.

Re Hawkins v. Batzold, 2 O.L.R. 704 (D.C.).

—Jurisdiction—Breach of undertaking — —Amount ascertained by signature.]—Defendant gave two notes for $75 and $62, respectively, on a form which contained an undertaking to give further security, and in the event of default in giving the security, that the notes might be treated as due. Plaintiffs demanded further security, and not receiving same, brought an action on the notes before the time mentioned in them for their maturity had expired:—Held, that notwithstanding the plaintiff had to prove a breach of the undertaking to give security before he could recover on the notes, the Division Court had jurisdiction to entertain the action. Petrie v. Machan (1897), 28 O.R. 642, followed in preference to Kreutziger v. Brox (1900), 32 O.R. 418. Judgment of the 10th Division Court of the County of York reversed.

McCormack Harvesting Machine Co. v. Warnica, 3 O.L.R. 427.

—Territorial jurisdiction—Cause of action —Flooding land—Erection of dam—Prohibition.]—In a Division Court action the plaintiff's claim was for damages for injuries caused to his lands, which were situate within the limits of the division in the Court of which his action was entered, by reason of their having been overflowed and his crops damaged by waters alleged to have been unlawfully brought by the defendants to and cast upon his lands. The backing of the water was alleged to have been caused by a dam which the defendants had erected on their own lands, situate beyond the limits of such Court:—Held, that the erection of the dam was part of the cause of action, and therefore the whole cause of action did not arise within the jurisdiction of the Division Court in which the action was brought; and prohibition was ordered.

Re Doolittle v. Electrical Maintenance and Construction Co., 3 O.L.R. 460.

—Assignments and preferences—Declaration of right to rank.]—An action for a declaration of the right to rank against an insolvent estate vested in an assignee under the Assignments Act, R.S.O. 1897, c. 147, is not within the jurisdiction of the Division Court.

In re Bergman v. Armstrong, 4 O.L.R 717.

—Jurisdiction—Dividing cause of action—Division Courts Act, s. 79—Proof against insolvent estate.]—The defendants, becoming insolvent, made an assignment for creditors, and the plaintiffs proved their claim upon a certain promissory note and other notes made by defendants, and in respect of an open account for goods sold, for a lump sum, upon which they were paid a dividend. The plaintiffs had no security for their claim:—Held, that the remedy upon the promissory note in question was not extinguished, and the plaintiffs could sue in a Division Court for the amount of it as a separate cause of action, giving credit for a proportionate part of the dividend paid without offending against the provisions of s. 79 of the Division Courts Act, R.S.O. 1897, c. 60, forbidding the dividing of a cause of action.

Harvey v. McPherson, 6 O.L.R. 60.

—Power to amend—Division Court Rule 4.]—The defendant joined in a promissory note, as the payees knew, for the accommodation of his co-maker. When it became due, the latter tendered a renewal note, purporting to be signed by the defendant, which the payees accepted, and gave up the original note, stamped "paid." The primary debtor became insolvent and died, and the payees afterwards sued the defendant on the renewal note only in a Division Court, when the defendant swore he never signed it, but, nevertheless, there was verdict and judgment for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the Judge, at the trial, allowed the plaintiffs to claim in the alternative upon the original note, as well as on the renewal, and to amend his claim accordingly. A verdict was then returned for the plaintiff on the original note:—Held, that the Division Court Judge had jurisdiction under Rule 4 of the Division Courts, to amend the plaintiffs' claim as he had done.

Matthews v. Marsh, 5 O.L.R. 540 (D.C.).

—Attachment of debts—Interest of Residuary legatee—Jurisdiction.] — A primary creditor in a Division Court, by garnishee summons served on the executors, attached the interest of a residuary legatee in the estate of a testator, who had died within the year of the attachment A receiver was subsequently appointed in a High Court action to receive his interest. The Division Court Judge gave judgment against the garnishees. An appeal to a Divisional Court was allowed on the ground that such interest was not attachable under section 179 of the Division Courts Act, R.S.O. 1897, c. 60.

Hunsberry v. Kratz, 5 O.L.R. 635.

—Solicitor's lien.]—Solicitors have no lien for their costs in Division Court proceedings.

Arnprior v. Bradley, 39 Can. Law Jour. 81.

—Judgment summons—Committal—"Ability to pay."]—Judgment was recovered at the trial by the plaintiff in a Division Court action, no order being at that time made for payment in instalments. Subsequently, the defendant was examined upon an after judgment summons and was ordered to pay $15 a month. Default having occurred, he was again brought before the Judge on a show cause summons and committed to jail for twenty days:—Held, that it was to be assumed in the absence of evidence to the contrary, that there had been a finding on proper evidence of the existence of the conditions justifying the making of an order of committal and that prohibition would not lie. Judgment of Anglin, J., affirmed. Per Meredith, C.J.:—"Ability to pay" in sub-s. 5 of s. 247 of the Division Courts Act, R.S.O. 1897, c. 60, covers the case of a dishonest debtor who can by working earn the means to pay the debt and contumaciously refuses to do anything. Per Anglin, J.:—An order for committal is not made as punishment for disobedience of a specific order for payment and in the nature of a committal for contempt, but is granted as a punishment of the fraudulent conduct of the debtor in having refused or neglected to pay the judgment debt, though having had the means and ability to pay. It is, therefore, not necessary before a committal order can be made, that there should be an order on after judgment summons and disobedience of that order. The judgment itself is sufficient foundation for the order to commit.

Re Kay v. Storry, 8 O.L.R. 45 (D.C.).

—Division Courts — Prohibition — Claim under $20—Counterclaim over $20—Trial by jury.]—The plaintiff sued in a Division Court for a sum less than the amount entitling the defendant to have it tried by jury. The defendant, besides filing a dispute notice, counterclaimed for a sum which entitled him to a jury, which he asked for, but the Judge refused to place the case on the jury list:—Held, that the filing of the counterclaim did not entitle the defendant to have the plaintiff's claim tried by a jury, but that s. 160 of the Division Court Act, R.S.O. 1897, c. 157, did entitle defendant to that right in respect of his counterclaim. Prohibition ordered ,subject to the right of the Judge to order that the counterclaim be the subject to an independent action under Division Court Rule 108.

Re Fraser v. Ham, 7 O.L.R. 449 (Teetzel. J.).

—Appeal—Notice of setting down.]—The giving of the notice of setting down for argument and of the appeal and of the grounds thereof, required by s. 158 of the Division Courts Act, is a condition precedent to the right to appeal to a Divisional Court from a judgment in the Division Court, and where this notice has not been given, the Divisional Court has no jurisdiction to deal with the appeal.

Bradley v. Wilson, 8 O.L.R. 184 (D.C.)

—Execution against lands—Previous nulla bona return.]—Since the revision of the statutes in 1897 incorporating sub-s. 5 of s. 8 of 57 Vict. c. 23 (O.), into s. 230 of c. 60 of R.S.O. 1897, it is not necessary to have a return of nulla bona made by a bailiff of the Division Court in which the judgment was recovered before an execution against lands can be issued, a return of nulla bona by a bailiff in such Division Court being sufficient. Judgment of Ferguson, J., reversed.

Turner v. Tourangeau, 8 O.L.R. 221 (D.C.).

—Money demand — Final judgment — Absence of dispute notice.]—An action in a Division Court in which the plaintiff's claim was stated in the particulars to be "for money received by the defendants for the use of the plaintiff, being money obtained from the plaintiff by the defendants by false representations," is an action for a "money demand" within s. 143 of the Division Courts Act, R.S.O. 1897, c. 60, and a motion for prohibition to restrain proceedings upon a judgment entered in default of a dispute notice was refused.

Re Mager v. Canadian Tin Plate Decorating Co., 7 O.L.R. 25.

—Jurisdiction—Proof of.]—When there is any evidence to support the finding of a Division Court upon a question involving its jurisdiction the Court, upon application for prohibition, will not review its finding, especially where the question relates to the merits and is not merely collateral to them; but it will review such finding where it is shown that there is no evidence to support it, whether the finding is of matters intrinsic or only collateral. After a valid lease of premises held by a company had been duly put an end to, and the key delivered up to the landlord, the company's agent, without any authority from the company, verbally agreed with the landlord for the renewal thereof for a year, and received the key. The company, however, refused to agree to the renewal lease and the key was handed back to the landlord; no actual possession of the premises being taken by the company:—Held, that there being no evidence of a contract made and broken within the jurisdiction of the Division Court, prohibition was properly granted.

Wilkes v. Home Life Association of Canada, 8 O.L.R. 91 (D.C.).

—Jurisdiction—Foreigner out of Ontario—Form of summons.]—Section 87 (1) of the Division Courts Act, R.S.O. 1897, c. 60, which provides that an action may be brought in the Division Court, notwithstanding that the residence of the defendant is out of the province, applies as well to foreigners as to British subjects. No practice being provided therefor by that Act, by s. 312, the practice of the High Court, under Con. Rules 103 and 312, is to apply. The form of summons issued in this action, and which is fully set out in the report, was held to be a compliance with such rules.

Re Coy v. Arndt, 8 O.L.R. 101 (D.C.).

—Judgment summons—Form of affidavit—Irregularity.]—An affidavit, by a plaintiff in a Division Court action desiring to issue a judgment summons, stating that "the sum of $65.10 of the said judgment remains unsatisfied as I am informed and believe," the judgment being for more than $65.10, is not such an affidavit as is required by s. 243 of the Division Courts Act, R.S.O. 1897, c. 60, and prohibition will lie to restrain proceedings upon a judgment summons issued pursuant to such an affidavit.

In re Barr v. McMillan, 7 O.L.R. 70, affirmed by Divisional Court, 7 O.L.R. 672.

—Jurisdiction—Amount over $100—Ascertainment—Extrinsic evidence.]—In an action in a Division Court for the price of goods, the amount claimed was more than $100, and the plaintiff relied upon the signature of the defendant to an agreement containing the terms of purchase, under which it was alleged default had been made, as ascertaining the amount:—Held, that the other extrinsic evidence beyond the mere production of the document and the proof of the signature to it, would have to be given to establish the claim of the plaintiff, and therefore the Division Court had no jurisdiction, by reason of the new section 72a added to the Division Courts Act, by 4 Edw. VII. c. 12, s. 1 (O.). The amending Act is declaratory and applies to an action begun before it was passed.

Re Thom v. McQuitty, 8 O.L.R. 705.

—Attachment of debts — Jurisdiction — Garnishee out of province—"Carrying on business"—Intervener.]—A person living in the United States entered into a contract in Ontario for the building of a house upon land owned by his wife. It was shown also that he acted as his wife's agent in affairs relating to this property and other property in Ontario, all situate

within the territory of a certain Division Court, process from which was issued against him as garnishee:—Held, that the evidence did not show that he was carrying on business in the division, within the meaning of s. 190 of Division Courts Act, R.S.O. 1897, c. 60. Held, however, Street, J., dissenting, that as the garnishee had submitted to the jurisdiction of the Division Court, a person holding an equitable assignment from a primary debtor of a part of the fund sought to be garnished, could not effectively intervene under s. 193 and defeat the garnishing proceedings by showing that the Court had no jurisdiction over the garnishee.

Nelson v. Lenz, 9 O.L.R. 50 (D.C.).

—Jurisdiction—Claim over $100—Promissory note—Endorser.]—Having regard to s. 8, sub-s. 24, of the Interpretation Act, the word "document" in s. 1 of 4 Edw. VII. c. 12, amending s. 72 of the Division Courts Act, may be read if necessary in the plural, and therefore the increased jurisdiction of the Division Court may be exercised where the claim can be established by the production of one or more documents and the proof of the signatures to them. Production of a promissory note and proof of the signature of the defendant as an endorser, and production of the protest setting out the facts of presentment and notice of dishonour, make out a prima facie case within the jurisdiction of the Division Court. Judgment of Magee, J., reversed.

Slater v. Laberee, 9 O.L.R. 545 (D.C.).

—Judgment inadvertently entered for wrong person—Correction of—Prohibition.]—In a Division Court action for $70 the Judge, by a mere slip, so obvious that no one was misled by it, directed judgment to be entered for the defendant instead of the plaintiffs, and about three weeks afterwards, on his attention being called to it, the mistake was corrected in the presence of the solicitors who appeared for both parties at the trial. Immediately after the trial the defendant had an interview with his then solicitors, when he was advised that there would be no use in moving for a new trial. He then retained a new solicitor, and without in any way communicating with his former solicitors, or making any application for a new trial, and after the time therefor had elapsed, moved for prohibition:—Held, that the application would not lie.

North American Life Assurance Company v. Collins, 9 O.L.R. 579.

—Bailiff—Service of summons.]—Except in a few special cases provided for by the Division Courts Act, the bailiffs of the Courts have the right to serve summonses, and a plaintiff is not entitled as of right to effect service himself. Mandamus to a Division Court clerk to compel him to give a summons to the applicants for service refused.

Re Wilson v. McGinnis, 10 O.L.R. 98.

—Division Courts—Action against an executor de son tort—Jurisdiction.]—An executor de son tort is not within the meaning of R.S.O. 1897, c. 60, s. 72 (d), giving enlarged jurisdiction to Division Courts 'when the amount is ascertained by the signature of . . . the person whom, as executor or administrator, the defendant represents,' and a Division Court has no power in the same proceeding to declare a defendant executor de son tort and pronounce judgment against him as such for the amount claimed.

Re Dey v. McGill, 10 O.L.R. 408.

—Judgment debtor—Married woman — Committal.]—The committal of a judgment debtor in a Division Court for wilful default in appearing to be examined is in the nature of process to coerce payment, rather than of a punitive character, as for contempt; and there is no jurisdiction to make an order for the committal of a married woman judgment debtor who refuses to attend for examination upon a judgment summons, even though her non-attendance amounts to wilful misconduct. Ex p. Dakins (1855), 16 C.B. 77, followed.

Re Stewart v. Edwards, 11 O.L.R. 378.

—Acceptance of goods—Cause of action—Statute of Frauds.]—In an action for $45 the price of a coat ordered by the defendant in Toronto to be made and sent by the plaintiff to him at Belleville by express:—Held, that the plaintiff must prove as part of his case an acceptance of the coat at Belleville and that certain letters written by him at Belleville to the plaintiff at Toronto while evidence from which acceptance might be inferred, were not the acceptance itself, and, as the plaintiff failed to prove this, the whole cause of action did not arise at Toronto within the jurisdiction of the Division Court in which the plaint was brought. Prohibition ordered.

Re Taylor v. Reid, 13 O.L.R. 205 (D.C.).

—Prohibition—Interpretation of statute—Jurisdiction.]—Where it is necessary to interpret a statute, in order to find out whether the Division Court should decide the rights of the parties at all, then if the Division Court Judge misinterprets the statute and so gives himself jurisdiction to decide such rights, prohibition will lie; but if it be necessary to interpret a statute, simply to decide the rights of the parties, prohibition will not lie, however far astray the Division Court Judge may go. In re Long Point Company v. Anderson (1891), 18 A.R. 401, followed.

Township of Ameliasburg v. Pitcher, 13 O.L.R. 417 (D.C.).

—Prohibition—Finding of Judge.]—On a motion to a Division Court Judge on the ground that the defendant declined to give any evidence or enter into any defence on the merits because the plaintiff had not shown that he had taken the various appeals to the domestic forum provided for by the conditions of a benefit society and so establish jurisdiction in the Division Court:—Held, that the Division Court had jurisdiction and that the question to be decided was not in what Court the action should be brought, but can such an action succeed in law? and that then a High Court Judge had no right to dictate to a Division Court Judge. Held, also, that a finding that the plaintiff "had exhausted every possible means of redress in the domestic forum" could not be interfered with, as a motion for prohibition was not an appeal; and that the Division Court Judge had not given himself jurisdiction by any error, but that any mistake he may have made was made in a matter within his jurisdiction to try. Prohibition refused.

Re Errington v. Court Douglas, C.O.F., 14 O.L.R. 75.

—Order for committal of judgment debtor —Power to rescind.]—A Judge of a Division Court has no power, under any of the provisions of the Division Courts Act, or otherwise, to rescind an order made by him under s. 247 of the Act committing a judgment debtor to gaol, on the ground that it appeared to the Judge that the debtor had incurred the debt for which judgment had been recovered, by means of fraud. A mandamus to the Judge to hear an application to rescind was refused.

Re Wilson v. Durham, 18 O.L.R. 328.

—Jury trial—Non-suit after verdict.]—In a Division Court suit tried with a jury, the Judge reserved judgment on a motion for non-suit, subject to which he took the findings of the jury, and subsequently granted the non-suit on the ground that there was no evidence to go to the jury. The plaintiff then applied for a mandamus, requiring the Judge to enter judgment for the plaintiff upon the findings of the jury:—Held, affirming the order of Anglin, J., that under the provisions of 62 Vict. c. 11, s. 9 (O.), the Judge had jurisdiction to non-suit the plaintiff, although the jury had rendered their verdict. Re Lewis v. Old (1889), 17 O.R. 610, not followed, having been decided before the passing of the statute above referred to.

Re Johnson and Kayler, 18 O.L.R. 248.

DIVISIONAL COURT (ONTARIO).

See APPEAL.

DOCUMENTS.

Production of documents—Order for.]—See DISCOVERY.

—Documentary evidence.]—See EVIDENCE.

DOMESTIC FORUM.

Appeal—Church discipline.]—Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference. Appeal dismissed with costs.

Ash v. Methodist Church, 31 Can. S.C.R. 497, affirming 27 Ont. App. 672.

— Membership.] — See CLUB; CHURCH; TRUSTS.

DOMICILE.

Change pending action—Power of attorney.]—As the necessity of furnishing a power of attorney results from the fact of non-residence in the province, the plaintiff who leaves the country while his action is pending, even when the cause has been inscribed for leaving, must furnish it.

Ricciordo v. Canadian Pacific Ry. Co., 11 Que. P.R. 112.

—Marriage laws.]—See MARRIAGE; HUSBAND AND WIFE; DOWER.

Change of—Residence abroad.]—Residence abroad is not sufficient to effect a change of domicil unless accompanied by an intention to remain abroad and not to return to the former domicil.

Bonbright v. Bonbright, 2 O.L.R. 249.

—Security for costs from non-resident.]—See SECURITY FOR COSTS.

DOMINION LANDS ACTS.

Charge on land—Record book — Real Property Act.]—Under s. 18 of 60 and 61 Vict. (D.C.), c. 29, amending the Dominion Lands Act, unless the registrar makes the necessary entries respecting the indebtedness of the patentee there referred to "in the proper register or other record book in his office," no charge or lien will be created on the land comprised in the patent for such endebtedness. A docket or note book in which the registrar kept a record of applications under the Manitoba Real Property Act received and examined by him is not to be considered "the proper register or record book" in which to make the necessary entries, which should have been made in the Abstract Book kept under The Registry Act, as the patent had been registered under the old system of registration.

Regina v. Fawcett, 13 Man. R. 205 (Bain, J.).

See HOMESTEAD LAWS; REGISTRY LAWS.

DONATIO MORTIS CAUSA.

Savings bank deposit book—Trust.]—A deceased person in her last illness, and shortly before her death, handed to the defendant a government savings bank pass book in which was credited in the names of the defendant and the deceased a sum of money deposited in their names, and at the same time told the defendant to pay to the plaintiff $400 out of the bank, pay some debts owing by the deceased, and her funeral expenses; to which the defendant assented. The money on deposit belonged to the deceased, but could be withdrawn by the defendant on delivery up of the pass book, before or after the deceased's death:—Held, (1) that the pass book was a good subject of a donatio mortis causâ. (2) That there was a valid donatio mortis causâ constituted by trust, and enforceable in equity, in favour of the plaintiff.

Thorne v. Perry, 2 N.B. Eq. 146, affirmed; Perry v. Thorne, 35 N.B.R. 398.

—Gift—Bank deposit book.]—A banker's deposit book, which is numbered, and in which it is stipulated that deposits recorded in it will not be repaid without its production, is a proper subject of donatio mortis causâ, and delivery of such a book in anticipation of death operates as a transfer of the debt to take effect upon death.

Brown v. Toronto General Trusts Corporation, 32 O.R. 319.

—Gift of mortgage.]—The holder of two mortgages, while very ill and about to start on a journey for the benefit of his health, handed the mortgages and some title deeds to the defendant, telling her that they were for her and that he would execute an assignment of them to her if one were prepared and sent to him. The mortgagee died two months later, no assignment having been executed by him, and one of the mortgages having been partially discharged by him:—Held, that there had not been a donatio mortis causâ of the mortgages, but merely an incomplete and ineffective gift inter vivos, and that the mortgages formed part of the mortgagee's estate.

Ward v. Bradley, 1 O.L.R. 118 (C.A.).

—Absolute or conditional gifts.]—See also GIFT; DONATION.

—Ratification by will.]—C., the father of the respondent, had sold an immovable to A. W. and C. B. Morris for the sum, secured by privilege of bailleur de fonds, of $150,000, of which $50,000 was payable to the respondent after the decease of the vendor, and subsequently he made a will in which he ratified the said donation and delegation of payment. Messrs. Morris were appointed executors of this will. The appellant having become proprietor of the immovable by virtue of a title which obliged her to pay the debts of the respondent, Messrs. Morris, in their quality of testamentary executors of C., granted her a discharge of this debt, and a withdrawal of the hypothec which secured it. On an action in declaration of the hypothec of the respondent, demanding the nullity of the discharge granted by the testamentary executors:—Held, (1) even if the delegation of payment stipulated in favour of the respondent by the deed of sale was null as containing a donation à cause de mort, made by a decd entre vifs this donation became valid by the subsequent will of C., and the debt in question passed to the respondent with its accessories, and especially with the hypothec and privilege of bailleur de fonds. (2) A testamentary executor only having possession for the purposes of the execution of the will, that is for the payment of the debts and legacies specified, Messrs. Morris had no power in this case to give a discharge to the appellant, there being nothing to show that they required this sum to satisfy the debts of the succession, on the contrary, one of the said executors, assignee of the other, had sold the immovable to the auteur of the appellant, with a charge to pay the amount of the legacy in question to the respondent herself.

Consumers' Cordage Co. v. Converse, 30 Can. S.C.R. 618, affirming 8 Que. Q.B. 511.

—Gift inter vivos — Promissory notes—Evidence.]—The defendant, by representations that he had been presented by one M., deceased, with several promissory notes, as a gift, a few days before the death of M., induced the plaintiff to give him a new note for the balance due by the plaintiff to M. on the old notes alleged to have been donated to the defendant. The notes in question were not indorsed by the deceased, and there was no evidence of the alleged gift apart from the defendant's statement. In an action by the plaintiff, asking that the note given by him to defendant be delivered up to him:—Held, 1. That the evidence of the defendant was inadmissible to prove the fact of the donation alleged, the debt represented by the notes being a civil and not a commercial debt. 2. Even if the defendant's evidence were admissible, the words to which he deposed as those which had been used by the deceased, viz., "ces billets, je te les donne au cas où je mourrais," were not sufficient to establish a valid donation inter vivos.

Ekemberg v. Mousseau, 19 Que. S.C. 289 (Davidson, J.).

—Payment for services.]—The defendant had for several years been agent and solicitor of Dame Léocadie Boucher, who, to

show her appreciation of the services which he had rendered and was rendering every day to her, and also as a mark of her regard, had made him a donation of the sum of $8,000 to be a charge upon her succession from the moment of her death and before division of her property. This donation was annulled by the Superior Court (12 Que. S.C. 162, confirmed in review 13 S.C. 205) on the ground that it was a donation à cause de mort. Defendant thereupon rendered an account of the sums he had received from the executors in execution of the donation, but set up en compensation a larger amount as being due him from the succession of the deceased for solicitor's fees, cost of agency, etc. The plaintiff in reply alleged that such account was prescribed:—Held, that, notwithstanding the donation in question had been declared void, the prescription of defendant's account had been interrupted by the acknowledgement and promise to pay contained in it, and had been suspended until the death of the donor, the defendant not being able, before then, to claim payment for his services; and that, moreover, the prescription had been interrupted by the payment by the executors of the amount granted by the donation.

Boucher v. Morrison, 20 Que. S.C. 151 (Ct. Rev.).

—Savings bank deposit—Delivery of pass book — Evidence — Corroboration.]—The money at the credit of a savings bank depositor may pass a donatio mortis causa by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book. The class of evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove donatio mortis causa, that is, any evidence which is believed and is corroborated as required by the statute, may be acted upon.

Re Reid, 6 O.L.R. 420 (Street, J.).

—Gift—Solicitor and client—Absence of independent advice — Invalidity.]—Held, per Moss, C.J.O., and Garrow, J.A., where at the time of the making of an alleged donatio mortis causâ, the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to any one, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the deceased, such gift could not be supported. Maclennan, J.A., dissenting. Per Osler, J.A.:—Apart from the question of confidential relationship, the plaintiff's testimony as a litigant making a claim upon the estate of a deceased person in respect of a matter occurring before the death of such person had not been corroborated by some other material evidence as required by section 10 of the Evidence Act, R.S.O. 1897, c. 73. Judgment of Falconbridge, C.J.K.B., affirmed.

Davis v. Walker, 5 O.L.R. 173 (C.A.).

—Succession duty—"Dutiable" property—Donatio mortis causa—Contract for valuable consideration.]—The aggregate value of the estate of an intestate was $12,877, and of this $7,540 passed to the hands of his niece by virtue of an agreement between them, given effect to by a donatio mortis causa, as established in Brown v. Toronto General Trusts Corporation (1900), 32 O.R. 319:—Held, that the $7,540 was not dutiable under the Succession Duty Act, R.S.O. 1897, c. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but made in pursuance of a contractural obligation for value; and the niece not being estopped, by the form of the judgment in her action against the Toronto General Trusts Corporation, from setting up in this action, brought on behalf of the Crown to recover succession duty, that the transfer was not a gift, but the implementing of a contract. Held, also, that the $7,540 did not pass by survivorship within the meaning of s. 4 (d) of R.S.O. 1897, c. 24.

Attorney-General for Ontario v. Brown, 5 O.L.R. 167, Boyd, C.

—Moneys and notes—Delivery of keys.]—The defendant's father, a man of ninety-eight years of age, who had been living in her house, was taken suddenly ill, and, while she was endeavouring to make him comfortable, he handed her a small wallet, containing three keys, and said: "all the money and notes I have got are yours." One of the keys was that of a trunk in his room and another of a cash box (in which the money and notes were) in the trunk. There was evidence that he had a foreboding that it would be his last illness, and that he intended to give his property to the defendant —she retained the keys until his death.—Held, that there was a good donatio mortis causâ. In re Mustapha, Mustapha v. Wedlake (1891), 8 Times L.R. 160, followed.

Charleton v. Brooks, 6 O.L.R. 87 (Ferguson, J.).

—Deposit receipts — Cheques and orders—Delivery for beneficiaries—Corporation.] — McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for $6,000, which he then handed to his brother, telling him that he wanted the money equally divided among his wife, brother and a sister. The brother then, on his own suggestion, or that of McD., drew out three cheques or orders for $2,000 each, payable out of the deposit receipt to the respective beneficiaries, which McD. signed and returned to his brother, who handed to McD.'s wife the one payable to her and the receipt, and she placed them

in the trunk from which she had taken the receipt. McD. died eight days afterwards: —Held, affirming the judgment appealed against (35 N.S. Rep. 205), Sedgewick and Armour, JJ., dissenting, that this was a valid donatio mortis causâ of the deposit receipt and the sum it referred to, notwithstanding there was a small amount for interest not specified in the gift. By R.S.N.S. [1900] c. 163, s. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife or both, unless it is corroborated by other material evidence:—Held, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential.

McDonald v. McDonald, 33 Can. S.C.R. 145.

DONATION.

Parties—Arts. 177, 521 C.P.Q.]—It is not necessary, in an action to revoke a donation for ingratitude, to bring into the cause one of the donees who, as alleged by the plaintiff, has since transferred all his rights to his co-donee the defendant in consideration of a hypothec on the immovable donated. Failure to make a necessary person a party is a still stronger ground for a dilatory exception, but does not in law make necessary the absolute rejection of the claim.

Jacob v. Klein, 3 Que. P.R. 519 (S.C.).

—Consideration — Maintenance of donor — Revocation.]—A donation is not a burdensome donation equivalent to a sale from the mere fact that the donee is under obligation to furnish lodging, board, heat and maintenance to the donor. A donation may be revoked for ingratitude when the donee—under obligation as above—uses low and insulting terms respecting the donor and expels him from her house.

Rousseau v. Majeur, 18 Que. S.C. 447 (C. R.).

—Absolute or conditional.]—See also GIFT.

—Donation subject to debts — Registry —Warranty—Fraud.]—The universal donee, being liable for the donor's debts, cannot evict a prior purchaser with an onerous title (titre onereux) of one of the immovables donated although the deed of sale had not been registered and the donation had, since the donee had succeeded to the liability under the warranty of the vendor. Art. 2085 C.C. does not apply to the donee of an immovable so as to prevent there being set up against him his knowledge of an interest unregistered appertaining to a third party and subject to registry, but it is otherwise when the charges on the donation equal in value what is donated, for then the pretended donation is really a sale. The mere knowledge that the purchaser à titre onereux might have that the immovable he has acquired had been previously sold by his auteur to a third party whose title was not registered, does not constitute a fraud sufficient to affect the validity of the duly registered title of such purchaser.

Barbe v. Barbe, 20 Que. S.C. 119 (Ct. Rev.).

—Gift — Confidential relations — Evidence —Parent and child—Public policy—Principal and agent.]—The principle that where confidential relations exist between donor and donee the gift is, on grounds of public policy, presumed to be the effect of those relations, which presumption can only be rebutted by showing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus, in the case of a gift to the donor's son, for benefit of the latter's children, when said son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later and by voluntarily paying it before he died, such presumption does not arise. Judgment of the Court of Appeal (2 Ont. L.R. 251) reversing that of the Divisional Court (31 O.R. 414) affirmed, Sedgewick and Davies, JJ., dissenting.

Trusts and Guarantee Co. v. Hart, 32 Can. S.C.R. 553.

—Transfer of title to accrue—Bounty—53 Vict., c. 26 (Que.)—Trespass—Discharge.]—A deed executed in proper form before a notary provided as follows:—"Now appear E Gélinas and Dame E. L. Villeneuve, his wife . . . of the parish of St. Barnabé . . . who have acknowledged by these presents that they have granted and released from the present time and forever to N. Gélinas, their son, merchant, of the city of Three Rivers, to wit: all the rights, privileges and benefits that can accrue and belong to them under an Act of the Legislature assented to on 2nd April last (1890) entituled 'An Act to confer a privilege upon fathers or mothers of a family of more than twelve children living,' which Act conferred a right to 100 acres of public land . . . a bounty to which the parties appearing are entitled as being parents of twelve living children, and for which they have applied." This present transfer or release is made voluntarily and from paternal affection on the part of the parties appearing for their son N. Gélinas, who testifies his gratitude for it. That the said N. Gélinas may enjoy, use and dispose of the said rights and privileges in full ownership and in perpetuity by virtue of these presents subject to the charges and conditions imposed by the said Act. Executed, made and passed in the house of the parties appearing (that is

at St. Barnabé) who have declared that they are unable to sign, by us the said notary, having been first read over to said parties, the 21st September, 1890. And as to the said N. Gélinas, grantee, he has only heard these psesents read, and signed them with us the said notary, this 24th day of September, 1890, at the city of Three Rivers, under No. 2411 of the repertoire of the undersigned notary:—Held, (1) That this deed of donation passed to the donee the lot of land which the donor had claimed from the Government, and for which he had afterwards obtained a grant, and it was not necessary, in order to make the donee owner of said lot so granted to the donor that the latter should make a new conveyance. (2) That the acceptance of the donation appeared by the same deed, and the signature of the notary to the deed after that of the donee perfected the deed of donation, and there was no necessity for the donee to notify the donor of its being made perfect by said signatures. (3) That the defendant, from whom the donee (plaintiff) claims the value of wood cut on said lot, was neither heir, legatee nor creditor of the donor, nor claims any rights in the immovable, had no interest to invoke want of registry of the deed of donation. (4) That defendant, by paying the amount claimed by plaintiff, who had the apparent title, was discharged as against the donor's heirs if they should wish to take advantage of the non-registry. (5) That the Act 52 Vict., c. 26, allowed the donor to make this donation.

Gélinas v. St. Maurice Lumber Co., 21 Que. S.C. 270 (Ct. Rev.).

—By marriage contract.]—

See HUSBAND AND WIFE.

—Practice as to concurrent findings—Avoidance of gifts—Civil Code, Art. 762.]—Held, that gifts made by the testator to the respondent during his lifetime would not be avoided under Art. 762 of the Civil Code where there was neither allegation nor evidence that they were made in expectation of death. The proviso in the article "unless circumstances tend to render them valid," requires that those circumstances should be investigated.

Archambault v. Archambault (1902), A. C. 575.

—Donatio mortis causa.]—See that title.

DOWER.

Petition—Title—53 Vict. (N.B.), c. 4, s. 237.]—While a widow may file a bill for the admeasurement of her dower, she must not where she proceeds by petition entitle the petition as in a suit.

In re Woodman, 37 C.L.J. 704 (Barker, J.).

—Registry — Declaration — Marksman — 47, Vict., c. 15 (Que.).]—The registration of a declaration signed by a cross in presence of a single witness is sufficient to preserve the right to legal dower. The widow has a right to possession of the portion of an immovable charged with payment of her legal dower even if there are debts which will be the subject of a claim on a subsequent partition. On taking possession of immovables charged with payment of her dower the widow must pay interest to the heirs on such portion of the debts as may be claimed against the part of the immovables which she is entitled to take; but this pertains only as to the heirs, and payment is due to them only and not to a third party purchasing the immovables whose only recourse is in warranty against his auteur. 47 Vict., c. 15 (Que.), which provides that after January 1st, 1884, the right to legal dower will be extinguished as against purchasers if the declaration required by law has not been registered, should be interpreted as being confined to the case where a purchaser subsequent to 30th June, 1881, has registered his title before registration of the right of the wife to her legal dower.

Toupin v. Vezine, 9 Que. Q.B. 406.

—Will — Dower — Election — Ignorantia juris.]—A testator left his wife all his personal estate absolutely, and all his real estate for life or widowhood, subject to which he devised "my said real estate" in specific parcels to his sons, and died in 1889. After his death his widow, who knew the will, remained in possession of the house, to which she built an addition, and sold some of the timber, rented the land on shares for two seasons, supporting the children, and married again in 1891. In 1893 she and her husband took a lease of the property from the executors to expire in 1899, when the eldest son came of age. His parcel was conveyed to him by the executors, who then granted a new lease, still current, of the rest of the land to the second husband:—Held, that the widow was put by the will to her election. Held, also, that though there was no positive evidence that the widow knew she had a right to elect between the will and her dower, yet on the principle ignorantio juris neminem excusat she must be held to have elected in favour of the will.

Reynolds v. Palmer, 32 O.R. 431.

—Report of commissioners—Right of widow to have land set off to her—Payment of money—Convenience of owner of land subject to dower.]—Under Act 53 Vict. (N.B.), c. 4, s. 237, et seq., a widow will not be compelled to take money in lieu of land because such a course will be more satisfactory or profitable to the owner of the land subject to dower. Affidavits upon questions of fact inquired of or relevant to an inquiry by commissioners to admeasure dow-

er cannot be read on a motion to confirm their report.

In re Kearney, 2 N.B. Eq. 264.

—Lease made by deceased husband — Priorities—Assignment of dower—Rights of executor and devisee.]—A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but, as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her, in priority to persons claiming under leases created by her husband, without her assent, during the coverture. Stoughten v. Leigh, (1808, 1 Taunt. 402, followed. Where a testator, dying in August, 1901, devised land to his son, and probate of the will was granted to the executor named therein, and the son in April, 1902, executed a conveyance of a part of the land to the testator's widow for her life, as and for her dower, the executor not assenting thereto:—Held, that the conveyance was of no avail; for the only person who could assign dower was the executor, in whom, under s. 4 of the Devolution of Estates Act, R.S.O. 1897, c. 127, the whole inheritance of the testator vested.

Allan v. Rever, 4 O.L.R. 309.

—Interdiction—Marriage laws — Authorization by interdicted husband — Dower — Registry laws—Sheriff's sale — Warranty—Succession — Renunciation.]—The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed and must also contain a description sufficient to identify the lands sought to be affected. A sale by the sheriff under execution against a debtor in possession of an immovable under apparent title discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of Art. 2116 of the Civil Code. Per Taschereau, J.—Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can on any ground whatever, attack a title for which such vendor has given warranty. Semble, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity and that the authorization to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorization.

Rousseau v. Burland, 32 Can. S.C.R. 541, affirming the Court of King's Bench, appeal side, Province of Quebec.

—Election — Proceeds of sale of deceased husband's land—Money in Court—Death of widow—Payment out to widow's administrator.]—The widow and administrator of a deceased owner of land sold the land with bar of dower, and the proceeds were paid into Court to her credit and that of the official guardian on behalf of an infant by the former marriage, she reserving her right to elect between the value of her dower and her distributive share in her husband's estate, one of which it was clearly understood she was to have out of the moneys in Court. Subsequently she elected in writing to take the former in lieu of "any other interest she might have in her husband's undisposed of real estate," and died shortly afterwards:—Held, that her administrator was entitled to receive out of Court the value of her dower according to her expectancy at the time of sale.

Re Pettit Estate, 4 O.L.R. 506.

—Dower—Equitable estate—Voluntary conveyance by husband.]—It is only when the husband dies beneficially entitled thereto that the wife acquires any right to dower in an equitable estate, and the husband can therefore deal as he pleases with such an estate, a voluntary conveyance thereof, even though made with an object of preventing the wife acquiring any right to dower, being unimpeachable by her.

Fitzgerald v. Fitzgerald, 5 O.L.R. 279 (C. A.).

—Equity of redemption—Conveyance by husband alone—Discharge of mortgage—Effect of.]—On the 8th February, 1881, the owner of land subject to a mortgage, dated the 29th January, 1879, in which his wife had joined to bar dower, made a second mortgage in which his wife did not join. A portion of the money advanced upon the second mortgage was applied in payment of the first mortgage, and the first mortgagees executed a discharge, which was registered on the 5th March, 1881. On the 30th September, 1881, the owner executed a conveyance of the land to the plaintiff, the grantor's wife joining therein to bar dower. Neither the plaintiff nor his grantor paid the principal money due under the subsisting mortgage, and the mortgagees, in the exercise of the power of sale, on the 27th February, 1892, contracted to sell the land to the defendant, who had ever since been in possession as purchaser. The plaintiff's grantor died on the 19th February, 1901, leaving his wife surviving him, and the plaintiff, claiming as assignee of the wife's right to dower by virtue of the conveyance of the 30th September, 1881, brought this action for dower on the 11th September, 1902:—Held, that, as the law stood on the 29th January, 1879, the wife, having joined in the mortgage of that date and thereby barred her dower, could become entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled; and, as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity, which he effectively did by the second mortgage; and this was not affected by 42 Vict., c. 22 (O.), which became law on

the 11th March, 1879. (2) The second mortgage having been executed and delivered for some weeks before the execution of the discharge of the first, the effect of the registration thereof was not to revest the premises in the mortgagor, but in the second mortgagees.

Anderson v. Elgie, 6 O.L.R. 147 (C.A.).

—Equity of redemption — Conversion — Dower.]—The testator in his lifetime purchased property subject to a $10,000 mortgage, which he assumed, but subsequently procured a new loan on the mortgage, in which his wife joined to bar dower, and paid the former mortgage off, the discharge being registered subsequent to the registration of the new mortgage. He afterwards made a further mortgage for $16,500.58, in which his wife also joined to bar dower. Subsequently he entered into an agreement for the sale of the property, receiving $500 on account. The agreement was carried out by his executrix, the purchase money being applied in paying off the two mortgages, taxes, etc., leaving a balance:—Held, that the wife was only entitled to dower out of the balance of the purchase money after satisfying the charges, and that the doctrine of conversion did not apply so as to defeat her claim to dower therein.

Re Williams, 7 O.L.R. 156.

—Infant wife—Purchaser for value—Consideration.]—A purchaser for value is one who obtains a property for a valuable, as distinguished from a merely good, consideration; and where there is no question of bona fides involved, the question of the adequacy of the consideration cannot be inquired into. Where a son, who had left his father's farm, returned upon his father's request and promise of remuneration, and helped the father to work the farm, and remained with him, working in that way upon a further request and promise of a conveyance, and the father afterwards married a girl under 15, and then conveyed a part of the farm to the son; the wife, who was still under 15, joining to bar her dower:—Held, that the consideration, having become executed by the son having done his part, was a substantial and valuable consideration sufficient to make the son a purchaser for value, and within the meaning of section 5 of the Married Woman's Real Estate Act, R.S.O. 1897, c. 165; and, therefore, the wife having been found to have known what she was doing when she executed the release of dower, was not entitled to dower out of the land conveyed to the son. Judgment of Meredith, C.J.C.P., 6 O.L.R. 259, affirmed.

Crossett v. Haycock, 7 O.L.R. 655 (D.C.).

—Prior equitable charge — Legacies—Mortgage.]—A testator devised a farm to his son, subject to the payment by him of certain legacies. The son mortgaged the farm, his wife joining to bar her dower, and paid the legacies out of the proceeds. The son died seised of the farm, and the mortgage was then in force:—Held, that the son took under the will the legal seisin in the farm and not a mere equitable estate, and that his widow was entitled to dower out of the full value of the land.

Re Zimmerman, 7 O.L.R. 489 (Anglin, J.).

—Land contracted to be sold by testator—State of nature—Right to dower—Payment to widow for release.]—The testator was the owner in fee at the time of his death of a timbered lot containing 100 acres, from 15 or 20 acres of which he had taken the timber; a part of the cleared land had been prepared for cultivation, and seeds planted, but, owing to the nature of the soil, with little or no result. The testator had contracted to sell the whole lot for $2,000, and after his death the purchaser called on the executors to receive the balance of the purchase money and to make title. The widow claimed her dower, and her claim was compromised by the executors at $390, which they paid her, and she released her dower; they then conveyed to the purchaser under s. 24 of the Trustee Act, R.S.O. 1897, c. 129:—Held, that, as the lot was not in a state of nature at the time of the death the widow's dower attached upon the whole of it; she was entitled to have one-third of such part as was not woodland assigned to her, and one-third of such part as was woodland, with the right to take from the woodland firewood for her own use and timber for fencing the other part, and the executors had the right, under section 33 of R.S.O. c. 129, to apply the money of the estate in the purchase of a release of the widow's dower.

Re McIntyre, McIntyre v. London and Western Trusts Co., 7 O.L.R. 548 (Street, J.).

—Locatee of Crown lands—Trust resting on bond—Unregistered assignment—Evidence—Corroboration.]—A locatee of Crown lands executed a bond in favour of his son, in consideration as to one of the lots, of the son's services for many years, which was duly registered, providing that the land should, at his death, be conveyed to the latter, on condition that he paid the Crown dues, which he did. The father married again before obtaining the patent:—Held, that his widow was not entitled to dower, insomuch as he had no more than the right of enjoyment for his life with the fee held as trustee for his son. A locatee of land transferred all his interest therein to his son by assignment, which was deposited, but not registered, in the Crown Lands Office:—Held, that notwithstanding R.S.O. 1897, c. 26, s. 19, the omission to register did not invalidate the transfer as against the assignor; and it operated to prevent the locatee from dying beneficially

entitled, and so defeated any claim of his widow under the Dower Act. Held, also, that the evidence of the son, on which the facts mainly rested, did not need corroboration under R.S.O. 1897, c. 73, s. 10, as he was not litigating adversely, to the representative of his father's estate.

Brown v. Brown, 8 O.S.R. 322, Boyd, C.

—Claim against assignee of mortgage—Remedy by redemption.]—Plaintiff joined with her husband in executing a mortgage of land, and released her dower in due form. Defendant took an assignment of the mortgage, and, subsequently, received from plaintiff's husband a release of his equity of redemption, in which plaintiff did not join:—Held, dismissing the action, that plaintiff could not assert a claim for dower against defendant as long as the mortgage remained on foot, her only remedy being to redeem.

Thompson v. Thompson, 37 N.S.R. 242.

—Marriage contract — Anticipation — Art. 1437 C.C.] — The clause in a marriage contract executed before the Civil Code came into force by which the husband gives to his wife the sum of $4,000 in anticipation of dower and barring future claim thereto interpreted according to the former law does not give the wife the property in this dower to the exclusion of her children, but only the usufruct, and the children on their mother's death could claim the ownership of such dower.

Birks v. Kirkpatrick, Q.R. 27 S.C. 51 (Ct. Rev.).

—Dower—Assignment of — Possession by widow—Adverse to heir—Right of entry—Statute of Limitations.]—An assignment of dower by verbal agreement is valid, and under such assignment the widow may take any part or even the whole of the descendant lands. Where the heir-at-law permits the widow of the owner of the fee to occupy the whole of the estate during her life under a verbal agreement with the heir understood to be in lieu of dower, but with no definite agreement or understanding to that effect, the widow's possession is not adverse to the heir-in-law, and the Statute of Limitations will not run against the right of entry.

Lloyd v. Gillis, 37 N.B.R. 190.

—Order dispensing with release of—Husband and wife living apart — Release of alimony.]—A husband whose wife has been living apart from him for two years, and who for valuable consideration has released and discharged him from all claims for alimony present and future, is not entitled, under s. 12 of R.S.O. 1897, c. 164, to an order dispensing with the concurrence of his wife to bar dower in a conveyance, for although barred by contract from claiming, she cannot be said to be living apart "under such circumstances as by law disentitle her to alimony."

Re Tolhurst, 12 O.L.R. 45 (Anglin, J.).

—Election — Specific devise of portion of lot.]—A testator by his will devised to his widow for life 17 acres on the west side of a lot together with the use of a drive house on his lands for the storage of crops, taken from the 17 acres, and of two rooms, certain furniture and bedding, and all the fruit she wanted for her own use from that now grown thereon; and, subject to such life estate and a payment of one hundred dollars to his daughter, he devised the same to one of his sons. To another son he devised the remainder of the lot containing thirty-three acres, together with all buildings and erections thereon, reserving such privileges as were theretofore given to his widow during her lifetime and subject to a bequest of $150 to the said daughter, and the payments of the funeral and testamentary expenses:—Held, that the widow was not entitled to dower in the dwelling house, but was so entitled as to the thirty-three acres, not being put to her election by reason of the disposition made in her favour.

Re Hurst, 11 O.L.R. 6 (D.C.).

—Statute of Westminster, 13 Edw. I.—Repeal by Provincial Legislature — Dower — Claim resisted on ground of adultery.]—A claim made by plaintiff to dower out of the estate of her deceased husband was resisted on the ground of adultery, the circumstances being that her husband, who was a seafaring man, being away from home for a number of years, and being reported to have been drowned, plaintiff, believing this to be true, went through the form of marriage with another man and lived with him. The provisions of the Statute of Westminster, 13 Edw. I., were substantially embodied in the Married Woman's Property Act of 1884, which provided that a woman guilty of adultery . . should not be entitled to dower, etc., but in the revision by c. 22 of the Acts of 1898 this section was omitted and by s. 23 the Married Woman's Property Act of 1884 was repealed:—Held, that the effect of this course of legislation was to repeal the Statute of Westminster, if it ever was in force in this province, irrespective of whether it would be applicable to such a case as the present, as to which no opinion was expressed.

Nolan v. McAdam, 39 N.S.R. 380.

—Dower—Adultery of wife — Dispensing with bar of dower.]—An order was made under section 12 of R.S.O. 1897, c. 164, dispensing with the concurrence of the wife for the purpose of barring her dower in a conveyance, where she had not been heard of for several years, having left her husband again and again for the purpose of living and having lived the life of a prosti-

tute. In such a case, in order to deprive a wife of an award of dower, it is unnecessary to show a continuous living with one man in adultery.

Re S., 14 O.L.R. 536 (Riddell, J.).

—Release of dower—Consideration for—Separate property of wife—Husband's creditors—Intent to delay or defraud.]—Money paid to a wife by her husband to secure her execution of a mortgage of lands of which she is dowable under an agreement that she was to receive half of the money advanced is not money received by the wife from her husband during coverture within the meaning of the qualifying part of subsection 2 of section 4 of chapter 78 of the Consol. Stat. 1903, and if an honest and bona fide transaction, entered into in good faith, can not be impeached as a fraud against the husband's creditors.

Cormier v. Arsineau, 38 N.B.R. 44.

—Dower—Adultery.]—A wife voluntarily separated from her husband after having lived with him for three years. Nine years later she married again, knowing that her first husband had married, and believing that he had obtained a divorce from her and that she was at liberty to marry. Subsequently she learned that her second marriage was illegal, and she immediately left her second husband:—Held, that under the statute 13 Edw. I. c. 34, the dower right of the wife in the estate of her first husband was not barred by her subsequent cohabitation with another, as she acted bona fide, believing, on reasonable grounds, that she was legally entitled to marry again.

Phillips v. Phillips, 4 N.B. Eq. 115.

DRAINAGE.

Appeal—Audit of engineer's charges.]—Where a County Court Judge, acting under 3 Edw. VII. c. 22, s. 4 (O.), audits the charges of an engineer or surveyor employed or appointed under the Municipal Drainage Act, there is no appeal, by virtue of 9 Edw. VII. c. 46 (O.) or otherwise, from his allowance or disallowance of charges upon such audit.

Re Moore and Township of March, 20 O.L.R. 67.

—Assessment for outlet—Drainage area—Benefit.]—The proceedings were begun by a petition to the council of the township of M. praying that, in order to drain a described area in that township, the C. river, which flows through a number of townships, might be deepened and improved. The petition was referred to a civil engineer, who prepared a report, plan, specifications, and an assessment of lands in several townships, which, in his opinion, would be benefited by the proposed work. The corporation of H. township appealed unsuccessfully to the Drainage Referee, and then to the Court of Appeal, contending that the lands in H., being comparatively high, had already a sufficient outlet and would not use the proposed new outlet:—Held, that the mere size of the area is of little consequence in considering whether or not the assessment is lawful. Drainage water must not go merely to an outlet by means of which it satisfactorily escapes from the lands which are being drained, but to a "sufficient outlet," which, as defined in s. 2, sub-sec. 10, of the Municipal Drainage Act, means the "safe discharge of water at a point where it will do no injury to lands and roads." It is not sufficient, in order to escape from liability, simply to shew that the first discharge was into a "swale, ravine, creek, or watercourse": s. 3, sub-sec. 4. There must appear to be a reasonable connection between the source of the injurious water and the outlet, and, that being established, the legal right to assess under the statute, however large the area, follows. And, upon the facts of this case, the assessment was right and should not be disturbed.

Re Township of Huntley and Township of March, 1 O.W.N. 190 (C.A.).

—Claim of engineer—Services preliminary to drainage construction work.]—A Drainage Referee has no jurisdiction, under s. 93 of the Municipal Drainage Act, as amended by 1 Edw. VII. c. 30, s. 4, or otherwise, to entertain a claim by an engineer against a municipality for payment for services not actually rendered in the construction, improvement, or maintenance of a drainage work; and prohibition was granted to prevent a referee from proceeding to try a claim of an engineer in respect of examining the area proposed to be drained, preparing plans, specifications, etc. Costs of the motion for prohibition were given against the engineer.

Re Moore v. Township of March, 1 O.W.N. 206.

—Municipal Drainage Act, 1910, s. 48—Appeal to County Court Judge—Time for delivering judgment.]—The provision of s. 48 of the Municipal Drainage Act, 10 Edw. VII. c. 90, that a County Court Judge, upon hearing an appeal from a decision of a Court of Revision, "shall deliver judgment not later than 30 days after the hearing," is imperative. Prohibition to a County Court Judge against the enforcement of a judgment delivered after the lapse of 30 days from the hearing. In re Township of Nottawasaga and County of Simcoe (1902), 4 O.L.R. 1, and In re Trecothic Marsh (1905), 37 S.C.R. 79, applied and followed. In re Ronald and Village of Brussels (1882), 9 P.R. 232, and Re McFarlane v. Miller (1895),

26 O.R. 516, discussed. Judgment of Meredith, C.J.C.P., reversed:—Held, by Riddell, J., in granting leave to appeal to a Divisional Court, under Con. Rule 777 (3) (a), upon the ground that there were conflicting decisions, that for the purposes of the Rule decisions of the Judges of the Court of Appeal should be considered decisions of "Judges of the High Court."

Re Rowland and McCallum, 22 O.L.R. 418 (D.C.).

—Drains — Overflow — Flooding premises abutting on street.]—The plaintiff complained of damage to goods in his shop on the 27th November, 1909, by the overflow of water from drains constructed by the defendants. On the day of the overflow there was an unprecedented rain-fall; 4.35 inches of rain having fallen in 24 hours. The floor of the plaintiff's shop was 2 feet below the street level:—Held, on the evidence, that the water which damaged the plaintiff's goods came from the overflow of the 10th street drain; and that drain had been proved, by actual experience of 20 years, to be sufficient to carry off properly all the rain-fall for that period, even on a previous occasion when there was a rain-fall of 4.10 inches in 24 hours. The plaintiff said that the condition of affairs had been altered by the macadamizing of the streets and the filling in of the portion of a swamp upon which the plaintiff's shop was situate with sand or silt from the river. Held, that the plaintiff, having consented to this, could not complain. Held, also, that the rainfall of the 27th November was so great that it could not reasonably have been anticipated—it amounted to vis major.

Sum Kum Wo v. City of New Westminster, 15 W.L.R. 512 (B.C.).

—Non-repair of drain—Other causes of flooding.]—

Teitelbaum v. Municipality of Morris, 5 W.L.R. 449 (Man.).

—Overflow of lands—Negligence—Natural watercourses—Construction of ditches.]—

Baskerville v. Rural Municipality of Franklin, 3 W.L.R. 547 (Man.).

—North-West Irrigation Act—Construction of ditch by land owner—Filling up by municipality.]—

Robertson v. Town of High River, 6 W.L.R. 281, 767 (N.W.T.).

Appeal to County Judge—Municipal Drainage Act.]—The Municipal Drainage Act, 10 Edw. VII. c. 90, s. 48, enacts: "At the Court so holden, the Judge shall hear the appeals and may adjourn the hearing from time to time, but shall deliver judgment not later than 30 days after the hearing. Meredith, C.J.C.P., held, that above section was directory only. Re Nottawasaga & Simcoe (1902), 4 O.L.R. 1, distinguished. Riddell, J., granted leave to appeal to Divisional Court on ground of conflicting decisions.

Rowland v. McCallum and Township of McKillop, 17 O.W.R. 557, 2 O.W.N. 305.

—Injury to crop—Faulty construction of ditches—Blocking of culverts.]—The plaintiff, the owner of the north-east quarter of section 16, sued for damages for injury caused to his land and crop by water carried to and gathered on his premises, owing, as he alleged, to the faulty construction of two ditches and the blocking of two culverts by the defendants:—Held, upon the evidence, as to the south ditch, that the marsh had no real outlet at its south-east end south of the ditch—so that the water which flowed on to H.'s and then to the plaintiff's quarter from the south, came from the overflow of this south ditch; and that, although the main runways into which the marsh flowed at its north-west outlet stretched out northerly, there were minor ones running in a north-easterly direction which must have carried considerable water, in the autumn of 1907, to the north-western portion of the plaintiff's land. Held, as to the north ditch, dug by the defendants along the road allowance immediately north of the plaintiff's land, that it was not shown that any water came from it on to the plaintiff's land. Held, as to the east culvert, that it was not necessary for the plaintiff to make that part of his case; and as to the west culvert, that the plaintiff had not established any duty on the part of the defendants to keep it open. The defendants were liable for the water that came from the south ditch and gathered in the direction of the north-east portion of the plaintiff's land, but not for that which gathered on the west side. The rainfall was a severe one, but not so much so as to bring it within the term "act of God." Special damages assessed at $200 and general damages at $25; costs of a County Court action.

Rose v. Rural Municipality of Ochre River, 15 W.L.R. 200 (Man.).

—Engineer in charge—Good faith—Materials.]—When the engineer employed to superintend the construction of a drainage system is constituted judge of the work done and materials furnished, he is not liable in damages if, rightly or wrongly but in good faith, he condemns any of the work or materials. If the character of the materials to be used in an undertaking is specified with precision in the contract the contractor has no right to use others even though they may be of equally good quality.

Audet v. Ouimet, Q.R. 37 S.C. 385.

Township drain—Division of township.]—A township, in which extensive drainage

works had been constructed, was divided into two townships by a statute which provided that the assets and debts of the original municipality should be divided between the new municipalities, each remaining liable as surety for the portion of the debts it was not primarily liable to pay, and the provisions of the Municipal Act as to the separation of a junior from a senior township to be applied as far as possible:—Held, that an action for damages incurred before the division caused by the drainage works, part of the area of which was in each township, and asking to have the drains kept in repair, must be brought against both townships and not against that one only in which the plaintiff's land was situate.

Wigle v. Township of Gosfield South, 1 O.L.R. 519 (C.A.).

—Ont. Ditches and Watercourses Act—Railway.]—An award under the Ditches and Watercourses Act directed that a drain should be built by the initiating owner a certain distance along a highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, then by another land owner, and then by the railway company along the highway, or across the highway through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company, whose railway had been declared to be a work for the general advantage of Canada, refuse to recognize the award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an embankment to keep it back, the result being that it overflowed from the highway ditches and caused damage to the plaintiff:—Held, that there was no jurisdiction under the Ditches and Watercourses Act as far as the railway company were concerned; that the award was therefore no protection to the defendants; that the damage resulted from the construction of the culvert; and that the defendants were liable therefor.

McCrimmon v. Township of Yarmouth, 27 Ont. App. 636.

—Mandamus — Notice — View—Damages.]—A letter written by the complainant's solicitor to the council of the municipality, stating that the land in question has been flooded by water from a drain constructed by the municipality, but not saying anything as to the drain's condition, and asking them to construct and maintain such drainage work as is required to relieve the land, is not a sufficient notice under section 73 of the Drainage Act to justify the issue of a mandamus. It is the claimant's duty to show that proper notice has been given if a mandamus is asked for, and objection to the sufficiency of the notice may be taken by the defendants at any stage of the action without pleading want of notice. The drainage referee in trying an action may proceed partly on view, but in so doing must follow strictly the directions of the Act, and not make the view without appointment or notice to the parties. If he do so proceed, however, his finding, though based partly on the view, may be upheld if the evidence supports it. A complainant is entitled to recover for any injury to the use and enjoyment of his land or for its depreciation in value, if caused by failure to keep a drain in repair, but not for depreciation in value based upon the alleged insufficiency in size of the drain as originally made, and the Court holding, on the construction of the referee's judgment, that this element had been allowed to enter into the computation of the damages, reduced them from $250 to $50.

McKim v. Township of East Luther, 1 O.L.R. 89 (C.A.).

—Drainage—Status of petitioners—Finality of assessment roll — Farmers sons.] — In proceedings under the Drainage Act the assessment roll is conclusive as to the status of the persons mentioned in it, and evidence is not admissible to show that a person entered on the roll as owner is in fact a farmer's son and has been entered on the roll as owner by the assessor's error.

Township of Warwick v. Township of Brooke, 1 O.L.R. 433 (C.A.).

—Local masters—Jurisdiction—Referring actions to drainage referee.]—A local master of the High Court has jurisdiction, by virtue of Rules 42 and 49—see also Rule 6 (a)—to make an order, under s. 94 of the Municipal Drainage Act, R.S.O. 1897, c. 226, referring an action brought in his county to the referee under the Drainage Laws.

McKim v. Township of East Luther, 19 O. Pr. 248 (C.A.).

—Alteration of report and plans.]—Before the report, plans and assessment of the engineer for a drainage scheme have been adopted by the council, it can refer them back to him for further consideration or for amendment, but after they have been adopted it cannot of its own motion change or amend them, and if the drainage scheme is carried out with a material change the municipality are not protected, and are liable to make good any damages resulting from the work.

Priest v. Township of Flos, 1 O.L.R. 78 (C.A.).

—Improvement of natural watercourses—Artificial watercourses — Embankments — Dykes—Drainage Act, 1894 (Ont.)—"Benefit" assessment—"Injuring liability"—"Outlet liability"—Assessment of wild lands—Construction of statute.]—The Ontario Act 57 Vict., c. 56, has not abrogated the funda-

mental principle underlying the provisions of the previous Acts of the legislature respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of the owners which rests on the maxim qui sentit commodum sentire debet et onus. Lands from which no water is caused to flow by artificial means into a drain having its outlet in another municipality than that in which it was initiated cannot be assessed for "outlet liability" under said Act. Where a drainage work, initiated in a higher municipality, obtains an outlet in a lower municipality, the assessment for "outlet liability" therein is limited to the cost of the work at such outlet. Every assessment, whether for "injuring liability" or for "outlet liability" must be made upon consideration of the special circumstances of each particular case and restricted to the mode prescribed by the Act. In every case there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands to their injury which water is to be carried off by the proposed drainage work. Assessment for "benefit" under the Act must have reference to the additional facilities afforded by the proposed drainage work for the drainage of all lands within the area of the proposed work, and may vary according to difference of elevation of the respective lots, the quantity of water to be drained from each, their distances from the work and other like circumstances. Section 75 of that Act only authorizes an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse for the purpose of draining lands is not assessable upon particular lands under said s. 75, but must constitute a charge upon the general funds of the municipality. In the present case, the scheme proposed was mainly for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality, and such works are not drainage works within the meaning of said s. 75 for which assessments can be levied thereunder, nor are they works by which the lands in the higher township can be said to have been benefited.

Sutherland-Innes Company v. Township of Romney, 30 Can. S.C.R. 495, reversing in part 26 Ont. App. 495.

—Drain—Damages awarded against municipality for trespass—Finding of jury—Continuing trespass.]—In an action brought by plaintiff against defendant for entering upon his land and cutting a drain or trench through the same, etc., the jury found, in answer to a question submitted, that the town constructed the drain in 1886 "by virtue of the Streets Commissioner's power of office." It appeared that plaintiff knew of the drain at the time, but made no objection until the latter part of 1896, when the land caved in and repair work was undertaken, and plaintiff demanded compensation:—Held, that the clear meaning of the words "by virtue of the Streets Commissioner's power of office" was that the town constructed the drain in question by their agent, the streets commissioner, one of whose duties it was to construct drains. Held, that the trespass, being a continuing one, was not barred by the Towns Incorporation Act of 1895, Acts of 1895, c. 4, s. 295, which provides that "no action ex delicto shall be brought against any town incorporated under the Act . . . unless within twelve months next after the cause of action shall have accrued" except as to damage suffered more than one year before action brought.

Archibald v. Town of Truro, 33 N.S.R. 401, affirmed, 31 Can. S.C.R. 380 sub nom Truro v. Archibald.

—Appeal from drainage referee—Scale of costs.]—The costs of an appeal to the Court of Appeal from the decision of the drainage referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice. Decision of a Divisional Court, 19 P.R. 188, reversed.

Re Township of Metcalfe and Townships of Adelaide and Warwick; Re Township of Colchester North and Township of Gosfield North, 2 O.L.R. 103 (C.A.).

—Artificial drain — Repairs — Outlet.] — Section 75 of the Drainage Act, R.S.O. 1897, c. 226, applies only to drains artificially constructed and does not apply to the repair or improvement of a natural watercourse. Sutherland-Innes Company v. Romney (1900), 30 S.C.R. 495, considered and followed. Observations upon the private Act, 1 Edw. VII., c. 72 (O.), validating the by-laws in question in that case. Where part of a drainage work to which the provisions of s. 75 apply is out of repair, it is not necessary before initiating proceedings for the improvement of the drain under that section for the initiating township to repair the portion of the existing drain which it is bound to repair, Maclennan, J.A., dissenting. Both classes of work may be provided for in the same by-law, the engineer in that case estimating and assessing separately the cost of each class. Judgment of the drainage referee varied.

Re Township of Rochester and Township of Mersea (No. 2), 2 O.L.R. 435 (C.A.).

—Drain traversing two counties — Special superintendent—Proces-verbal—Costs on rejection — Chose jugee.]—Defendants presented a petition to the council of the corporation of the County of Hochelaga asking that a procès-verbal be drawn up for the opening and maintenance of a drain which—though the fact was not disclosed by the

petition—would traverse the counties of Hochelaga and Jacques Cartier. The council granted the request and appointed a special supervisor, who, after visiting the locality and hearing the parties, prepared a procès-verbal ordering the work asked for. This procès-verbal was submitted for homologation to the Bureau des délégués of the counties of Hochelaga and Jacques Cartier which, after considering it, quashed it with costs against the petitioners (defendants). These costs were taxed during a sitting of the board at the sum of $1,200, and were paid by the plaintiff corporation which brought action against the defendants for the amount. Defendants pleaded want of notice and that the County of Hochelaga had no right to appoint the special supervisor:—Held, that as the costs were taxed while the board was in session notice was not required; and that the council had, in this case, power to appoint the supervisor, but even if it had not the corporation would not be responsible for the consequences of a wrong proceeding solicited and accepted by the interested defendants. Held, further, that the decision of the Bureau des délégués rejecting the procés-verbal with costs against the petitioners, had, as to them, the force of chose jugée and could not be incidentally reformed in an action for recovery of the costs taxed on said judgment.

Corporation of the County of Hochelaga v Laplaine, 20 Que. S.C. 165 (Ct. Rev.).

—Qualification of petitioners—"Last revised assessment roll."]—The "last revised assessment roll" which governs the status of petitioners in proceedings under the Drainage Act is the roll in force at the time the petition is adopted by the council and referred to the engineer for enquiry and report, and not the roll in force at the time the by-law is finally passed. Challoner v. Township of Lobo, 1 O.L.R. 156 (C.A.), affirmed.

Challoner v. Lobo, 32 Can. S.C.R. 505.

—Removal of obstruction—Municipal Act, 1883, s. 570 (Ont.)—Mun. Amendment Act, 1886, s. 22—Report of engineer.]—In 1884 a petition was presented to the Council of Elizabethtown asking for the removal of a dam and other obstructions to Mud Creek into which the drainage of the township and of Augusta adjoining emptied. The council had the Creek examined by an engineer who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each township. The council then passed a by-law authorizing the work to be done which was afterwards set aside on the ground that removal of an artificial obstruction was not contemplated by the law then in force, s. 570 of the Municipal Act, 1883. In 1886, the Act was amended and a fresh petition was presented to the Council of Elizabethtown which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval) but presented to the council his former report, plans, specifications and assessment, and another by-law was passed under which the work was done. In an action to recover from Augusta its proportion of the assessment:—Held, affirming in this respect the judgment of the Court of Appeal (2 Ont. L.R. 4), Strong, C.J., dissenting, that the amendment in 1886 to s. 570 of the Municipal Act, 1883, authorized the Council of Elizabethtown to cause the work to be done and claim from Augusta its proportion of the cost. Held, further, reversing said judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment.

Township of Elizabethtown v. Township of Augusta, 32 Can. S.C.R. 295, reversing 2 O.L.R. 4.

—Inter-municipal works—Guarantee continuing liability.]—

See PRINCIPAL AND SURETY.

City of Montreal v. City of Ste. Cunegonde, 32 Can. S.C.R. 135.)

—Municipal corporations—Contract to construct sewers—Interference by reason of other sewers.]—The plaintiff contracted with the defendants to construct certain sewers. In the course of his work the contents of other sewers of the defendants, the existence of which had not been disclosed to him, but which had to be displaced to enable him to complete his work, flowed into the trenches dug by him, and impeded him, and caused him additional expense:—Held, that the plaintiff was entitled to recover from the defendants the loss thus sustained for the defendants had broken the duty they owed to him, to do nothing to prevent or interfere with his doing the work he had contracted to do.

Bourque v. City of Ottawa, 6 O.L.R. 287.

—Flooding of land—Prevention of damages.]—Where there is, in the power of the person complaining, an obvious and inexpensive method of reducing, diminishing, or wholly doing away with the damages complained of, e.g., by a short transverse drain to prevent flooding of the land, it is his duty to adopt it, and, in default of his doing so, he is only entitled to recover such loss as he would have suffered if he had taken proper measures to prevent or diminish the damages.

Filiatrault v. Village of Coteau Landing, 23 Que. S.C. 62 (Archibald, J.).

—Drainage referee—Official referee—Reference.]—The Drainage Referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee. Decision of a Divisional Court, 4 O.L.R. 97, reversed.

McClure v. Township of Brooke; Bryce v. Township of Brooke, 5 O.L.R. 59 (C.A.).

—Drainage of highway — County road — Special superintendent.]—Held, reversing the judgment of Robidoux, J. (Lacoste, C.J., and Blanchet, J., dissenting:—1. That Art. 772 of the Municipal Code applies only to the case where it is necessary to construct a watercourse over lands which adjoin a duly established highway, and where such watercourse is necessary, not only to carry off the water from the highway, but also for the drainage of the neighbouring lands. 2. In the present case, there being no question as to a watercourse serving for the drainage of several farms in the neighbourhood of the highway, but merely one as to the prolongation or continuation of the road ditches in natural hollows to facilitate the carrying off of the waters from the highway end, consequently, the special superintendent has the right, in the procès-verbal, to provide for the construction and maintenance of such discharge drains in virtue of Arts. 799 and 803 of the Municipal Code.

[An appeal to the Supreme Court of Canada was quashed for want of jurisdiction, 32 Can. S.C.R. 353.]

County of Nicolet v. Toussignant, 12 Que. K.B. 105.

—Liability of lessee to adjoining proprietor in respect of works on his land.]—Where a lessee of defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatory of the defendants, the lower part of the leased land with the effect of diverting to the plaintiff's adjoining land, and thereby causing him damage, the water which would otherwise have been discharged over the defendants' land:—Held, that the plaintiff's remedy was against the lessee, and that an action negatoire against the defendants who claimed no servitude over the plaintiff's land, was unnecessary.

Kieffer v. Le Seminaire de Quebec, [1903] A.C. 85.

—Negligence of municipality—Costs—Municipal Act, R.S.O. 1897, c. 223, s. 470—Trespass.]—Section 470 of the Municipal Act, R.S.O. 1897, c. 223, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality." In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work:—Held, that section 470 did not apply, as the plaintiff's claim was for trespass and not for negligence, and that the trial Judge had full power over costs.

Lawrence v. Town of Owen Sound, 5 O.L.R. 369 (D.C.).

—Ditches and Watercourses Act — Engineer's award—Time for making.]—Held, on appeal from the award of the engineer of the township of the front of Yonge and Escott, made under the Ditches and Watercourses Act, R.S.O. c. 285, that the 30 days prescribed by s. 16 (2) of that Act, within which the engineer is to make his award, is merely directory and not imperative; and where the engineer attended on May 25rd under the Act, but did not make his award till August 1st, the award would not be set aside on the ground of being made too late.

Bigford v. Baile, 40 C.L.J. 875.

—Costs of repairs—Varying apportionment.]—Upon certain repairs to a drainage work becoming necessary, one of the townships interested directed their engineer to make a report, and he assessed the cost against the different townships in the proportions in which the original cost had been assessed, no proceedings having been taken under sections 69 or 72 of the Drainage Act to vary the assessment:—Held, that this was the proper mode of apportionment, and that, notwithstanding the wide wording of section 71 of the Act the Drainage Referee had no power to vary an apportionment made under such circumstances.

Township of Chatham v. Township of Dover, 8 O.L.R. 132 (C.A.).

—Municipal corporation—Extending drain into adjoining municipality—Terms and conditions—Award of arbitrators.]—Arbitrators made an award, purporting to be under section 555 of the Consolidated Municipal Act, 1903, 3 Edw. VII., c. 19 (O.), permitting an extension of a sewer from one municipality into another, but no by-law had ever been passed by the former defining the lands to be taken or affected, or the route of the sewer, and there were, moreover, no terms or conditions imposed upon the former by the award:—Held, affirming the decision of Teetzel, J., that the award was bad, and should be set aside.

Township of Waterloo v. Town of Berlin, 8 O.L.R. 335 (C.A.).

—Township drain—Division of township—Damages for construction—Joint claim—Amendment of statute—Limitation clause—Recurrence of damages.]—Pursuant to the judgment of the Court of Appeal of the 2nd March, 1901 (1 O.L.R. 519), the Drainage Referee on the 25th July, 1901, added the corporation of the township of Gosfield North as defendant, and they filed a statement of defence on the 10th September, 1901. The Referee then heard the evidence and assessed damages against both townships in respect of the construction of the drain in question, which was completed before the division of the township of Gosfield. On the 15th April, 1901, 1 Edw. VII. c. 30 (O.), was passed, which

repealed section 93 of the Drainage Act, and made new provisions, one of which was that the notice claiming damages was to be filed within two years from the time the cause of complaint arose:—Held, that the plaintiffs' claim for damages was against the two defendants jointly, and that it must be taken to have been first made on the 10th September, 1901, and was confined to damages suffered by the original construction of the drain which had arisen within two years next before that date; and that the plaintiffs would be at liberty to take proceedings under section 93 as often as any damages should arise in the future, until a remedy should be provided to prevent their recurrence.

Wigle v. Townships of Gosfield South and Gosfield North, 7 O.L.R. 302 (C.A.).

—**Notice—Appeal to County Council.**]—A public notice by a special superintendent of his appointment and visit to the place where it was proposed to make drains, is sufficient if addressed to the persons directly or indirectly interested in the work to be done, and owners of a concession through which the drains will necessarily pass are properly summoned by such notice. Arts. 881 and 882 of the Municipal Code, passed in the interests of agriculture, override Art. 501 C.C., and oblige the owners of high lying land to submit to drains being made thereon for the benefit of low and marshy lands. Owners who claim to be already subjected to the drainage established under procès-verbal in order to escape contributing to the cost of new works, must prove the homologation of the procès-verbal, and can, moreover, be subjected to participation in the cost of the new works for the portion of their land to be drained thereby. An appeal to the County Council does not deprive the appellant of his right to demand that the Superior Court shall quash a procès-verbal for illegality.

Parish of Ste. Julie v. Massne, Q.R. 13 K.B. 228.

—**Extension of sewers into adjoining municipality—Acquisition of necessary land—Terms and conditions — Uncertainty.**]—Where a municipality is desirous of extending its sewers into an adjoining municipality, the acquisition of lands therein is not a condition precedent to an arbitration under s. 555 of the Consolidated Municipal Act, 3 Edw. VII. c. 19; but the arbitration or an agreement between the municipalities as to terms and conditions is a condition precedent to the dominant municipality exercising the power of expropriation of private property in the servient municipality. An award in which no specific lands are mentioned which may be taken by the dominant municipality with which the necessary connection with its sewage system may be made is void for uncertainty. And an award is bad which does not determine, pursuant to the Act, the terms and conditions upon which a proposed extension is to be made as between the municipalities.

Re Waterloo and Berlin, 7 O.L.R. 64.

—**Culvert — Drain — Revocable license therefor — Damages — Easement.**]—The owner of a farm consented to the water, which came through a culvert, being carried off by means of a drain, which he himself dug, through the corner of the farm, into a ravine. No written agreement was entered into therefor, nor was there any expenditure of public money thereon, nor any consideration given for its use:—Held, that a revocable license merely was constituted, which the plaintiff, claiming through such owner, was entitled to revoke; and even if a valid agreement with such owner were established, it would not be binding on the plaintiff, for no notice or knowledge thereof was proved, knowledge merely of the existence of the culvert and drain not being sufficient. Held, also, that the plaintiff was entitled to an injunction, the damages allowed him—$100—being under the circumstances substantial, while the cause was a recurring one, which, if allowed to continue, might ripen into an easement by prescription.

Taylor v. Township of Collingwood, 10 O.L.R. 182, C.A.

—**Pumping machinery—Negligent operation of—Lands injuriously affected.**]—Persons whose lands are injuriously affected by the non-operation, or imperfect or negligent operation of pumping machinery constructed under the Drainage Act, R.S.O. 1897, c. 226, are entitled to damages under the provisions of s. 73 of that Act, and s. 4 of 1 Edw. VII., c. 30 (O.). Where, therefore, the plaintiff's lands and crops were injured by the overflow of water caused by the neglect of the corporation to efficiently operate the pumping plant erected in connection with certain drainage works constructed by the township, the plaintiff was held entitled to recover damages for the injury he had sustained, one-half of which was imposed on the general funds of the township, and the other half on the area benefitted.

Bradley v. Township of Raleigh, 10 O.L.R. 201, C.A.

—**Through another municipality.**]—A municipal corporation, unless specially authorized by statute, has no right to construct sewers or other works across or under the public streets of another municipality, without having obtained the consent of such municipality, or a right of way; and it may be restrained by injunction from proceeding with such works, where the same will cause great or irreparable damage to the plaintiff.

Village of Ahuntsic v. City of Montreal, 26 Que. S.C. 291, Dunlop, J.

—Sewer—Insufficiency — Damage resulting therefrom—Compulsory use of—Actionable negligence.]—In the exercise of their statutory duties the corporation of the city of Moncton provided a system of sewers for the city. In the year 1894 the plaintiff built a house on the east side of lower R. street, and, in pursuance of a by-law of the city requiring drains to be made from all houses and buildings on the streets to the sewers, entered a sewer already laid down in the street. The sewer extended along lower R. street to a point a short distance south of the plaintiff's house, where it connected with a cross drain leading eastwardly into a main outlet sewer discharging into the Petitcodiac river at a point below high water mark. In the year 1898, when an unusually high tide took place, the water backed up through the sewer into the plaintiff's and other cellars on lower R. street. The same thing occurred several times afterwards. In 1901 the corporation, with a view, if possible, of preventing damage in future by back flowage, continued the sewer on lower R. street southwardly to the river, the outlet being below high water mark. The new sewer was constructed according to plans prepared by the city engineer and approved of by the city council, and the device at the outlet to prevent back flowage is the same as in the other sewers in the city, and similar in principle and mode of operation to those used in other places where sewers discharge into tidal rivers. The new sewer did not prevent back flowage, and the action was brought for loss and damage by the flowage of back water from the main sewer into the plaintiff's cellar through the house drain. Held, that the city, having the statutory authority to construct the sewer, and having built it after plans made by a competent engineer and adopted by the council, was not guilty of actionable negligence, on account of the insufficiency of the sewer to answer its purpose, and a person thereby injured has no remedy by action at law; and it makes no difference in this particular whether the use of the sewer is voluntary or under compulsion.

Lirette v. City of Moncton, 36 N.B.R. 475.

—Defective system—Recovery of damages and costs—Subsequent assessment.]—The assessment for damages and costs recovered by a person complaining of a defective system of drainage must be made only against the lands included in the drainage scheme complained of. Lands included in an amended scheme undertaken after the right to damages has accrued and claim has been made are not liable.

Re McClure and Township of Brooke, 11 O.L.R. 115 (C.A.).

—Ditches and Watercourses Act—Award—Reconsideration — Construction of ditch — Charge for engineer's services — Letting work — Breach of contract—Re-letting.] — By virtue of s. 36 of the Ditches and Watercourses Act, the township engineer, on the reconsideration of an award, may make any award which might have been made in the first instance. In accordance with the provisions of sub-section 2 of section 4 of the same Act, the council by by-law fixed for the charges to be made by the engineer for his services at the rate of $5 a day, and under section 29 the engineer certified to the clerk that he was entitled to $45 for fees and charges for his services:—Held, that his certificate established prima facie the validity of his claim for $45, and the onus was on the plaintiff, objecting to the award, to show its incorrectness, which she had not done. Held, also, that under sub-section 4 of section 28 work under an award not performed as contracted for, may be re-let.

Cuddahee v. Township of Mara, 12 O.L.R. 522 (D.C.).

—Ditches and Watercourses Act — Costs of construction — Charge on the land—"Owner."]—Monies paid by a municipality under the provisions of the Ditches and Watercourses Act, R.S.O. 1897, c. 285, for the construction of a ditch under that Act, when placed upon the collector's roll, become, by virtue of s. 30, a charge upon the lands traversed by the ditch in the hands of the respective owners for the time being, though different from the owners at the time of the initiation of the proceedings under the Act.

Wicke v. Township of Ellice, 11 O.L.R. 422 (D.C.).

—Sewers — Neglect of duty to repair — Notice—Misfeasance—Liability for damage.]—A municipal corporation which fails after notice to repair a sewer laid under statutory authority, thereby causing continuous damage to a person connected therewith for sewerage purposes, is guilty of a misfeasance and liable for damages in a civil suit.

Curless v. The Town of Grand Falls, 37 N.B.R. 227.

— Jurisdiction of marsh commissioners — Certiorari—Limitation for granting writ—Expiration of time—Delays occasioned by Judge.]—Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of six months from the initiation of the commissioners' proceedings:—Held, (Girouard, J., dissenting), that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void notwithstanding that it was applied for and judgment on the application reserved before the time had expired. Held, per Taschereau, C.J., that where jurisdiction has been taken away by statute, the maxim actus curiæ neminem gravabit cannot be applied, after the expiration of the time

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prescribed, so as to validate an order either by antedating or entering it nunc pro tunc; that, in the present case, the order for certiorari could issue as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction in the commissioners but the appellants were not entitled to it on the merits.

Re The Trecothic Marsh, 37 Can. S.C.R. 79.

—Engineer's report—Delay in filing—Extension of time—Alteration and enlargement of scheme.]—The power of extending the time for filing the report of an engineer upon a municipal drainage scheme, by s. 9, sub-s. 8, of the Municipal Drainage Act, as amended by 62 Vict. (2) c. 28, s. 6 (O.), can only be exercised under the condition mentioned in that sub-section. It is a limited power to extend for good cause, and is dependent upon inability of the engineer to make a report within the time fixed owing to the nature of the work, and not upon dilatoriness or supineness on his part. An engineer was appointed to make examination and report in 1900, but did nothing within the first six months after his appointment. Various extensions were granted, several after the extended time had expired. No report was made till February, 1905, and such report was after amendment adopted by the council in June, 1905, and a by-law founded upon it, the engineer advancing no excuse for delay except press of work and lack of assistance:—Held, that when the report was made the petition was not on foot, and therefore there was no warrant to the council for adopting the report or founding a by-law upon it.

Re McKenna and Township of Osgoode, 13 O.L.R. 471 (C.A.).

— Rural municipality — Maintenance of road.]—Rural municipalities which, in the construction and maintenance of roads, do not follow the requirements of the law respecting drainage (in this case to make ditches on each side) are liable for damages resulting therefrom to adjacent owners.

Thérien v. Township of Windsor, Q.R. 30 S.C. 24 (Sup. Ct.).

—Injury to riparian lands—Increased flow of water.]—A municipal corporation cannot, by its system for draining the streets, increase the flow of water, sewage, etc., from higher to lower riparian lands. The remedy by the action negatoire is open to the owner of the latter to put a stop to the aggravation of servitude thereby caused to them.

Desbiens v. Village of Jonquières, Q.R. 30 S.C. 376 (Ct. Rev.).

—Trespass — Compensation.] — In an action brought against a township corporation and its contractor for damages caused by the variation of the specifications by the contractor for constructing a drain under the Municipal Drainage Act, R.S.O. 1897, c. 226, in placing earth excavated in digging the drain upon the land of the plaintiff without permission:—Held, that whether the plaintiff was entitled to be compensated or not her claim fell under s. 93 of the above Act as amended, and her remedy was by notice and proceedings before the drainage referee as provided for by the said section, and not by writ and proceedings in an action.

Burke v. Township of Tilbury North, 13 O.L.R. 225 (D.C.).

—Liability to contribute—"Persons interested"—Water flowing from high level to low level lands.]—(1) The expression "persons interested" in article 470 M.C. applies to those who are benefited by the work therein mentioned. Hence, the owner of lands on a higher level from which water is carried by its natural flow to those on a lower level cannot be made a contributory to the work or expense provided in a proces-verbal for the opening and maintenance of the municipal watercourse through the low level lands into which such water is discharged. (2) An action will lie before the Superior Court by a party unlawfully made a contributory to work in a proces-verbal to have it annulled in so far as he is concerned and such action is not subject to the limitation of thirty days prescribed in article 708 M.C. (3) When the considerations and homologation of a proces-verbal is referred by a local council to the County Council under article 136 M.C. and the latter takes the matter up and homologates the proces-verbal any action to annul it is properly brought against the corporation of the county which is liable for costs in case of contestation.

County of Beauce v. Breakey, 15 Que. K. B. 520.

—Flat rate—Authority of dyking commissioners to fix—Compliance with statute—Drainage, Dyking and Irrigation Act, R.S. B.C., 1897, c. 64.] — In assessing certain lands under the provisions of the Drainage, Dyking and Irrigation Act, the commissioners fixed upon a flat rate, reaching their conclusion from their personal knowledge of the lands, extending over many years, and without making a personal inspection:—Held, on appeal, that the assessment so made was good.

B. C. Land and Investment Agency v. Featherstone, 13 B.C.R. 190.

—Rural lands—Flow of water.]—The owner of rural lands is obliged, under Art. 501 C.C., to receive water diverted by the ditches on higher land of the adjoining owner, necessary ditching not being comprised in the exception of the article "without manual labour having contributed thereto." Moreover, difficulties of this nature between owners of rural lands are matters of administration and should be governed by the

provisions of the Municipal Code. They do not give an opening for an action negatoire.

Lapointe v. Tellier, Q.R. 32 S.C. 529.

— **Municipal corporation — Negligence — Drainage—Capacity of drain.**]—F. brought action against the city of Ottawa claiming damages for the flooding of his premises by water backed up from the sewer with which his drain pipe was connected:—Held, that according to the evidence the sewer is capable of carrying off a fall of 1½ inches of water per hour, which is considered as meeting the requirements of good engineering and is the standard adopted by all the cities of Canada and the Northern States; the city, therefore, was not liable. Held, also, that a fall of rain at the rate of 3 inches per hour for nine minutes was one which could not reasonably be expected and for which the city was not obliged to provide.

Faulkner v. City of Ottawa, 41 Can. S.C.R. 190.

—**Proces-verbal.**]—The owner of land subjected to the expense of opening and maintaining a drain to draw the water from the street without it draining his land and being of no benefit to him, in a district where road work is only done at the expense of the municipality by application of Art. 1080 M.C., has a right of action in the Superior Court to have the proces-verbal for such work annulled.

Cote v. Township of Windsor, Q.R. 36 S.C. 363.

— **Claim for payment for construction work.**]—S. 93 of the Municipal Drainage Act, as enacted by 1 Edw. VII. c. 30, s. 4, deals only with cases of damages occasioned to others by reason of the construction of drainage works in the way provided for by the municipality, and does not refer to the claim of a contractor or workman to be paid for work performed; and therefore an action brought in the High Court which appears by the statement of claim to be one to enforce payment of such a claim should not be summarily dismissed on the ground that the drainage referee alone has jurisdiction; but the question of jurisdiction should be left for determination at the trial, when the facts are investigated; Meredith, J.A., dissenting. Whether the point of law raised is brought up for hearing and disposal under Rule 259 or Rule 373, the party raising it must admit, for the purposes of the argument, that the pleading on which it is alleged that the question arises is true in fact; and for the purposes of the argument the allegations of the statement of defence ought not to be regarded.

Bank of Ottawa v. Township of Roxborough, 18 O.L.R. 511 (C.A.).

DRUGGIST.

Selling crude opium for other than medicinal purposes.]—Where a drug clerk, contrary to instructions, sold crude opium for other than medicinal purposes, held the master could not be convicted of the offence under 7, 8 Edw. VII. c. 50, s. 1. Defendants having admitted keeping crude opium for sale to Chinese, held that that was sufficient evidence to support a conviction for keeping crude opium for sale for other than medicinal purposes.

Rex v. A. & N., 15 O.W.R. 339, 16 Can. Cr. Cas. 381.

DURESS.

Alleged embezzlement — Duress — Payment under threat of criminal prosecution—Error—Ratification.] — About the time a dissolution of partnership was imminent, one of the partners was accused of embezzlement of funds and, supposing that he was liable for an alleged shortage and under threat of criminal prosecution, he signed a consent that the amount should be deducted from his share as a member of the firm. He was denied access to the books and vouchers and, some weeks afterwards, upon settlement of the affairs of the partnership, the amount so charged to him was paid over to the other partners. It was subsequently shown that this partner had made his returns correctly and had not appropriated any part of the missing funds:—Held, that he was entitled to recover back the amount so paid in an action condictio indebiti as both the consent and the payment had been made under duress and in error, and, further, that there had been no ratification of the consent to the deduction of the amount by the subsequent payment, because the denial of access to the books and vouchers caused him to continue in the same error which vitiated his consent in the first place and, further, that, even if the consent given could be regarded as amounting to transaction, it would be voidable on account of error as to fact.

Migner v. Goulet, 31 Can. S.C.R. 26.

—**As to wills.**]—See WILLS.

—**Duress—Verdict of jury—Appeal.**]—In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts, in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager:—Held, that the jury having believed the defendant's account and given him a verdict which the evidence justified, such verdict ought to stand.

Western Bank v. McGill, 32 Can. S.C.R. 581, affirming the Court of Appeal for Ontario.

—Action for specific performance—Duress—Evidence.]—
Tirschmann v. Schultz, 7 W.L.R. 525 (Man.).

—Duress—Evidence—Interest.]—
Tirschmann v. Schultz, 8 W.L.R. 210 (Man.).

—Incapacity of grantor—Absence of consideration.]—Where at the time of the execution of a deed of conveyance the grantor was 70 years of age, was sick and in feeble health, and it was the opinion of some witnesses, though not of others, that he did not understand the nature of his act; and the effect of the deed was to deprive him of means of support, and the evidence was uncertain respecting the existence of adequate consideration for the deed, and favoured the view that it was intended as a gift, the deed was set aside.
Winslowe v. McKay, 3 N.B. Eq. 84, affirmed 37 N.B.R. 213.

DYKES.

See EASEMENT.

EASEMENT.

Right-of-way.]—The owner of lands which owe a servitude of passage can do nothing to diminish the user thereof or render it more inconvenient. Hence, he cannot close it by a locked gate during the hours of active traffic if such inconvenience results therefrom. The Court, in adjudicating upon the conclusions of an action confessoire brought by the owner of the dominant tenement may fix the hours during which it can be so closed.
Rioux v. Nesbitt, Q.R. 19 K.B. 75, reversing 36 S.C. 160.

—Way—User restricted by words of reservation—Terminus a quo.]—Where the description of a way, reserved in a deed of land, described it as "running from the north east corner, etc.," but the words "north east corner" appeared to have been used in a general sense:—Held, that they would not confine the entrance to the angle, but they must be read as signifying the near vicinity of that point as the terminus a quo. In an action claiming damages for trespass to land, defendant justified under a deed reserving a way "formerly used" by the grantor, and "running, etc." Evidence was offered to show that the way claimed by defendant, although it did not conform to the description, was the one used by the grantor, and was treated by him when he occupied the land as the road specified in the reservation, but there was evidence on the other hand to show that there was a way on the land which did comply with the description, although it could not be conveniently used on account of an obstruction placed upon it by a tenant, and because of a stream running across it. Held, that defendant's rights were limited by the words of the reservation, and that she could not acquire a different way by user, or by acts or declarations of the grantor after he had parted with the title.
Miller v. Demers, 44 N.S.R. 347.

—Private right of way—Plea of—Evidence of user of public.]—
McAulay v. McDonald, 4 E.L.R. 486 (P.E.I.).

— Prescription — Ditch — Statutory easement—Maintenance of ditch.]—
Gray v. Daniels, 8 W.L.R. 246 (B.C.).

—Right of way—Dominant tenement—Sale of part.]—The sale of part of the dominant tenement of a right of way, which does not adjoin the servient tenement, which does not provide for the entrance upon and use of an additional right of way over the portion retained by the vendor extinguishes the servitude as to the part sold, and Art. 556 C.C. does not apply. The construction of a railway on the servient tenement making impossible the use of the right of way effects its extinction.
Gosselin v. Charpentier, Q.R. 19 K.B. 18.

—Easement—Conveyance of lots according to registered plan—Park reserve.]—Held, affirming the judgment of a Divisional Court, 19 O.L.R. 471, in the circumstances there stated, that what the plaintiff claimed and was entitled to was an easement, and that the defendant's possession was insufficient to bar the plaintiff. Mykel v. Doyle (1880), 45 U.C.R. 65, approved and followed. Per Garrow, J.A., that, even if the conveyance to the defendant had actually been of the land which she claimed to have purchased, she must have taken subject to the rights of prior and subsequent purchasers of lots laid out on the plan, such rights resting upon and being protected by the prior registration of the plan, of which every one subsequently dealing with the land was bound to take notice; and such rights were in the nature of easements. Per Meredith, J.A., that the whole difficulty had arisen through a mistake of fact as to the actual position on the ground of the reservations, a mistake made when the defendant first acquired an interest in the land, and not attributable to the plaintiff; what the parties were bargaining about was land abutting on these reservations, with common rights over them, for access, etc.; and the common rights in the reservations—created, at least when the defendant took her lease—

being easements, against which the Statute of Limitations relied upon by the defendant does not run, no title by length of possession had been acquired.

Ihde v. Starr, 21 O.L.R. 407 (C.A.).

—Water power.]—See WATERS.

Servitude — Destination — Homologated plan — Street — Registry — Hypothecary creditor.] — The indication on an official plan of a projected street homologated by the city is not equivalent to the writing required by Art. 551 C.C. for creation of the servitude by destination of the proprietor; such destination must be by writing and not otherwise. The homologation of this plan does not constitute a title to the owner; such title is only acquired by compulsory or voluntary expropriation. The servitude created by destination of the proprietor has effect, as against third persons, only by registry with indication of the parts taken, conformably to Art. 2168 C.C., and is of no avail as against creditors previously registered. In this case the debt of the claim was registered at the time of the creation of the alleged servitude, and the city of Montreal not having followed up its purpose of expropriation for the continuation of Hutchinson Street, the claimant had a right to demand that the land be sold against the insolvent in satisfaction of his debt.

In re Thomson, 19 Que. S.C. 329 (Ct. Rev.).

—Servitude — Right of passage — Parties to suit.]—The plaintiff, who is the owner of a farm lot abutting upon the rear of defendant's property, and without communication with any highway, complained that he had been prevented from exercising the legal servitude of passage to which the defendant's property was subject in favour of the plaintiff's. He asked that the servitude be located, and prayed that it be located on the defendant's farm road:—Held, 1 The legal servitude of passage in favour of the owner of a property enclavée over the neighbour's property, to gain access to a highway, exists upon the shortest line which communicates from the nearest highway to any part of the property enclavée, unless upon this line serious obstacles exist which would render the cost of constructing and using the road very onerous, in which case the servitude would lie over the shortest road which would avoid such obstacles. 2. No part of the property enclavée can be counted in computing the distance to a highway, which distance would be measured from any point of the property enclavée to the nearest highway. 3. Even where a servitude of passage is held to exist, the person whose land is subject to it is not obliged to permit the person exercising it common use with himself of his farm road,—the situation of the servitude depending upon the natural conditions of the several properties, and not upon the works which the surrounding proprietors may make. 4. In case of doubt as to the locating of the servitude, the plaintiff ought to put in the cause the various parties interested, so that the location of the servitude may be ascertained by experts. It is not the duty of the defendant to bring these parties into the cause.

Boyer v. Perras, 17 Que. S.C. 523.

—Right of way—User—Prescription.] — A railway line passed over the northern half of lots 32, 33 and 34 respectively, of the eighth concession of North Dumfries, having a trestle bridge over a ravine on 34, near the boundary of 33. G., the owner of lot 33 (except the part owned by the railway company), for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34, over which he could pass to a village on the west side, his predecessor in title, who owned all these lots, having used the same route for the purpose. The company having filled up the ravine, G. applied for an injunction to have it re-opened:—Held, reversing the judgment of the Court of Appeal (Guthrie v. Canadian Pacific, 27 O.A.R. 64), that such user could never ripen into a title by prescription of the right of way nor entitle G. to a farm crossing on lot 34.

Canadian Pacific Ry. Co. v. Guthrie, 31 Can. S.C.R. 155.

—Right of ingress and egress — Covenant of indemnity—Breach of—Statute of limitations.]—By 52 Vict., c. 53 (O.), an agreement entered into between the Crown on behalf of the University of Toronto and the city of Toronto for the purpose of restoring a lease for 999 years of a block of land, made to the city for a public park, which had been declared forfeited, was validated, under the circumstances set out in the report, and a street which constituted one of the avenues under the lease, made a public street; but such dedication was not of itself to confer on adjacent property owners any right of ingress or egress thereto; and any owner, who had not, prior to said agreement acquired rights of access, was required to pay such sum therefor as might be awarded under arbitration proceedings or settled between the parties. The plaintiff subsequently purchased from the defendant lands on said street, the deed containing a covenant by the defendant to indemnify plaintiff against the payment of any money, and all loss, costs or damages he might be obliged to pay for access to said street. The plaintiff's right of access being objected to by the university and use of the same forbidden, a settlement was effected by plaintiff agreeing to pay a named sum, part of which was paid down and an undertaking given to pay the balance by yearly instalments:—Held, that the dedication of the street was a limited one, and

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Palmer v. J

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that the plaintiff was entitled to recover the amount he agreed to pay, and that his remedy was not limtied to what he had actually paid. Held, also, assuming that the predecessors in title of the plaintiff had for nearly thirty years before the passing of the Act enjoyed access to and from the avenue, no right thereto had been acquired under the statute of limitations, for the effect of the 52 Vict., c. 53 (O.), was to create a new beginning for the statute; and also by s. 41 of R.S.O., c. 133, the statute could not commence to run until three years after the expiration of the original lease to the city.

Palmer v. Jones, 1 O.L.R. 382.

—Agreement respecting easement — Effect of, upon subsequent purchasers of dominant and servient tenements—License—Revocation — Expenditure — Equitable compensation — License to lay water pipes — Repairs.]—The lower and the upper half of a lot of land were respectively conveyed to separate purchasers. In the deed of the lower half the grantor reserved to himself, his heirs and assigns, the right of way to convey water by aqueduct or otherwise from one of the springs on the lower lot to the upper lot. The easement was assigned in the deed of the upper lot. On the lower lot were two springs known as the front and back springs. It was agreed and acted upon by the purchasers of the lots that the back spring should be set apart for the exclusive use of the owner of the upper lot under the reservation in the deed of the lower lot. Plaintiff and defendant, becoming respectively the owners of the lots, entered into a parol agreement for the construction by the defendant of a pipe from the front spring to her house, to be tapped on her land by a pipe leading to the plaintiff's house. The plaintiff paid for the pipe connecting with his house, and for the part of the main pipe from the spring to the dividing line between the lots, and the defendant paid for the remainder. The flow of water to the plaintiff's house having been stopped by the defendant, the plaintiff forbade the defendant the use of the front spring. In the plaintiff's bill it was admitted that the defendant was entitled to use the back spring:—Held, that the agreement between the original purchasers of the lots to limit the easement to the back spring was binding upon the defendant; and that the license to the defendant to use the front spring was revocable upon the plaintiff making equitable compensation, fixed by the Court, to the defendant for her expenditure under the license. Where license is given to lay pipes on another's land to convey water to the licensee's land the burden of repair rests in law upon the licensee, and it is a revocation of the license to refuse to the licensee permission to go upon the licensor's land for the purpose of making repairs.

Cronkhite v. Miller (No. 2), Miller v. Cronkhite, 2 N.B. Eq. 203.

—Servitude—Enclave — Right of way—Arts. 540-543.]—Held, affirming the judgment of the Superior Court, Archibald, J., 17 Que. S.C., p. 522):—A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, cannot claim way over the land of a neighbour which does not offer the shortest crossing, unless it be established in evidence that the shortest crossing would be too inconvenient for the use of the enclosed proprietor.

Boyer v. Perras, 10 Que. K.B. 313 (Q.B.).

—Riparian rights.]—

See WATERS AND WATERCOURSES.

Way of necessity—Parol grant — Easement by prescription — Constructive notice.]—The plaintiff's claim was for damages for trespass and an injunction to prevent defendant from exercising an alleged right to cross the plaintiff's land in going from his farm to the travelled road. The two parcels of land were separated by at least half a mile, but evidence was given to show that in the year 1875 the plaintiff's predecessor in title had as part of an agreement for an exchange of the two parcels with the defendant promised verbally to allow the latter the right to cross the parcel in question and that the defendant had exercised this right for four or five years. His user of the way, however, ceased after that for six or seven years until about 1886 or 1887 he commenced to use the trail over the plaintiff's land at times for heavy loads; but in 1892 the defendant himself built a fence without any gate right across the trail which he claimed the right to use and between the plaintiff's land and a parcel on the east of it which the defendant had in the meantime acquired. There was no evidence to show that the plaintiff when he acquired the land had any notice of the alleged agreement for a right of way:—Held, 1. That the intermittent use by the defendant of a convenient old trail was not sufficient to affect the plaintiff with constructive notice of the alleged agreement. 2. That defendant was not entitled to use the trail as a way of necessity notwithstanding that there were natural obstacles to his reaching the travelled highway by any other road. 3. That there was no such continuous enjoyment of the way as is necessary to establish an easement by prescription under 2 & 3 Wm. 4, c. 71, s. 2. Carr v. Foster 1842), 3 Q.B. 581, and Hollins v. Verney (1884), 13 Q.B. D. 308, followed. 4. That the evidence was not sufficient to establish a definite agreement for a perpetual right of way or to warrant the interference of a court of equity by way of specific performance, as the agreement was made when the country

was sparsely settled and the road allowances were not expected to be speedily made passable, and the passage across the intervening land not owned by either party might have been shut off at any time.

Huddleston v. Love, 13 Man. R. 432.

—Streets and lanes marked out by hypothecary debtor—Antecedent registered hypothecary rights of vendor.]—On the 4th August, 1891, the estate of the late F. Frothingham sold to J. S. Thomson two blocks of land, for the sum of $35,945, part of which Thomson paid in cash, and the vendor retained a bailleur de fonds claim for the balance,—the hypothec being restricted to fifty cents per foot of the land so sold. On the 29th October, 1891, Thomson caused to be made and registered a plan sub-dividing the two blocks of land into building lots, and also indicating the proposed extension of a street called Hutchison street, and of two lanes through the land. These building lots he subsequently sold to various persons granting them a servitude of right of passage over the projected street extension and over the lanes. On the 8th December, 1892, the intervening party, Hatton, purchased the bailleur de fonds claim from the Frothingham estate, and was subrogated in all the rights of that estate. On the 11th October, 1893, Thomson having become insolvent made an abandonment of his property for the benefit of his creditors, and Caldwell (subsequently replaced by Stevenson) was appointed curator of the estate. The city of Montreal refused to carry out the proposed extension of Hutchison street, and the result was that the lots sold by Thomson, and on which buildings had been erected, fronted on portions of the land covered by the hypothec of Hatton, the intervening party. On the 1st October, 1894, Hatton petitioned for an order upon the curator, for the sale by the sheriff in ordinary course of the land subject to his hypothec. The petition was granted, and the sheriff seized and advertised for sale four lots, being parts of the projected extension of Hutchison street, and also parts of lanes. Five oppositions to the sale were filed by persons whose rights of passage would be interfered with by the proposed sale. These oppositions were dismissed by Davidson, J., in the Superior Court, on the ground that any undertaking or warranties or servitudes pretended to be made by Thomson could not affect the antecedent registered hypothecary rights of his vendor, which rights, in so far as they remained undischarged by payment, were vested in the petitioner Hatton:—Held (by the majority of the Court of Review, affirming the judgment of Davidson, J., as to the depositif, but with a change of motifs) that the opposition, being an opposition to secure a servitude, was, under Art. 725 C.C. P., unnecessary and inadmissible.

Re Thomson, Hatton v. Masson, 19 Que. S.C. 218.

—Servitude — Oppositions — Ordre de sursis.]—The Court of Review had confirmed a judgment of the Superior Court which dismissed several oppositions by different persons, to secure an alleged servitude of right of passage, but as the oppositions were dismissed by the majority of the Court, on the ground that an opposition afin de charge to secure a servitude is prohibited by the Code of Procedure, Art. 725, the recourse of the opposants by opposition to annul, or such other procedure as might be advised, was reserved. The opposants now asked for an ordre de sursis:—Held, that the opposants having urged no reasons subsequent to the proceedings by which the sale was stopped in the first instance, the Court was precluded by Art. 654 C.C.P., from granting the order asked for; and it was not within the jurisdiction of the Court to express an opinion for the guidance of the sheriff as to the effect of the judgment of the Court of Review.

Re Thomson, Hatton v. Masson, 19 Que. S.C. 254, Archibald, J.

—Execution — Opposition — Art. 654, C.C. P.]—In a judgment of the Court of Review, confirming the dispositif of the judgment of the Court below dismissing an opposition, the following clause was inserted: "Sauf recours par telle autre opposition ou procédure qu'ils aviseront, mais qu'ils seront autorisés à produire nonobstant les délais, vu que l'opposition afin de charge qu'ils ont adopté n'est pas celle qui leur compétait, et qu'ils paraissent avoir des droits à sauvegarder." The opposants then made an opposition afin de distraire, which the petitioner-intervenant moved be rejected from the record:—Held, that the opposition, being founded upon reasons which were not subsequent to the proceeding by which the sale was stopped in the first instance, and there being no Judge's order to stop the sale, was without effect under Art. 654 C.C.P., and should be rejected from the record, notwithstanding the reservation contained in the judgment of the Court of Review.

Re Thomson, Hatton v. Masson, 19 Que. S.C. 256. Langelier, J.

— Construction of deed — Ambiguity.] — One Louis Hudon dit Beaulieu, then sole owner and in possession of the whole of the lot No. 267, sold to Johnny Potvin "certain land situated in the parish of St. Denis containing three-quarters of an arpent frontage by forty arpents in depth more or less, and bounded on the north by the public road, on the south au fronteau, on the southwest by land of the vendor, and on the northwest by land of Francois Thibault (the respondent), the said land forming part of the lot of land known and designated on the plan and books of the official cadastral return of the county of Kamouraska for the said parish of St. Denis under the number 267 and being the north-

west portion of said lot reserving in favour of Honorat Dumais (the appellant), here present for himself and his heirs, of twenty panels (pagees) of the right of way (allee) on the land sold running south from the public road. The said vendor conveys and transfers to the purchaser in addition fifteen feet of land on the other side of said lot along the public road running west to the watering trough (abreuvoir), but the said purchaser must enclose at his own expense the said watering trough." Honorat Dumais, although the deed stated he was present, and though he was, in fact, present with the parties at the time the deed was executed, did not sign it, nor was he asked to do so. After the above transaction, but on the same day, Beaulieu sold to Dumais, "a certain piece of land containing three-quarters of an arpent frontage by forty arpents in depth, the whole more or less, bounded on the south au fronteau, on the north by the public road, on the northwest by land which he has this day sold to Johnny Potvin, and on the southwest by land of Honorat Dumais, forming part of the lot of land known and designated on the said cadastral plan of the parish of St. Denis, under the No. 267, and being the southwest part of said lot, without other reserve than that in favour of Johnny Potvin of which the purchaser admits he has knowledge." By the same deed the said Paul Dumais sold to Thibault all he had acquired from Beaulieu by the deed of 21st February, 1889, in all respects just as it was conveyed to him:—Held, that in view of the ambiguity of the terms of the contract, and to give effect to it according to what seemed to be the intention of the parties under the special circumstances appearing in the evidence the clause containing the reserve the subject matter of the litigation), should be interpreted and made to read as follows: "With the reservation in favour of Honorat Dumais of what shall serve as a right of way on the land sold with a length of twenty panels (pagées) running from the public road."

Dumais v. Thibault, 10 Que. Q.B. 7.

—Non-apparent continuous servitudes — Want of renewal of registration — 44-45 Vict. (Ore.), c. 16 —Arts. 505, 520, 534 C.C.]—Held (affirming the judgment of the Superior Court, Archibald, J., 19 Que. S.C. 292)—(1) Clauses in a deed of sale, prohibiting building in certain materials, or for certain purposes, do not create servitudes. (2) The words "établissements qui pourraient être de nature à incommoder les voisins et devenir un sujet de plainte," imply some substantial inconvenience exceeding ordinary grievances such as neighbours living together are obliged to endure. (3) A proprietor has a right, under Art. 520, C.C., to occupy nine inches of his neighbour's land, for a foundation wall eighteen inches in thickness. He has also the right to erect upon his line, a building which cannot serve as a mitoyen wall, such as a wooden brick-encased wall, but subject to the obligation of demolishing such wall at his own cost, in the event of his neighbour constructing a mitoyen wall between their respective properties; and even where the previously existing wall was quite sufficient for his purposes, he will still be obliged to contribute one-half of the cost of the mitoyen wall if he use it. (4) The word "fastened" (scellé) in Art. 534, C.C., is sufficiently complied with by a window fixed to the wall with nails or screws, and these covered by a moulding of plaster which is, itself, fastened in such a way as not to be removable without being broken. (5) The deed creating a servitude must sufficiently indicate the dominant property without extrinsic aid.

Sicotte v. Martin, 20 Que. S.C. 36 (C.R.).

—Projecting eaves—Descending water and snow—Common owner — Conveyances by—Grant and reservation of rights.]—Plaintiff's predecessor in title built two houses on a lot with a passageway between them, and with the eavestrough and part of the eaves of the westerly house projecting over the passageway. He then conveyed to defendant's predecessor in title the westerly house "with the privilege and use of the projection of the roof . . . as at present constructed," and covenanted for the quiet and undisturbed enjoyment of the projection and that on any sale or conveyance of the house to the east he would "save and reserve the right . . . to such projection." Subsequently he conveyed the easterly house with the land between the two houses to the plaintiff "subject to the right . . . to the use of the projection . . . as at present constructed" — Held, that the defendant was not bound to prevent the snow and water discharged from the clouds upon his roof from falling from it upon the plaintiff's land, and that the easement of shedding snow and water, as had been done ever since the defendant's house was built, was necessary to the reasonable enjoyment of the property granted; that the original grantor could not, after such a grant, insist upon the grantee altering the construction of the roof so as to prevent the snow and water coming down, and the plaintiff stood in no higher position than the grantor, and that the projection of the roof carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below. Judgment of the County Court of the County of York reversed.

Hall v. Alexander, 3 O.L.R. 482.

—Dyke land—Liability of owners for necessary repairs—Covenant running with land.]—In 1847 T. R. purchased from R. a portion of a large tract of marsh land of which R. was owner. From the time of the pur-

chase down to the time of his death, in 1886, T. R. contributed, either by the performance of work or in cash, in the proportion of one seventh of the whole amount, towards the maintenance and repair of a dyke and aboiteau erected, prior to the time of the purchase, for the protection of the land against the sea. In an action brought by plaintiffs, claiming under R., against defendant, claiming under T. R., to recover a proportion of the cost of rebuilding the aboiteau, it appeared that the dyke in question had never been brought under the operation of the Act, R.S., c. 42, of Commissioners of Sewers and Dyked and Marsh Lands, but that the provisions of this Act had been followed in relation to the calling of meetings of proprietors, the summoning of proprietors to perform work, and the apportionment of the cost of such work among the proprietors according to the acreage. an agreement signed by T. R. having reference to his liability to contribute towards the keeping of the dyke and aboiteau, but, at keeping of the dyke and aboiteau, but, at the time of the commencement of the action, the agreement had been lost, and there was no evidence to show the exact contents of the agreement:—Held, that, after the lapse of time, in view of the position of the parties, and the necessity of the work for their protection, the requirement of the Act, and the facts shown in relation to payments made and work done, there was evidence from which to infer the existence of an agreement touching the keeping up and repair of the dyke and aboiteau, constituting a covenant running with the land by which the defendant was bound. Held, also, the Judge of the County Court having found that the amount which defendant was required to pay was not excessive, that such finding was supported by the evidence, and should be affirmed.

Roach v. Ripley, 34 N.S.R. 352.

—Ancient lights—Right to—How acquired—Unity of possession—Prescription Act.]—A right to the access and use of light to a house cannot be acquired under the Prescription Act by the lapse of time, during which the owner of the house or his occupying tenant is also occupier of the land over which the right would extend. In an action to establish a right to ancient lights, the burden of proof in the first place is on the plaintiff to show uninterrupted use for twenty years, and then the burden is shifted to the defendant to show such facts as negative the presumption of ancient lights.

Feigenbaum v. Jackson and McDonell, 8 B.C.R. 417.

—Servitude — Renewal of registry—Aggravation.]—Failure to renew the registry of a deed creating a servitude does not involve the extinction of such servitude unless it is a question of a servitude real, discontinued and not apparent. In the present case the servitude in question, though discontinued, is apparent; it is indicated by a road, and the Act 44 & 45 Vict., c. 6, ss. 5, 6 and 7 do not apply to servitudes discontinued but apparent, and therefore it was not necessary to renew the registry of the deed which constituted it. There is no ground for claiming that there is aggravation of the servitude in the fact that the place where it should be exercised changes little by little on account of this state, as in the present case, the water of the river encroaches on the land and gradually destroys the place where the gravel is found which would be taken out under the terms of the deed creating such servitude.

Perry v. Simard, 21 Que. S.C. 322 (S.C.).

—Right of way over Crown property—Easement — Prescription—C.S.U.C., c. 88, ss. 37 40 and 44.]—The provisions of c. 88 of The Consolidated Statutes of Upper Canada, ss. 37, 40 and 44, were in force at the time of Confederation and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada. (2) Under such provisions, where in Ontario one enjoys an easement as against the Crown and over Crown property, within the limits of some town or township, or other parcel or tract of land duly surveyed, and laid out by proper authority, for a period of twenty years he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings the owner is entitled to compensation. (3) To establish the easement by prescription it is not necessary to show that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription.

McGee v. The King, 7 Can. Exch. R. 309.

—Right of view—Projecting roof.]—

See TITLE TO LAND.

(Parent v. Quebec North Shore, 31 Can. S.C.R. 556.)

—Assent to, by mortgagee—Power to reconvey—Action on covenant—Discharge.]—A mortgagee not only discharged a portion of the mortgaged lands upon part payment, as he was entitled to do under the mortgage, but also assented to a right of way across the whole of the property granted by the then owners of the equity to a purchaser of a portion of it, and released such right of way from his mortgage:—Held, that the mortgagee having debarred himself from restoring the mortgaged lands unaltered in character and quantity, in a manner unauthorized by the terms of the mortgage, owing to the right of way, an assignee of the mortgage could not claim under the covenant therein in an administration of the mortgagor's estate. It is proper, however, in such a case that the claimant

should have an opportunity within a limited time to get into a position so to restore the land, and twenty days were here allowed for that purpose.

In re Thuresson, McKenzie v. Thuresson, 3 O.L.R. 271.

—Prescriptive right — Enjoyment for forty years—Interruptions not acquiesced in not sufficient to defeat statute—Life estate—Computing time.]—In an action by plaintiff for trespass to land, of which plaintiff was the admitted owner, defendant justified under an alleged right of way appurtenant to land owned by his father, J. W., which J. W. and defendant were farming jointly at the time the alleged trespasses were committed. The evidence showed that J. W. became the owner of, and went into possession of his land in 1855, at which time A., plaintiff's predecessor in title, was owner of and in possession of the servient tenement. That in April, 1856, J. W., with the knowledge and assent of A., made use of the way claimed, being informed by A. that he had the right to do so, and that the way had been given by the previous owner, P.A., for the benefits of the lots owned by J.W. That there had been a user, at various times in each year, as required, from 1856 down to 1890, the time of action brought, without any interference by plaintiff or others, until 1896, when, in 1897, 1898 and 1899, plaintiff obstructed the way, and sought to prevent defendant from using it. That the obstructions placed by plaintiff were, in each instance, removed, or protested against, by defendant. Evidence was given on the part of plaintiff to show that a gate had been maintained across the way, and that the user was permissive, but the learned trial Judge found that the gate was maintained with defendant's permission, and that its purpose was to avoid the expense of fencing, and to prevent cattle straying at certain seasons of the year. As to the character of the way, the evidence showed that it was a well defined road, with deep wheel tracks over its entire length, except for a few feet close to the gate, where the ground was hard and stony. Also, that the road had been in the same condition throughout the whole period during which it had been used: —Held, per Graham, E.J., Ritchie, J., concurring, affirming the judgment of the learned trial Judge (McDonald, C.J., and Weatherbee, J., dissenting), that defendant was entitled to the way claimed, and that plaintiff's action must fail. Held, also following Symons v. Leaker, 15 Q.B.D. 629), that the period from 1871 to 1895, during which a life estate was outstanding in plaintiff's mother, was not to be excluded in computing the period of forty years referred to in R.S. (1900), c. 167, s. 36, although it should be excluded in computing the shorter period of twenty years. Semble, that the tenancy for life, being a matter in respect to which defendant would not ordinarily have knowledge, and plaintiff would, should have been replied by the latter. Held, also that the occasional attempts at interruption by plaintiff in 1897, 1898 and 1899, not acquiesced in by defendant, were not sufficient to defeat the operation of the statute.

Eisenhauer v. Whynacht, 35 N.S.R. 295.

—Servitude — Water flowing from higher lands to lower — Action to annul procès-verbal.]—1. A procès-verbal establishing an artificial watercourse to bring water from a higher land to a lower, which would not flow there naturally, is illegal and will be annulled. 2. In an action to annul such a procès-verbal, it is not necessary to make a county council, which, sitting in appeal, had amended the said procès-verbal, a party to the suit.

Brouillet v Corporation de Saint-Sévérin, 22 Que. S.C. 159 (C.R.).

—Right of way—Agreement—Evidence—User.]—Plaintiff claimed a right of way over a private road of several hundred feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised in part by defendant's land, sold by defendant's predecessor in title, B., under a conveyance reserving to the grantees the use in common of the road. The evidence of plaintiff's predecessor in title, K., was, that shortly after the sale of these lots, he moved back on his land his farm house and fence, to widen the entrance of the private road at its junction with the highway, under an agreement with B., concurred in, as he believed, by the owners of the lots, that he, K., should have for so doing a right of way with them over the road. B. denied that an agreement was concluded, and his evidence was corroborated by H., a former owner of the lots, and by drafts of an agreement, containing alterations indicating that the parties were merely in treaty, and providing for the maintenance of the road by K. in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K. of the part of his land to be used for widening the entrance. This conveyance was never made, and the road was included in the conveyance to the plaintiff. The road had been used, from the time of the alleged agreement, by K. and plaintiff in connection with the farm house, until it was torn down, situate about two hundred feet from the public highway, and the plaintiff had used, but not without interruption, the road for about 15 years, for a considerable part of its length. Shortly after the date of the alleged agreement, fences, with gates, crossing the road at separate points a considerable distance from its entrance, were erected by H., without objection by K.:—Held, that plaintiff's bill for an injunction to restrain defendant from obstructing plaintiff in the use of the road should be dismissed.

Fairweather v. Robertson, 2 N.B. Eq. 412.

—Private way over railway lands—User not incompatible with requirements of railway.] —Railway lands may be dedicated for public or other user so long as that user is not incompatible with the present and actual requirements of the railway. Where an adjoining landowner had used a well-defined path across railway station grounds continuously for over 30 years, his user was held to be confirmed by lapse of time. (Canadian Pacific R.W. Co. v. Guthrie, 1 Can. Ry. Cases, 9, distinguished.)

Grand Trunk R.W. Co. v. Valliear, 2 Can. Ry. Cas. 245 (Boyd, C.).

—Right-of-way — Gates.]—Plaintiff being the owner of a part of a farm, which was subject to a right-of-way connecting two other portions of the farm, reserved by a former owner of the whole farm, for the use and benefit of himself, his heirs and assigns as a lane or roadway 33 feet wide across . . so long as needed or required in passing to and from the other lands now owned (by the grantor) brought his action for a declaration of his right to place gates at the termini of the right-of-way:—Held, that he was so entitled.

Siple v. Blow, 8 O.L.R. 547 (C.A.).

—Aqueduct—Servitude—Contract to supply water.]—In the year 1880, Roy, who was building an aqueduct, found it necessary to pass over Doyon's land, and bound himself, in consideration of being permitted to do so, to supply Doyon with as much water for the use of his house as he had a right to expect from the proper working of the aqueduct, on payment of $4 per annum. In 1902, Roy forcibly broke the connection between the main pipe and Doyon's house and cut off his supply of water, because, although Doyon's family had increased in numbers, he refused to pay $9 per annum for the water:—Held, reversing the judgment of Pelletier, J.:—(1) Defendant had no right to refuse the supply of water so long as he retained the servitude on plaintiff's property. (2) If a party to a contract dissolves it by reason of infractions, by the other party, of some of its stipulated conditions, he must dissolve it in toto.

Doyon v. Roy, 24 Que. S.C. 191 (C.R.).

—Right of way—Contract—Part performance—Unsigned draft of agreement—Admissibility.]—Though the agreement was verbal and related to an interest in lands, there was evidence of sufficient part performance by the plaintiff's predecessors in title to take it out of the provisions of the statute of frauds. Drafts of the agreement, as to the right of way, containing alterations and providing for the partial maintenace of the way in question by the plaintiff's predecessors in title, which obligation was entirely disclaimed by the plaintiff, were offered in evidence and admitted:—Held, per Tuck, C.J., and McLeod, J., that as the drafts were not signed by any of the parties to the agreement, were not shown to them when giving their evidence, and no explanation as to them was sought from the parties, such admissions were improper.

Fairweather v. Lloyd, 36 N.B.R. 548.

—Servitude—Creation by deed—Light and air.]—A notarial deed inter partes, entitled "Convention et Accord" contained the following stipulation: "The parties, their heirs and assigns, will respectively have the right at all times to retain the openings in their houses built on said lots Nos. 120 and 119, and to alter the position of the same according to their several necessities, but they shall have no right to place more of them therein than they each have at present":—Held, that the said deed created a servitude de vue in favour of the parties. It follows therefrom that nothing could be done tending to lessen the use of this servitude and render it less convenient; no more can the condition of the places mentioned be altered so as to render the servitude illusory. Thus, the construction of a new roof to one house, of a height which almost entirely shut out the light and air from a window the maintenance and enjoyment of which were secured by the said deed, constitutes an interference with the exercise of such servitude, and consequently the person entitled thereto may demand the demolition of such new construction, which demolition must be such as will replace him in the same enjoyment as he had before. The servitude de vue so agreed to implicitly bound the defendant not to build in a manner to interfere with the exercise of the plaintiff's servitude.

Thibault v. Gourde, Q.R. 26 S.C. 185 (Sup. Ct.).

—Common lanes—Right of passage—Private wall—Windows and openings on line of lane—Arts. 533-538 C.C.]—A conveyance of lands fronting on public highways with the right of passage merely over a private lane does not create a servitude that can entitle the grantee to make windows and openings in walls which are built upon the line of the lane. A reservation in a deed of partition to the effect that lanes through subdivided lands should be held in common by the proprietors par indivis or their representatives must be construed as reserving the rights in common only to the co-proprietors, their heirs or the persons to whom such right in the lanes might be conveyed.

Lespérance v. Goné, 36 Can. S.C.R. 618.

—Easement appurtenant—User of lane—Prescription—Agreement for right of way.] —In 1860 J. D. conveyed to J. D. the younger (the plaintiff) the east half of lot 19 in the 5th concession west of Yonge street in the township of York "together with all and singular the . . . ways . . . . easements . . . and appurtenances whatsoever in the said land . . . belonging or in any wise appertaining or therewith

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used and enjoyed, etc." 19 and 18 were contiguous lots of which 18 lay to the south of 19, and both lots were bounded on the east by the 5th concession road and on the west by the 6th concession road. At the time of the conveyance and for many years preceding, the occupants of the east half of lot 19 were accustomed to drive to the 6th concession road across the west half of lot 18, and by his statement of claim the plaintiff claimed a right of way as an easement over the west half of 18 by reason of the conveyance from his father and twenty-five years' user of the same. J. D. died in 1877, and by his will devised to J. D. the younger the northeast quarter of lot 18, and to W. D., the grantor of the defendant, the residue of lot 18, and, by an agreement between J. D., the plaintiff, and W. D., the latter conveyed to J. D. a right of way over a lane then existing upon the west half of lot 18 and over an extension to be made of said lane, so as to give him access to the 6th concession road, in the following language: "Agree and permit the said J. D., his heirs, etc., a full and free right of way along the lane where it now is, on lot number 18, leading from the 6th line and extending 40 rods east from the centre of said lot so as to allow a free communication for all his and their teams, etc." The lane on the west half of lot 18, if extended easterly in a straight line, would be upon the northeast quarter of lot 18, the lands devised to J. D., and one matter in dispute between the parties was whether a proper construction of the agreement required that the extension of the lane should be by means of a jog continuing solely upon the land of W. D., or should be extended in a straight line upon the lands of J.D. Upon the trial before Galt, J., and a jury, a verdict was found that the plaintiff was entitled to the right of way over the west half of 18 to 6th concession road by reason of grant and continuous user, and also that the extension of the lane should be wholly on the defendant's land. An order nisi to set aside the verdict and to enter a nonsuit or verdict for the defendant was made absolute by the Divisional Court, and judgment entered for the defendant. On appeal to the Court of Appeal this judgment was set aside and the judgment at the trial restored. On appeal to the Supreme Court of Canada:—Held, Ritchie, C.J., dissenting, reversing the judgment of the Court of Appeal, that a way must be a defined way in order to pass by the general words "all ways used and enjoyed," when the way is not an existing easement or way of necessity, and that in this case the way claimed as an easement was not a well defined, permanent road or way, but simply a track in no settled or defined direction, and that all J. D. obtained from his father was a user purely of tolerance, under license and permission, and one which neither constituted an easement in fact at the time of the conveyance, nor a user which however long its continuance would ripen into an easement by prescription. Held, affirming the judgment of the Court of Appeal, that according to the true construction of the agreement between J. D. and W. D., the extension of the lane was to be wholly upon the lands of W. D., and not in a straight line. Held, that under Con. Rule 755, the Court having all the material before it necessary for determining the case, and as no useful purpose would be served by sending the case back for a new trial, the Court should give the final judgment in the action. Rule 755 being a transcript of the English Order 40, Rule 10 of 1875, and there being no rule in Ontario corresponding to Rule 568 of the English Rules, which restricts the Court to such inferences of fact as are not inconsistent with the findings of the jury, the observations of the Lord Chancellor in Toulmin v. Millar (12 App. Cas. 746) have no application.

Rogers v. Duncan (1890), S.C. Cas. 352.

—Water supply—Injunction.]—If a right to use water is granted in consideration of other benefits, it should be regarded as a real servitude as much as a personal right; and an interim injunction will be granted to cause it to be maintained, especially when the respondent cannot put an end to it without trespassing on the property of the petitioner.

Christin v. Peloquin, 7 Que. P.R. 13 (Sup. Ct.).

—Conveyance—Right of way for pole line with exclusive possession—Grantor's right of cultivation.]—A conveyance of a right of way to a power and light company for a pole line and any other purpose which it may use it for and the sole and absolute possession of the right of way does not divest the grantor of his right to cultivate the right of way in such a manner as will not interfere with the company's poles or pole line.

Tarry v. West Kootenay Power and Light Company, 11 B.C.R. 229 (Morrison, J.).

—Origin in grant—Prescriptive title—Evidence—Referee's deed—Proof of decree.]—In 1854, R.B., owner of lot 8, conveyed the northern part thereof to M., together with the privilege of taking water thereto through a pipe, which M. was empowered to build, from a spring on the southern part of the lot. By mesne assignments M.'s lot, with the water privilege, became vested in J.B. In 1871 he executed to S. for 21 years, with covenant for renewal, a lease of the spring, with a right to lay a pipe therefrom, through the southern part of lot 8 to lot 9. The ownership of the southern part of lot 8 was then in H., and in 1905 became vested in the defendant. In 1872 S. built a pipe from the springs across H.'s lot to lot 9, and it has been in uninterrupted use ever since, a period exceeding 20 years. In 1904 lot 9, with the lease, was assigned to the

plaintiffs. The plaintiffs' predecessors in title always rested their right to the easement on the lease and not upon adverse user:—Held, that a prescriptive title to the easement could not be set up. A deed of a Referee in Equity, though purporting to have been made under a decree of the Court, is not admissible in evidence without proof of the decree.

Loggie v. Montgomery, 3 N.B. Eq. 238.

—Party wall — Reservation of servitude — Resulting privilege.] — The vendor of a building of which the wall is in the condition of a party wall may reserve the right of the party wall himself. (2) This right to a common wall applies to the eventual rights of the vendor or his representatives in either of two alternatives, i.e., to make the wall common without payment of the compensation provided by Art. 518 C.C., should he acquire the adjoining premises, or to recover such compensation from the owner of such adjoining premises making it a party wall.

Duperrault v. Roy, Q.R. 28 S.C. 519 (Sup. Ct.).

—Real servitude—Dominant and servient tenements — Personal obligation.] — A covenant in a deed by which P. acquired the right to erect a wind mill pump on his neighbour's land to supply water to his premises by a pipe, "that he agrees to permit F., another neighbour, to take water for the use of his premises from the pump, and for that purpose to connect a pipe with the one to be laid by P.", does not establish a servitude in favour of F.'s premises. The latter are not described so as to be made a dominant tenement and there is no servient tenement on which the charge is imposed. The covenant only gives rise to a personal obligation by P. to F. and the subsequent owners, à titre particulier, of F's premises have no rights of servitude that can be enforced against P.

Christin v. Péloquin, 28 Que. S.C. 299 (Archibald, J.).

—Servitudes—View from sides of gallery at right angles to division line.]—A view over a contiguous tenement from a platform or gallery of which the front parallel to the division line is closed, obtained by leaning over the side-rails that are at right angles to the division line, is not a direct view within the meaning of Art. 536 C.C.

De Bellefeuille v. Auger, 28 Que. S.C. 532.

—Servitude — Building line — Condition of deed.]—In a deed of land sub-divided into building lots, a condition pronibiting the construction of buildings within a specified distance of the line of the street does not establish a servitude upon each of the lots for the advantage of the others, nor, in the absence of a dominant tenement, does it give rise to the obligation to observe the condition against building whereof the vendor and his representative would be creditors and the purchaser and his representatives would be debtors.

Pelletier v. Trudeau, Q.R. 27 S.C. 196 (Sup. Ct.).

—Servitude—Undivided ownership — Right of view—Petition—Common lanes—Rights of subsequent purchaser—Windows.]—In a deed of partition giving each of four co-partitioners certain lots and lanes in a subdivision of inherited lands, the clause "the lanes adjoining their respective properties, shall be in common, as well to them as for their representatives," does not create an indivisible servitude or enforced co-ownership as to these lanes. Nor does it constitute a servitude by destination of the original grantor. Consequently a subsequent purchaser of one of the lots under a conveyance granting him merely a right of passage on one of the lanes cannot put windows in his building overlooking the lane in violation of Art. 536 C.C. Any of the co-partitioners and co-owners of the lanes may, in such case, exercise the action négatoire against him.

Goné v. Lespérance, Q.R. 14 K.B. 168.

[Cf. Lespérance v. Goné (36 Can. S.C.R. 618), affirming this judgment.]

—Tenants in common—Division of lands by agreement and subsequent occupation—Way —User for more than twenty years.]—L. and H., who owned and occupied a farm in common, agreed upon a division of the property between them and called in a surveyor for that purpose who ran a line upon which a fence was erected and by which the parties continued to hold. At the time of the division there was a road upon the property which had been used as a means of obtaining access to the public road and which both parties continued to use. After a time H. constructed a road on his part of the property which gave him a more convenient mode of access to the public road when going in certain directions, but he continued from time to time as necessary to use the former road. After the death of H., L. erected a fence for the purpose of preventing defendants, who claimed under H., from making use of the portion of the old road which passed through his land, and upon defendants taking down the fence brought an action claiming damages for the removal of the fence and an injunction to prevent defendants from passing over his land. The evidence showed a continuous user of the way for a period of about thirty years and plaintiff failed to show any abandonment or interruption of the user:—Held, affirming the judgment of the trial Judge, that plaintiff could not succeed in his action. Also, that the construction by H. of the new road over his own land and its use as mentioned was not an abandonment of his right to use the former way.

Horne v. Horne, 38 N.S.R. 404.

—Usufruct — Access to attics — Usage.]— Where a deed of usufruct is silent as to the mode of access to attics it is determined by the established usage prevailing at the time of the grant of the usufruct.

Godbout v. Godbout, Q.R. 28 S.C. 481 (Sup. Ct.).

—Usufruct—Conditional term.]—In a deed of sale of a dwelling house the usufruct of the land upon which it was constructed was granted to the purchaser during such time as the house should exist and last:— Held, that the term of the usufruct came to an end when, on account of repairs and additions the original building had been virtually replaced by new constructions of essential parts without which it could not exist as a dwelling.

Beaudry v. Chouinière, Q.R. 28 S.C. 1 (Ct. Rev.).

—Window overlooking neighbouring property—C.C. 536—Liability of architect.]— See ARCHITECT.

—Sale of building—Reservation of right to use wall in common—Transfer.]—(1) The vendor of a building, a wall of which is susceptible of becoming a common wall (mur mitoyen), can retain and reserve to himself the right of mitoyenneté in such wall. This right is not a real, but a personal conditional right of acquiring the common use of the wall without charge, in the event of becoming the owner of the contiguous property, or of recovering the charges and dues prescribed in article 518 C.C. from any other party who, becoming such owner, chooses to make the wall a common one. (2) The vendor who reserves the right of mitoyenneté as above can assign it to others and the assignee is not bound to signify the assignment to the person who makes the wall common, before bringing suit to recover the charges exigible under article 518 C.C.

Duperreault v. Roy, 29 Que. S.C. 343 (Ct. R.).

—Right of way—Ambiguity in deed—Possession.]—When the title establishing a right of way does not determine its location in precise and formal terms it may be determined by length of possession (in this case 33 years).

Thuot v. Ménard, Q.R. 16 K.B. 174.

—Right of way.]—The sale of an immovable described as "lot No. 5 in the subdivision of lot No. 212 of the cadastre," etc., with a common right of user by all persons having rights in the streets bounding the lot, when the plan of the said subdivision, deposited for registry by the vendor contains the indication of a strip of land intended for use on the street, is a title constituting a sufficient right of way and gives the purchaser recourse by action confessiore against the person subsequently acquiring the strip which forms the servient tenement. It is the owner of the dominant tenement who should do the work necessary to establish the right of way over the servient tenement. The obligation on the owner of the latter is to submit to the servitude and nothing more.

Lamontagne v. Leclerc, Q.R. 30 S.C. 418.

—Lane—Private way—Closing up—Registering plan—Amendment and alterations.] —The effect of section 110 of the Registry Act, R.S.O. 1897, c. 136, whereby after a plan has been registered and a sale or sales made thereunder, the plan is binding upon the persons so registering it, is that it is not irrevocably so, but it may be amended or altered on a proper case being made out. Notice of any proposed amendment or alteration must be given to all purchasers thereunder, who are entitled to oppose the amendment or alteration. Such application may be made not only by the person registering the plan, but also by a purchaser or anyone claiming under him; but when it is sought to close a lane laid out on plan the soil of which remains in the person registering it, a purchaser seeking to close the lane must show that he represents the title of the person who registers. Where, therefore, an application was made by the purchaser of lands laid out on a plan situated in a city to close a private lane laid out thereon and the applicants failed to show that they had acquired the title to the soil in the lane, the application was refused.

Re Hamilton Terminal R.W. Co. and Whipple, 14 O.L.R. 117 (C.A.).

—Origin of right—Presumption of grant—Rebuttal.]—The plaintiffs and their predecessors in title had for many years under a lease from B., a supply of water by pipes passing through the land of the defendant. B. did not in fact own the land, and had no right to make the lease. There was no evidence that the lease was made with the knowledge and consent of H. the predecessor in title of the defendant), the owner of the servient tenement:—Held, that the plaintiffs' right to the easement could not be supported on the presumption of a lost grant and a continuous uninterrupted user for over twenty years referable to that title.

Loggie v. Montgomery, 38 N.B.R. 112.

—Light and air—Sale of house and portion of land—Interference by fence with enjoyment of vendee—Derogation from grant.]— Defendant, being the owner of certain land, on the east end of which was a house lighted by windows on the west side, sold and conveyed part of the land, including that part upon which the house was built, to the plaintiff. The defendant subsequently built a high fence very close to the house, entirely on his own land, but up to the boundary line. The fence cut off the

light, and by excluding the air impaired the ventilation, and the snow and ice collected in the narrow space between the fence and the house from which it could not be removed, and when melting in the spring the water could not run away, but soaked through the walls of the house:—Held, that the defendant could not derogate from his own grant, and as the plaintiff was thus deprived of that comfortable and reasonable enjoyment of the house which he had a right to expect, an injunction was granted restraining the defendant from continuing the fence in such a way as to interfere with that enjoyment.

Ruetsch v. Spry, 14 O.L.R. 233 (Riddell, J.).

—Right of way—Extinguishment by unity of possession — Revival on severance.]—Unity of ownership extinguishes all pre-existing easements, such as a private right of way over one part of the land for the accommodation of another part, and nothing in ss. 26 or 45, or in any other provisions of the Land Titles Act, R.S.O. 1897, c. 138, affects the matter. The owner of a certain property, upon which was a saw mill, in 1887 built a grist mill upon another part of the same property. In 1888 he conveyed the part of the property on which the grist mill was, and in 1891 he also conveyed the rest of the property, with the saw mill, to the same grantees. In 1894 the saw mill property was conveyed to the defendant's predecessors in title, and in 1895 the grist mill property was conveyed to the plaintiff's predecessor in title. Throughout all this time access to the grist mill had been obtained by a more or less defined way running through the saw mill property, and so continued until 1906, when the defendant obstructed it. The plaintiff brought this action for an injunction restraining the obstruction and for damages. In none of the conveyances or transfers was there any mention made of the way now in question, either by way of grant reservation or otherwise:—Held, affirming the decision of the Divisional Court reported 15 O.L.R. 67, that the action must be dismissed, upon the above principle.

McClellan v. Powassan Lumber Co., 17 O.L.R. 32, affirmed; 42 Can. S.C.R. 249.

—Aggravation of condition of the servient tenement—Action to abate aggravation — Stable erected near a common wall.]—(1) An action lies in favour of the owner of a servient tenement against the owner of the dominant one to have it declared that the condition of the former has been aggravated by the latter in the use of the servitude, and for an order upon him to desist from the acts of aggravation complained of. (2) He who builds a stable near a common wall or a wall belonging to his neighbour, is obliged to make a counter-wall or other works as provided in Art. 532, s. 4 C.C. (3) The rule of the article is a fixed one to provide against a cause of probable damage and to preclude the greater number of disputes which would otherwise arise. Relief from the obligation cannot therefore be obtained through care, cleanliness or the avoidance of injury to the neighbour. (4) It is imposed as a protection, not merely to the wall from deterioration, but also to the neighbour, from nuisance or injury. (5) Nor does it matter how the neighbouring wall is constructed, whether of masonry or of wooden planks. (6) The obligation also arises in the case of the enlargement of a stable which has existed for many years, during which it has not been enforced.

Defoy v. Saint Jean, 16 Que. K.B. 432, reversing 31 Que. S.C. 97.

—Right of way—Digging wells.]—The action negatoire between adjoining owners of the right of digging wells (puisage) and of passage against which the defendant sets up his title to the land on which the wells and the passage are situate can be instituted and determined as an action for revendication of said land without any necessity for resorting to a bornage. The contents of a lot of land expressed in square feet will be understood as meaning French feet for land originally forming part of a seigniory and English feet in all other cases. Nevertheless such rule can be departed from by agreement and when land in the first category is conveyed by a description expressing its contents according to English measure subsequent transfers of parts of it by measurement in feet will be deemed to be according to the same measure when knowledge of the parties to the deeds is shown by the references they make to the first conveyance and by the conduct while in possession of the land.

Béchard v. Boucher, Q.R. 31 S.C. 92 (Ct Rev.).

—Possession of land—Way between lots—Ownership in common — Prescription.]—A right of way between two properties may become the joint property of the owners by prescription. Therefore, one of them, disturbed in the legal possession which he has had for a year and a day has his remedy against the author of such disturbance. The Court adjudicating on the claim in such case should, in pronouncing upon the rights of ownership in the parties, avoid joining together the petitory and possessory rights.

Morel v. Dorval, Q.R. 16 K.B. 448.

—Use of common lane—Overhanging fire-escape—Encroachment on space over lane.] A grant of the right to use a lane in rear of city lots "in common with others," as an easement appurtenant to the lots conveyed, entitles the purchaser to make any reasonable use, consistent with the common user, not only of the surface but also of the space over the lane. The con-

struction of a fire-escape, three feet wide with its lower end 17 feet above the ground (in compliance with municipal regulations), is not an unreasonable use nor inconsistent with the use of the lane in common by others; consequently, its removal should not be decreed at the suit of the owner of the land across which the lane has been opened. Judgment appealed from affirmed.

Meighen v. Pacaud, 40 Can. S.C.R. 188.

—Entry for repair—Notice to owner of servient tenement.]—(1) An agreement between neighbours in these words: "les parties auront toutes deux droit de passer sur le terrain situé entre les dites maisons pour réparer chacune la sienne," does not establish a servitude of right of way; it simply confers the right known to the old French law as "le droit de tour d'échelle." It gives the owner of the dominant tenement the right to go upon the servient one and to use upon it such implements as ladders, scaffolding, etc., as may be necessary to repair his buildings, wherever they are in need of repair and then only. Notice to the owner of the servient tenement is therefore implied, as a condition precedent to the exercise of the right. Further, it cannot be used, if no repairs are necessary, nor if such repairs cannot be effected at the season when the exercise of the right is claimed. (2) An action lies to compel the owner of a building to perform the necessary works to prevent rain-water from spattering from his roof or outworks into his neighbour's windows.

Thibault v. Gourde, 33 Que. S.C.R. 536.

—Obstruction to access of light to windows —Claim under grant — Distinction between grant and ancient lights.]—The rules settled by the Courts in case of the interference with ancient lights are not applicable to a case where, as here, the plaintiff's rights were dependent upon a prior conveyance from the common owner of his lot and the adjoining one, now owned by the defendants, the plaintiff being entitled to receive such access of light through his windows as they had at the time the severance of his lot from that owned by the defendants:—Held, however, Mabee, J., dissenting, that the plaintiff had by his inertness in insisting on his rights, while the defendants' building complained of was in course of construction, disentitled himself to a mandatory injunction for the removal thereof, his remedy being limited to an award of damages, with a reference, if the damages assessed by the trial Judge were not accepted as sufficient. Held, also, that the existence at the time the grant to the plaintiff's predecessor in title of an outstanding mortgage, which was subsequently discharged, was not material.

Simpson v. Eaton, 15 O.L.R. 161 (D.C.).

—Dominant and servient tenement — Flow of water.]—Difficulties between adjoining owners of rural property arising from water flowing to the lower land are subjects of administration and should be governed by the provisions of the Municipal Code. They do not afford ground for recourse by action negatoire in favour of the owner who claims that his neighbour, by means of ditches, has caused an excessive discharge of water on the former's land.

Muldoon v. Casey, Q.R. 33 S.C. 45 (Ct. Rev.).

—Servitude — Purchase of dominant and servient tenements—Unity of ownership.]—By the judgment appealed from (Q.R. 18 K.B. 24), reversing the judgment of the Superior Court (Q.R. 32 S.C. 289), it was held that (1) Where the purchaser of two parcels of land upon one of which there existed a servitude for the benefit of the other, that was extinguished by the unity of ownership thus restored, executes a deed of sale of the former, subject to the servitude as constituted by the original title deed to which it made reference, such deed of sale in turn becomes a title which revives the servitude; (2) The situation of a servitude giving a right of passage, which has not been defined in the title by which it was created, is sufficiently determined by the description given of its position, accompanied by a plan, in a deed of compromise between the owners of the two parcels of land submitting their differences in regard to the servitude to the decision of an arbitrator; (3) Both before and since the promulgation of the Civil Code, apparent servitudes are not purged by adjudication on a sale by the sheriff under a writ of execution. On appeal to the Supreme Court of Canada the judgment appealed from was affirmed.

Thompson v. Simard, 41 Can. S.C.R. 217.

—Conveyance of lots according to registered plan—Park reserve and entrance marked.]—Upon a registered plan of land in the township of Bertie there were laid down one hundred and sixty-two lots, and there were shown upon it six blocks, lettered from A to F; between these blocks there was a space marked "No thoroughfare, private entrance for occupants of lots in Crescent Beach tract;" and, except between blocks E and F, there was at the lake shore end of the space a figure marked "Park Private Reserve," and between blocks E and F two figures similarly marked. All of these lots were originally owned by the Crescent Beach Association, and the plaintiff and defendant each bought and had conveyed to them certain lots according to the registered plan, and certain other lots were demised to the defendant by the association for a term of 99 years from the 21st August, 1894. The defendant, by mistake, occupied with her house and grounds part of one of the spaces marked "entrance" on the plan and part of one of the parts marked "Park Private Reserve." The plaintiff, alleging

the right of herself and all others the property holders at Crescent Beach to the enjoyment of the private entrance and park reserve, brought this action to restrain the defendant from obstructing and to compel the removal of the house, etc. The defendant pleaded a mistake as to the land conveyed and demised to her and also the Statute of Limitations:—Held, that the defendant was not in the present action, to which the association was not a party, entitled to a reformation of the instruments of conveyance from the association to her; and semble, that the evidence would not justify a reformation. Held, also, that if the defendant were in equity the owner of the land which she claimed to have purchased from the association, her equitable right could not prevail against the plaintiff, who claimed under a registered conveyance; there was no evidence that the plaintiff purchased with such notice of the defendant's equitable right as would be required to defeat the plaintiff's registered title; all that was shown was that the plaintiff had notice that the defendant was in possession and had made valuable improvements on the land, and that was not sufficient. Held, also, following Mykel v. Doyle (1880), 45 U.C.R. 65, that the defendant's possession for ten years was not sufficient to bar the right of the plaintiff to the easements claimed by her. Held, also, that the plaintiff was entitled to the easements or rights claimed; that was the effect of the plan and the conveyances of lots to her. Semble, also, that the defendant was precluded by the judgment in a former action from setting up in this action the same defences in regard to the easements claimed by the plaintiff as had been set up in regard to the lots in question in the former action.

Ihde v. Starr, 19 O.L.R. 471.

—Servitude—Right of way.]—The owner of land subject to a servitude of passage can enclose it by a wicket gate furnished with a lock by sending the key to the owner of the dominant tenement.

Rioux v. Nesbitt, Q.R. 36 S.C. 160.

—Water power.]—See WATERS.

—Servitude—Surrender.]—A servitude may be extinguished by surrender, or by renunciation implied as well as expressed, on the part of the owner of the dominant property. This result follows, in the case of a servitude non altius tollendi, when such owner having conveyed away the portion of his land adjoining the servient property, has allowed the purchaser, a joint stock company in which he is a shareholder, to erect a building of a height exceeding that permitted by the conditions of the servitude.

Morgan v. Guy, Q.R. 18 K.B. 56, reversing 32 S.C. 67.

—Right of way—Obstructions by owner of servient tenement.]—Obstructions, refuse and filth placed or thrown in a passageway by the owner of the servient tenement, without any intention to assert an adverse right to that of the owner of the dominant tenement, do not amount to a disturbance (trouble de droit) affording a legal ground for a possessory action.

Roumilhac v. Denniss, 35 Que. S.C. 186.

ECCLESIASTICAL LAW.

See CHURCH.

EDUCATION.

See SCHOOL LAW.

EJECTMENT.

Conveyance of fee—Reservation of life estate—Possession.]—In October, 1853, D. conveyed to his father and two sisters six acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee "saving and excepting" thereout six acres for the life of the grantor's father and sisters or that of the survivor, or until the marriage of the sisters, on the happening of said respective events the six acres to be and remain the property of M., his heirs and assigns under said deed. Three months later M. conveyed the block of land to R. M. in fee, and when the life estate terminated in 1903 the latter brought ejectment against the heirs of the life tenants who claimed the six acres on the ground that the deed to M. contained no grant of the same and also because the life tenant had had adverse possession for more than twenty years:—Held, that as the evidence showed that the life tenants went into possession under R. M. the title of the latter could not be disputed and the statute would not begin to run until the life estate terminated. Held, per Idington, J., that R. M. under his deed and that to his grantor had the reversion to the fee in the six acres after the life estate terminated. The lease of the life estate was given to R. M. with the other title deeds on conveyance of the land to him and on the trial it was received in evidence as an ancient document relating to the title and coming from proper custody. It was not executed by the lessees and no counterpart was proved to be in existence. Held, that it was properly admitted in evidence.

Dods v. McDonald, 36 Can. S.C.R. 231.

—Ejectment action—Judgment—Lapse.]—Re Ling, 5 E.L.R. 494 (N.S.).

—Documentary title — Root of title not shown—No evidence of possession by plaintiff or predecessors in title.]—
Gaudet v. Hayes, 3 E.L.R. 152 (P.E.I.).

—Presumption—Grantee in possession and exercising acts of ownership with knowledge of grantor—Declaration of right.]—
Hubley v. Hubley, 4 E.L.R. 132, 392 (N.S.).

—Judgment for possession—Mesne profits.]—
Little v. Pelletier, 3 W.L.R. 67 (Terr.).

—Mesne profits—Improvements—Evidence—Damages—Costs—Set-off.]—
Easton v. Anderson, 7 W.L.R. 282 (Alta.).

—Deed absolute in form given by way of mortgage—Amendment of pleadings.]—To an action by plaintiffs, as executors and heirs of W., to recover possession of land which it was alleged defendant had entered into possession of and was withholding, defendant pleaded that the land in question was conveyed to W. by M. by a deed which, though absolute in form, was given by way of mortgage to secure a sum of money; that W. executed a bond to reconvey the land upon payment of the amount secured with lawful interest; that M. died intestate and since his death the land in question had been in possession of H., one of the heirs-at-law of M., and had never been in possession of the defendant; and that before action brought the full amount of principal and interest was tendered to plaintiffs. This paragraph of the defence having been struck out as disclosing no reasonable answer to the action, or in the alternative, as tending to prejudice, etc., the fair trial of the action:—Held, that the paragraph should be restored and amended in such a way as to show that the heir of M., in whose possession the land was alleged to be, was defendant's wife, and that plaintiffs, if they wished, should have leave to add H. as a defendant.
Whitman v. Hiltz, 38 N.S.R. 174.

—Change of ownership—Evidence—Notice to tenant—Art. 360 C.P.Q.]—The order for examination upon articulated facts should mention the names, occupation and residence of the defendant. (2) The plaintiff in an action of ejectment must make proof of change of ownership of the immovable and notice of such change to the tenant.
Valiquette v. Kennedy, 7 Que. P.R. 409.

—Equitable defence — Verdict under—Legal title—Costs.]—In an action of ejectment where the defendant pleads he is entitled to possession on equitable grounds, and the Judge trying the case without a jury finds that the plea is proved, it is proper under s. 134 of c. 111 Con. Stat. 1903, to order a verdict for the defendant, although the legal title and right to possession is in the plaintiff, and the effect of the verdict is to deprive the plaintiff of the costs of the ejectment.
Souci v. Ouillette, 37 N.B.R. 393.

—Possession—Action en complainte — Trespass.]—The disturbance of possession which gives rise to the action en complainte must be of a nature adverse to and in contempt of the title of a person in possession of lands animo domini. A simple trespass gives merely a right of action for damages.
Bertrand v. Levesque, Q.R. 28 S.C. 460.

—Right of action by owner who has leased the land.]—An owner of land may bring an action to recover possession, although he has previously given a lease of it to a third party.
Penner v. Winkler, 15 Man. R. 428.

—Possession of land—Squatter—Revendication by owner—Payment for improvements — Liability for revenues received.—The party in possession of land is in good faith within the meaning of Art. 411 C.C. only so far as he possesses animo domini. Therefore a squatter who has conveyed or sold his rights in a lot on the public domain and continues to occupy it after his purchaser has obtained a title to it by letters patent from the Crown does not occupy the lot in good faith and is not entitled to the revenues therefrom. He can only claim from the owner who revendicates the land the cost of his improvements subject to compensating said owner for the value of the revenues he has received.
Ellard v. Miljour, Q.R. 16 K.B. 545.

—Variance between title and cadastre, as to description—Proof of identity.]—A plaintiff who brings suit respecting an immovable described by its cadastral number, and sets up a title granted before the cadastre of the locality was made, and which varies, as to the description of the immovable, from the cadastral book of reference, must prove the identity of the lots described, to justify his claim.
Fraser v. Cayer, 35 Que. S.C. 75 (C.R.).

ELECTION LAW.

I. VOTING AND QUALIFICATION.
II. ELECTION PETITIONS.
III. OFFENCES AND PENALTIES.
IV. ELECTION EXPENSES.

I. VOTING AND QUALIFICATION.

Returning officer—Return — Injunction.]—An injunction order was made ex parte restraining the defendant, who was the returning officer for an electoral division, his servants and agents, from making a return to the clerk of the Executive Coun-

cil that H. was elected as a member of the Legislative Assembly for that electoral division. Before notice of the injunction order reached the defendant, he had delivered his return, to the effect that H. was elected by acclamation, to an express company for conveyance to the clerk. The agent of the express company was notified of the injunction order, and knew that it restrained the defendant, his servants and agents from delivering the return; but, several hours afterwards, delivered it to the clerk:—Held, that, although the express company were the agents of the defendant, and had committed an act in violation of the injunction, and were guilty of contempt of Court, the status as it existed at the time they received notice of the injunction could not be restored, because the return could not be recalled, and it could not be said that it, although made in violation of the injunction, was a nullity; and the Court had no jurisdiction to declare void a return which was not on its face a nullity. The return having been actually made, its validity or invalidity must be dealt with under the Controverted Elections Act; and the Court could not grant a mandamus to the defendant to compel him to declare that the plaintiff had been duly nominated as a candidate at the election in question, for to do so would involve a finding that the return made was illegal; and to continue the injunction would be futile. Semble, that the violation of the injunction by the express company was deliberate and intentional, and it was no excuse that the agent had been advised by his solicitors to do as he did.

Davis v. Barlow, 15 W.L.R. 49 (Man.).

Order compelling County Court Judge to proceed with recount of ballots.]—

Re North Cape Breton and Victoria, 6 E.L.R. 37, 532.

—Registration of electors—Sittings of registration clerk.]—Pursuant to s. 6 of the Manitoba Election Act, 1904, an order of the Lieutenant-Governor in Council was passed on the 28th April, and proclaimed in the Manitoba Gazette on the 30th April, appointing registration clerks for a certain electoral division, and fixing the 23rd May as the date and A.'s house as the place for receiving applications for registration of electors. Notices as provided for in s. 7 were posted up as required, naming the 23rd as the date. The King's Printer, for certain reasons, deemed the date inconvenient, and printed and on the 4th May sent out new posters naming the 16th May as the date, and these were posted 10 days before the 16th May. On the 10th May an order in council was passed amending the proclamation of the 30th April by substituting the 16th for the 23rd May. Quære, whether the Lieutenant-Governor in council had power to change the date mentioned in the proclamation. Semble, that, at all events, the King's Printer had no authority to issue the amended notices, and the notice thus given was not a compliance with s. 9, which requires the notice to be posted at least 10 days before the commencement of the registration sitting. Upon an application for a mandamus to compel the registration clerk to hold a sitting at A.'s house, the applicant swore that he had seen the notice appointing the 23rd, but did not become aware of the change of date until after the sitting had been held on the 16th. Semble, that it was no answer to the application that the applicant might have attended at another place in the electoral division on a subsequent day; his right was to have the clerk sit at the places named in the proclamation. But held, that to make a mandamus effective the clerk must be ordered to attend at some future time; the Court had no power to fix a time, and the clerk was equally powerless. The Lieutenant-Governor in council might have the power under s. 10, but the Court had no jurisdiction to compel the exercise of it; and the Court will not grant a mandamus unless it can be made effective.

Re Assiniboia Electoral Division; Re Carr, 14 W.L.R. 392 (Man.).

At municipal elections.]—See MUNICIPAL LAW.

For school trustees.]—See SCHOOL LAW.

At Parliamentary elections.]—See ELECTION LAW, II. AND III.

Voters' lists—Assessment made in previous year—Qualification arising subsequent to final revision of roll—Freeholders—Tenants.]—Where the assessment for a city, on which the rate for the year 1898 was levied and the voters' list based, was made in the previous year, the roll having been finally revised on the 2nd December, 1897, the freeholders, who were such between that date, and the last day for the revision of the voters' list, were, under s. 86 of the Municipal Act, R.S.O. (1897) c. 223, and s. 14 (7) of the Ontario Voters' Lists Act, R.S.O. (1897) c. 7, held entitled to be placed on the list; and freeholders also who had parted with the property for which they were assessed, but had acquired other sufficient property, were held entitled to remain on the list; otherwise as regards tenants, under similar circumstances, the form of oath required to be made by them precluding them.

Re Voters' Lists of St. Thomas, 2 Election Cases 154.

—Voters' lists—Notice of complaint—Loss of—Parol evidence.]—A list of appeals, containing names sought to be added to the voters' lists, was prepared, and a voter's notice of complaint in Form 6 to the On-

tario Voters' Lists Act, R.S.O. 1897 c. 7, was signed, by the complainant, attached to the list of names to be added, and handed to the clerk in his office within the thirty days required by the statute. When the list was produced by the clerk in Court, the notice of complaint was missing:—Held, that it was competent for the Judge to hear and receive parol evidence as to the form and effect of the notice in question and of its loss; and that, upon his being satisfied by such evidence that a sufficient notice of complaint was duly left with the clerk, the complaint might be dealt with.

Re Voters' Lists of Marmora and Lake, 2 Election Cases 162.

—Voters' Lists—Notice of complaint—Service on clerk—Registered letter.]—A notice of complaint, with list of names, was received by the clerk through the mail by registered letter, in due time:—Held, that s. 17 (1) of the Voters' Lists Act, R.S.O. 1897 c. 7, had been complied with.

Re Voters' Lists of Madoc, 2 Election Cases, 165.

—Aliens — Non-residents — Voting without right—Actual knowledge — Agency — Evidence.]—Actual knowledge on the part of a voter that he has no right to vote is necessary to constitute a corrupt practice under R.S.O. 1887, c. 9, s. 160.

Re South Perth, Malcolm v. McNeil, 2 Election Cases 30.

—Voters' list — "Resided continuously" — Meaning of.]—The provision of s. 8 of the Ontario Voters' List Act, R.S.O. 1897, c. 7, that persons to be qualified to vote at an election for the Legislative Assembly, must have resided continuously in the electoral district for the period specified, does not mean a residence de die in diem, but that there should be no break in the residence; that they should not have acquired a new residence; and where the absence is merely temporary, the qualification is not affected. Where, therefore, persons resident within an electoral district, and otherwise qualified, went to another province merely to take part in harvesting work there, and with the intention of returning, which they did, their absence was held to have been of a temporary character, and their qualification not thereby affected.

Re Voters' List of the Township of Seymour, 2 Election Cases 69.

—Voters under twenty-one.]—No inquiry can be made on a scrutiny as to voters being under the age of twenty-one, as the voters' lists are final and conclusive on that point.

Re South Perth Provincial Election, 2 Election Cases 144.

—Territorial election—Court of Revision — Judge in appeal — Jurisdiction — Voter's qualification.]—In the case of an election under the Territories Election Ordinance, a Judge sitting in appeal from the Court of Revision is limited in the exercise of his jurisdiction to the same extent as the Court of Revision. The jurisdiction of the Court of Revision is limited to enquiring whether any of the formal statements, subscription to which the Ordinance provides may be required from a person tendering a vote, is "false in whole or in part; if false in whole or in part, the vote is to be disallowed; if altogether true, the vote is to be allowed. New polls were held in two polling divisions; votes were challenged on the following grounds: (a) voter was deputy returning officer in another polling division on the day of the general election, (b) voter was resident in another polling division on the day of the general election and entitled to vote there, and (c) voter was absent from electoral district on day of general election; and in each case the voter could not possibly have voted on that day at either of the two polling divisions in question; the Court of Revision disallowed these votes; the Judge in appeal held that he had no jurisdiction sitting in appeal (but only in proceedings under the Controverted Elections Ordinance) to consider the validity of these votes, though he doubted their validity. "Residence" means a man's habitual physical presence in a place or country which may or may not be his home; the word "habitual" does not mean presence in a place for either a long or short time, but the presence there for the greater part of that period.

In re Banff Election—Brett v. Sifton (No. 1), 4 Terr. L.R. 140. Rouleau, J.

—Bogus election list—Certiorari.]—The revisors of the parish of Rothesay, Kings Co., prepared and certified under oath a list of persons entitled to vote in each parish under the New Brunswick Elections Act. One of the revisers took this completed list for the purpose, as alleged, of forwarding it to the secretary-treasurer of the municipality. Several days afterwards the certificate and affidavit, which were attached to the list above mentioned, were received by the secretary-treasurer, annexed to another list containing over 400 additional names—of unqualified voters — the same having been mailed—registered—from the city of St. John in an adjoining county. On motion to make absolute a rule nisi to quash the bogus list the fraud was admitted by the counsel showing cause, but it was contended that certiorari would not lie. The Court held, however, that the action of the revisors was a judicial proceeding and that certiorari would therefore lie. Rule absolute to quash.

The King v. Otty, 37 C.L.J. 250 (S.C., N.B.).

—Ballots— Marking — Validity of.] — A ballot properly marked but not initialed by the deputy returning officer, having in-

stead the initials C.S. which appeared, and were assumed to be those of the poll clerk, was held good. A ballot from which the official number was torn off, without anything to show how it happened, was held bad. Ballots marked —— I or V or A were held good. Jenkins v. Brecken (1883), 7 S.C.R. 247, followed. Ballots marked for a candidate, but having (1) the word "vote" written after his name; (2) having the word "Jos.," being an abbreviation of the candidate's christian name, written before his name; (3) having the candidate's surname written on the back of the ballot, were held bad.

Re West Huron, Garrow v. Beck, 2 Election Cases 58.

—Ballot papers — Divisions of — Names of candidates in — Uncertainty as to — Ambiguity.]—Where the surname of a candidate had been printed so high up in the ballot paper as to appear in the division containing the name of another candidate and to lead to uncertainty as to which of the two candidates' divisions of the ballot paper it was in it was held that the votes marked opposite to such surname were ambiguous, and could not be counted for either candidate, and under the circumstances a new election was ordered.

Re South Perth, Schoultz v. Moscrip, 2 Election Cases 52.

—Ballot papers—Marked with numbers—By deputy returning officer—Marking cross on left-hand side — Name of candidate printed in wrong division—Uncertainty.]—The fact that a number has been placed on the back of each ballot paper in a voting sub-division, in pencil, by the deputy returning officer, will not invalidate them. The fact that the cross is marked in the division on the left-hand side of the ballot paper containing the candidate's number, and not in the division containing his name, will not invalidate them. The West Elgin Case, 2 Election Cases p. 38, followed. Where the printer had printed the surname of a candidate too high up and in the division of the ballot paper occupied by the name of another candidate:—Held, that the ballots marked with a cross above the dividing line but opposite to the surname so placed could not be counted for such candidate, but were either marked for the other candidate, or were void for uncertainty.

Re South Perth, Provincial Election, 2 Election Cases, 47.

—Ballot papers—Marking of—Division of—Portion removed—Marking same.] — If a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act, according to any fair and reasonable construction of it, the vote should be allowed:—Held, that the dividing lines on the ballot between the names of the candidates, and not the lines between the numbers and the names, indicate the divisions within which the voter's cross should be placed, and the space containing the number is part of the division of the ballot containing the candidates' name, and that votes marked by a cross to the left of the lines between the numbers and the names were good. Held, also, that a ballot, from which a portion of the blank part on the right-hand side had been removed, leaving all the printed matter except a portion of the lines separating the names, but which was properly marked by the voter, was good. Held, also, that ballots marked for both candidates, and a ballot marked on the back, although over a candidate's name, were properly rejected. Held, also, that certain ballots with other marks on them beside the cross were good or bad under the circumstances of each case set out in the report. Held, also, that a ballot, having the name of a candidate marked on its face in pencil, in addition to being porperly marked for that candidate, was good; that a ballot with two initials on the back as well as those of the deputy returning officer, was good; that a ballot with the name of a voter on the back was bad; and that ballots with certain peculiar crosses marked thereon were good.

Re West Elgin (No. 1), 2 Election Cases, 38.

—Dominion Elections Act — Recount before a Judge—Place where order for recount is signed—Chef-lieu of district—Appeal.]—(1) A recount before a Judge of the Superior Court of the votes given at a Dominion election is not a judicial, but a ministerial and executive proceeding. (2) There is no right of appeal from such a Judge's order concerning such a proceeding to the Court of Queen's Bench. (3) The Judge of the Superior Court, to whom application is made for a recount of the votes, is not bound to act in such a proceeding at the chef-lieu of the district, but can grant such application and issue his summons at any place.

Meigs v. Comeau, 3 Que. P.R. 307, 10 Que. K.B. 56.

—Preparation of voters' lists — The Manhood Suffrage Registration Act (M.) — The Manitoba Voters' Lists Act.] — A person claiming to be entitled to be registered as an elector in the Electoral Division of South Winnipeg, and to have had his name on the last revised list of electors for the division, applied for a prohibition to restrain the Board of Manhood Suffrage Registrars as constituted under the Manhood Suffrage Registration Act, 63 & 64 Vict., c. 25 (M.) from proceeding to prepare the list of voters for that constituency under the provisions of the Act, which they were about to do for the purpose of a by-election then

pending. On the motion coming on for hearing, it was claimed that the board had no power to go on with their proceedings because, under s. 70 of The Manitoba Voters' List Act, 63 & 64 Vict., c. 62, the former revised lists were to be used until new lists had been prepared and revised throughout the province, and further, that even when that was done, the board were not to prepare the whole list, but only lists supplemental to the lists prepared under The Voters' Lists Act. It was contended on behalf of the board that there was no power in the Court to interfere with a board of that kind by prohibition:—Held (1), That a Judge should not undertake to decide difficult questions of that kind on a summary application such as was made, but that the parties should be left to declare in prohibition which might still be done under The Queen's Bench Act. (2) Although the board was about to prepare and revise lists of electors under the Act, it could not be assumed that they would decide or attempt to decide what lists the returning officer should use at the coming election, or would determine or attempt to determine whether the vote of the applicant should be received or not in the event of his name not being put on the list they were about to prepare; and therefore the applicant could not say that the board intended to take away any of his rights, and there was no necessity for an immediate prohibition. Motion dismissed without costs.

In re The Board of Manhood Suffrage Registrars for South Winnipeg, 13 Man. R. 345.

—**B. C. Elections Act—Voters' list—Collector — Prohibition — Summons or motion.**]—After the collector of votes under the Provincial Elections Act (1897) as amended in 1899, has placed on the register of voters the names of persons objected to, an application for prohibition on the ground that the collector proceeded without jurisdiction is too late:—Semble, in any event prohibition is not the proper remedy.

In re Provincial Elections Act, and In re O'Driscoll v. Wright, 8 B.C.R. 427.

—**Dominion election—Presiding officer—Refusal to deliver ballot to voter—Liability for malice—Non-resident's oath.**]—Plaintiff who resided at St. John in the province of New Brunswick, was a property owner and entitled to vote at Dalhousie in the County of Annapolis and province of Nova Scotia, where his name appeared on the list of voters as a non-resident. Plaintiff presented himself before the deputy returning officer at Dalhousie at the last Dominion election and demanded a ballot paper, but the officer refused to deliver a ballot paper or to permit plaintiff to vote unless plaintiff took the non-residents' oath:—Held, that the oath proposed was not applicable to the case of a property owner residing in another province, and that the officer was wrong in his refusal to permit plaintiff to vote. Per Ritchie, J., McDonald, C. J., concurring (affirming the judgment of the trial Judge). Held that plaintiff's right to vote being clear defendant was responsible in damages for his refusal to permit him to do so. Held, also, that defendant, in undertaking to determine plaintiff's right to vote, was not acting in a judicial capacity, but was merely a ministering officer to carry out the provisions of the Act. Held, also, even assuming that defendant was acting in any respect in a judicial capacity, that, his action in refusing the ballot paper not being bona fide, but being wilful and corrupt, the action was maintainable even on the theory that proof of malice was necessary. Per Weatherbe, J., and Graham, E.J. Held that defendant was a public officer having a quasi judicial duty to perform and that he could not be made liable for an error of judgment. Held, that in order to make defendant liable, malice must be shown, that the burden of showing malice was on plaintiff, and that the evidence adduced was not sufficient for that purpose.

Anderson v. Hicks, 35 N.S.R. 161.

—**Voters' lists—Notice of complaint—Form of—Grounds of objection—Subjoined lists—Amendment of notice.**]—In a list of complaints contained in a notice of complaint under the Ontario Voters' Lists Act, R.S.O. 1897, c. 7, the names of persons wrongfully omitted from the voters' lists were given, and in the column headed "grounds on which they are entitled to be on the voters' list," "M.F. and" appeared:—Held, having regard to the provisions of s. 6 (1) and (7) and Form 6 (list 1) of the Voters' Lists Act, and of ss. 1 (12), 13, and 56 of the Assessment Act, and of s. 4 of the Manhood Suffrage Registration Act, that the letters "M.F." could properly be read as meaning "Manhood Franchise," and those words were sufficient for the purposes of the notice, while the word "and" should be treated as surplusage. (2) The notice of complaint consisted of fifteen sheets, each in itself in the form given in the schedule to the Voters' Lists Act as No. 6, the lists Nos. 1, 2, 3, and 4 being printed on the back of forms of notices of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the whole fifteen sheets were attached together when the complainant signed the notice, and handed the whole to the clerk; and they so appeared before the Court. The notice referred to the "subjoined lists:"—Held, that the lists were part of the complaint, and it was sufficient in that regard. (3) Held, that, if it were necessary, in order to make the notice of complaint a good one, to amend it so that it should refer explicitly to the annexed sheets, the amendment should not be allowed under s. 32.

Re Voters' Lists of Carleton Place, 3 O. L.R. 223.

—Damages for depriving of vote — Two causes of action — Election to pursue one —Penalty — Discovery — Dominion Elections Act, 1900.]—The writ of summons (issued 30th January, 1901) was indorsed with a claim to recover penalties under the Dominion Elections Act, 1900, and for damages for wrongfully depriving the plaintiff of his vote at an election held on the 7th November, 1900. The statement of claim (delivered 14th March, 1901) did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence delivered 27th March, 1901, denied the allegations of the statement of claim and alleged want of notice of action. The plaintiff obtained the usual discovery from defendant, without objection. On 31st December, 1901, after such discovery, and when the action was ready for trial, the plaintiff applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the indorsement of the writ:—Held, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery. Regina v. Fox (1898), 18 P.R. 343, distinguished. The plaintiff, having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, and having allowed more than a year to elapse before applying for leave to amend, must, notwithstanding the indorsement of the writ, be taken to have conclusively elected to pursue his common law remedy; and leave to amend was properly refused. Ss. 19, 131, 133, and 142, of the Dominion Elections Act, 1900, discussed.

Rose v. Croden, 3 O.L.R. 383.

—Ballots — Marking of — Initialling of.]—Ballots marked with a straight line only are improperly marked and cannot be counted, while ballots marked with a cross upon or above the upper division line, or marked with a cross made by three or four pencil strokes, or marked with a cross and also with what might be taken for a "c," are properly marked, and should be counted. In initialling the ballots a deputy returning officer at one sub-division put as his initials H. G., instead of his full initials H. C. G., and a deputy returning officer at another polling subdivision put McN. instead of his full initials W. D. McN.:—Held, that such ballots were sufficiently initialed within the meaning of the Act, the object of such initialling being merely the identification of the ballot, which was effected here, there being no suggestion that the number of ballots cast at the polling sub-division was not correct; and, semble, that under these circumstances the ballots should not be rejected, even if not initialed at all.

Muskoka Provincial Election, 4 O.L.R. 253.

—Recount of votes—Jurisdiction of Junior Judge of County Court—Ballots—Irregular marking — Notice of appeal.] — A Junior Judge of a County Court has jurisdiction under the Ontario Election Act, R.S.O. 1897, c. 9, ss. 124-131, to recount votes. Four ballots counted for one of the candidates by a deputy returning officer were held to have been properly rejected by a County Court Judge on a recount, in consequence of each being marked with a cross in the divisions of both candidates. There was nothing to show that, as was alleged, one of the crosses had been placed on each ballot, after the count by the deputy returning officer. A ballot having a distinct cross in the division of one candidate, and an obliterated cross in that of the other, was allowed for the first. But where there was a distinct cross in one division, and a very faint one in the other, the ballot was rejected. A ballot marked for one candidate and having the name of that candidate written on the back, was rejected. Ballots having, instead of a cross, a perpendicular line, a horizontal line, a straight slanting line, were rejected. A ballot properly marked, but having on the back words written by the deputy returning officer, was allowed. Ballots marked by placing the cross on the back were rejected. Several tremulous connected marks in one division. Ballot allowed. A strongly marked cross in one division, and a thin faint upright pencil mark on the upper edge of the ballot in the other division, not indicative of any intention to make a cross. Ballot allowed. A distinct cross, and in the same division, in one case, a slight, irregular pencil marking, and in another case a slight, cloudy, formless pencil marking. Ballots allowed. A mark consisting of two lines lying very close to each other, partly coincident and then divergent, both distinctly visible in one division. Ballot allowed, as there was evidence of an intention to make a cross. Remarks of Ritchie, C.J., in the Bothwell Case (1884), 8 S.C.R. 676, 696, referred to. The notice of appeal from the decision of a County Court Judge upon a recount of votes under s. 129 (1) of the Election Act, need not be signed by the appellant candidate personally, but may be signed by his solicitor or agent on his behalf. Where both candidates appeal from the decision of the County Court Judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority. Neither appeal having been limited to particular ballots, it was open to the candidate whose appeal was first determined to object, when his opponent's ap-

peal was being heard, to certain ballots not previously objected to.

Re North Grey Provincial Election, 4 O.L.R. 286.

—Recount of votes—Ballot papers — Absence of candidates' numbers.]—The candidate's number, mentioned in s. 69 (3) of the Ontario Elections Act, R.S.O. 1897, c. 9, is not an essential part of the ballot paper; and where a deputy returning officer, in detaching the ballot papers from the counterfoils, did so in such a manner that the candidates' numbers were left on the counterfoil, instead of appearing on and as part of the ballot papers, such ballot papers, when marked by voters, were not rejected.

Re Prince Edward Provincial Election, 4 O.L.R. 255, Osler, J.A.

—Recount of ballots.]—Upon the recount of ballots cast at the election of a member for the Ontario Legislature, there being two candidates, ballots were allowed which were marked (1) with a cross below and to the right of the lower compartment; (2) with a cross in one compartment and a line in the other; (3) with a cross in one compartment and a faint and probably unintentional mark in the other; (4) with a mark somewhat in the form of an inverted V as being probably intended for a cross; (5) with three crosses in one compartment; and (6) with a mark which might fairly be taken to be a clumsy and ill-made cross; and ballots were disallowed which were marked (1) with a single stroke—the error in the head-note in West Huron (1898), 2 E.C. 58, in which it is stated that ballots so marked were in that case allowed, being pointed out; (2) with a plain cross in one compartment, and a fainter, partly smudged or rubbed out cross in the other; (3) with the name of the candidate written in the compartment; and (4) with a circle in both compartments. Ballots marked in due form, but with a coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence and evidence not being admissible, to show whether a pencil of this kind had or had not been supplied by the deputy returning officer.

In re Halton Provincial Election, 4 O.L.R. 345.

—Recount of votes — Marking of ballot papers — Identification of voters — R.S.O. 1897, c. 9, ss. 112 (4), 124, 126.]—A County Court Judge is not confined on a recount to the consideration of cases in which an objection was made before the deputy returning officer when counting the votes at the close of the poll. A ballot marked with a cross outside, but near, the upper line of the top division:—Held, good. It is not essential to have such a line on a ballot paper at all. Similarly all votes below the lower division must be counted for the candidate whose name is in it. Where a ballot was marked with a circle, not a cross, or any apparent attempt to make a cross. Held, bad. Where a ballot was well-marked for one candidate, but in the other candidate's division there was an irregular, shapeless pencil mark, which was not, however, a cross, or any attempt to make a cross, nor a mark by which the voter could be identified. Held, a good vote for the candidate for whom the paper was well marked. A ballot, though well marked, had in the same division the initials S. A. in small, but legible capitals. Held bad. Any written word or name upon a ballot, presumably written by the voter, ought to vitiate the vote, as being a means by which he may be identified. Ballot papers had a cross or crosses in the divisions of both candidates. Held, bad.

Re Lennox Provincial Election, 4 O.L.R. 378.

—Naturalization and aliens — British Columbia Provincial Elections Act, s. 8 — Privileges conferred or withheld after naturalization.]—S. 91, sub-s. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted. The Provincial Legislature has the right to determine, under s. 92, sub-s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it. Accordingly, the British Columbia Provincial Elections Act, 1867, c. 67, s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires.

Cunningham and Attorney-General for British Columbia v. Tomey Homma and Attorney-General for Dominion of Canada, [1903] A.C. 151, reversing Re Homma, 8 B.C.R. 76.

—Ontario Voters' Lists Act—Notice of appeal — Leaving at clerk's residence.] —The language of R.S.O. 1897, c. 7, s. 17, sub-s. 1, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc., means, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time allowed by the statute. And where, between 9 and 10 o'clock of the evening of the last day for serving notices of appeal, certain notices were left on the outside knob of one of two doors of the clerk's dwelling house, by a person who first knocked but received no response, and such notices did not come to the knowledge of the clerk till about noon the next day, the service was held insufficient.

Re Voters' Lists of Hungerford, 5 O.L.R. 63 (Garrow, J.A.).

—**Revision of voters' lists under the Manitoba Election Act, R.S.M. 1902, c. 52—Power of revising officer to keep his Court open after expiration of time.**]—A revising officer appointed to revise and close the lists of electors under the Manitoba Election Act, R.S.M. 1902, c. 52, although directed by the Board of Registration to hold his sitting for that purpose on a certain day and between certain hours, has power to continue the sitting to a later hour and on a subsequent day or days if necessary to enable him to hear and dispose of all applications brought before him. Where, however, it was shown that, before the hearing of the application for a mandamus to the revising officer to compel him to reopen his court for the purpose of hearing further applications, to be placed on the lists, he had, pursuant to s. 92 of the Act, transmitted the list of electors and all books and papers to the chairman of the Board of Registration, and that before the final argument of the motion the chairman had, pursuant to s. 97 of the Act, sent the revised lists to the King's printer and the books, documents and other papers to the clerk of the Executive Council:—Held, that the issue of a mandamus to the revising officer as asked for should be refused as it would be fruitless and futile, and both he and the Board of Registration were functi officio.

Rex v. Bonnar (No. 1), 14 Man. R. 467.

—**Application for registration—Affidavit — Official to take.**]—Questions referred, under s. 98 of the Supreme Court Act, by the Lieutenant-Governor in Council to the Full Court for determination. S. 3 of the Elections Amendment Act of 1901 provided a form of affidavit or application for registration as a voter, the jurat of which being given thus: "Sworn (or affirmed) before me at in the Province of British Columbia this day of A.D. 19 ," and s. 4, provided that the affidavit might be sworn before (amongst others) any justice of the peace, mayor, notary public, postmaster, Government agent, constable or commissioner for taking affidavits in the Supreme Court. The main questions argued were as to whether or not the affidavit could be sworn outside the province and if it could, what officer could take it:—Held, (1) The affidavit might be sworn outside the province, and the jurat altered to conform to the facts. (2) It might be sworn before a commissioner for taking affidavits in and for the Courts of the province, or before any of the officers named in s. 4 provided they derive their power from provincial authority, or ordinarily reside and perform their duties within the province. Per Irving, J.—It might be sworn before a foreign notary public. Per Walkem and Drake, JJ.—Acts affecting the franchise should be construed liberally so as not to disfranchise persons having the necessary qualification of voters. The Lieutenant-Governor in Council has power (under s. 210A. of the Act, and s. 11 of the Redistribution Act) to make regulations providing that affidavits sworn outside the province may be received by collectors of voters and the applicant's name be placed on the register.

In re Provincial Elections Act, 40 C.L.J. 45, 10 B.C.R. 114.

—Voters' lists—**Notice to strike off names —Non-compliance with form—Amendment.**]—It is not essential that the form given in Ontario Voters' Lists Act, R.S.O. 1897, c. 7, for objections to the names wrongly inserted on the voters' list should be followed with exactness, all that is required being that the nature of the objections to the names should be stated with reasonable clearness. Where, therefore, in giving notice of the wrongful insertion of names placed on the voters' list, the complainant used List No. 2, of Form 6 in the Schedule, being the list for persons wrongfully named, instead of List No. 3, being the list for those wrongfully inserted on the voters' list, but it was quite apparent what the grounds of the objections were, the notice is sufficient. An amendment in such case might be made if such was necessary.

Re Voters' List, Township of Rawdon, 40 C.L.J. 31, 6 O.L.R. 631.

—**Quebec Election Act, 1903—Qualification of elector on income—Domicile within the electoral district — Residence.**]—A person must have his domicile in the electoral district, in order to have his name put on the list of electors, on qualification of income. Semble, that having such a domicile in one municipality, an elector can be put on the voters' list of the place of his actual residence, in another municipality, in the same electoral district.

Barker v. Village of Cowansville, 24 Que. S.C. 333 (Lynch, J.).

—**Preparation of voters' lists — Dominion Franchise Act, 1898, s. 9—Appointment of persons to prepare lists.**]—The High Court of Justice for Ontario has power to prohibit persons assuming to exercise judicial functions in the preparation of voters' lists for an election to the House of Commons for Canada, if these persons have no authority in law for the exercise of any judicial functions in respect of such lists. Re North Perth, Hessin v. Lloyd (1891), 21 O.R. 538, distinguished. The Dominion Franchise Act of 1898 changed completely the whole law in regard to the preparation of voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared; but to provide against the possibility of there being no sufficiently recent provincial lists in some of the electoral districts, s. 9 was passed. This section means that when provincial lists exist—"are prepared"—they shall be used, but when they do not exist the mode of preparing them

provided in the section may be adopted. On the facts of the case, it was within the power of the Governor-General in council to appoint all necessary officers for the preparation of the lists, thus making them officers of a Federal Court constituted by the section. These officers are to follow, as far as possible, the provisions of the laws of the province regulating the preparation and revision and bringing into force of the provinical lists. If the order in council appointing the officers gives directions to them in conflict with the statute, the order, to that extent, has no effect. If the officers do not proceed in accordance with the statute, they are answerable to parliament, not to the Court, upon an application for prohibition.

Re West Algoma Voters' Lists, 7 O.L.R. 533.

—B. C. Elections Act—Recount—Ballots in custody of Deputy Provincial Secretary—Production for recount.]—The Court or a Judge thereof has no jurisdiction, under s. 154 of the Provincial Elections Act, to order the Deputy Provincial Secretary to produce ballots for the purpose of a recount before a County Court Judge under s. 43 of the amendment to the said Act in 1899.

Re Fernie Election, 10 B.C.R. 151 (Irving, J.).

—Voters' lists—Revision—Posting up lists—Time for objecting.]—A person resident in, and entitled to be placed upon the manhood suffrage register for, a town forming part of an electoral district, is entitled to require the revision, under s. 13 of the Ontario Voters' Lists Act, R.S.O. 1897, c. 7, of the voters' lists for another municipality forming part of the same electoral district, and is also entitled to require the subsequent revision of such lists provided for by ss. 22 and 23 of the Ontario Voters' Lists Act, R.S.O. 1897, c. 7. A deputy registrar of deeds is not entitled to vote at an election of a member of the Legislative Assembly of Ontario for the electoral district in which he is acting as such deputy registrar, and is not entitled to be placed on the voters' lists in such district. The date mentioned by the clerk of the municipality, in the advertisement published by him pursuant to s. 12 of the Ontario Voters' Lists Act, R.S.O. 1897, c. 7, as that upon which the voters' lists have been posted up in his office, is the date from which the time for taking such proceedings, limited by s. 17, runs, even though the clerk has in fact posted up the lists some days before the date named in the advertisement.

Re Huron Voters' Lists, 7 O.L.R. 44 (Maclennan, J.A.).

—Secrecy of ballot — Act of D.R.O.—Numbering ballot.]—Under the Dominion Controverted Elections Act a ballot cast at an election is voided if there are any marks thereon by which the voter may be identified whether made by him or not. Hence, when the deputy returning officer in a polling district placed on each ballot the number corresponding to that opposite the elector's name on the voters' list the ballots were properly rejected. Judgment appealed from (9 Ont. L.R. 201) affirmed, Sedgewick and Idington, JJ, dissenting.

Wentworth Election Case, 36 Can. S.C.R. 497.

—Recount — Ballots — Mistaken initials endorsed — Torn ballots — Two adhering as one — Marked with numbers in poll book.]—On a recount of ballots the county Judge having found that three ballots marked as delineated, in the judgment, were good, and that the letters "B.S." on the back of a ballot were placed there by the deputy returning officer by mistake for his own initials "R.S." and that the validity of that ballot was saved by sub-s. 3 of s. 112 of R.S.O., 1897, c. 9 his decision was affirmed on appeal. A ballot torn in two and pinned together, no part of it being absent or wanting, held a good ballot. Re West Huron (1898) 2 Elec. Cas. 59 at p. 62 distinguished. Two ballots, consecutive in number, were supposed to have been handed to a voter, sticking together as one, with the deputy returning officer's initials on the lower one, and the voter was supposed to have marked the upper one, not initialed, which was not discovered until the counting of the votes:—Held, that the ballot marked but not initialed was properly rejected, although the initialed ballot had not been marked. Held, also, that ballots marked on the back with the number in the poll book opposite to the name of each voter were properly counted. Re Russell (2) (1879), H.E.C. 519, followed.

Re West Huron Provincial Election, 9 O.L.R. 602.

—Recount—Jurisdiction of Deputy Judge—Deputy returning officer's non-compliance with Act.]—A deputy County Court Judge, in case of the illness of the County Judge, has jurisdiction to hold a recount of ballots in an election for the provincial legislature. There is nothing in the Election Act making invalid or void the votes cast at any particular poll, in case the deputy returning officer has failed to comply with the requirements of the Act after the close of the poll; and where the deputy returning officer omits to return a statement of the votes cast, but the returning officer has no difficulty in ascertaining the number cast, the votes ought not to be rejected:—Held, also, that a ballot was properly counted for a candidate which had a well formed cross in his division, although there was a distinct indication that a cross had been placed in the other division, which was afterwards erased: Re West Elgin (No. 1) (1898), 2 Elec. Cas. 38, at p. 45, and Re Lennox (1898), 4 O.L.R. 378, followed.

Held, also, that a ballot with a mark Q in one of the divisions was well marked: Re West Huron (1898), 2 Elec. Cas. 38, cited.

Re Prince Edward Provincial Election, 9 O.L.R. 463.

—Penalty for illegal voting.]—
See ELECTION LAW I.

—Ontario Election Act—Disqualified person voting—"Postmasters in cities"—Sub-postmaster.]—A sub-postmaster appointed by the Postmaster-General to the charge of a sub-post-office in a city is not a "post-master," within the meaning of s. 4 of the Ontario Election Act, and is not liable to the penalty imposed by that section if he votes at an election for the Legislative Assembly. Judgment of Meredith, J., 10 O. L.R. 604, reversed.

Lancaster v. Shaw, 12 O.L.R. 66 (C.A.).

—Setting aside an election.]—
See ELECTION LAW II.

—Scrutiny — Disqualification of class of voters—Appeal to Court of Appeal—Jurisdiction.]—Upon proceeding with the scrutiny consequent upon the judgment of the Court of Appeal, 12 O.L.R., 453, Teetzel, J., one of the Judges who tried the petition, made a general ruling to the effect that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to show minority or alienage, notwithstanding the provisions of the Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final and conclusive:—Held, that no appeal lay to the Court of Appeal from such ruling.

Re Port Arthur and Rainy River Provincial Election, 13 O.L.R. 17 (C.A.).

—Voters' list — Finality of — Scrutiny.]—Held, affirming the decision of the rota Judges, that, upon a scrutiny, the voters' lists are final and conclusive evidence of the right of the persons named therein to vote; and no inquiry can be then entered into respecting the votes of persons on the lists, as, for example, that the voters were aliens or under age. Such questions of fact are, under the Ontario Voters' Lists Act, R.S.O. 1907, c. 7, to be tried and determined before the voters' list is finally settled, revised and transmitted, and the only exceptions are those mentioned in s. 24 of the Act. Irregularities in respect to the issue by the returning officer of certificates of transfer under s. 94 of the Ontario Election Act, R.S.O. 1897, c. 9, commented on.

Re Port Arthur and Rainy River Provincial Election (No. 4), 14 O.L.R. 345.

—Ontario Voters' Lists Act—Case stated by County Court Judge—"General question"—Specific cases.]—S. 39 of the Ontario Voters' Lists Act,, 7 Edw. VII., c. 4, only authorizes a County Court Judge to state a case for the consideration of the Court of Appeal upon some "general question" which has arisen or is likely to arise in the revision of the lists by the Judge. It is not competent for a County Court Judge to ask the Court of Appeal to determine simple questions of fact arising in any particular case, nor within the competence of the Court to relieve him of his duty to find, in such particular cases as were here stated, whether, at the times necessary to confer a right to vote, a particular person was in good faith a resident of and domiciled in some particular municipality, and had continuously resided in the electoral district, as the Ontario Election Act requires. Re Voters' List of Township of Seymour (1899), 2 Ont. Elec. Cas. 69, distinguished.

Re Norfolk Voters' Lists, 15 O.L.R. 108.

—Electoral list—Petition to amend—Proof of status.]—The mere production of the electoral list containing the name of the party who applies for its revision is not sufficient to establish the identity of the latter with the person mentioned on said list and therefore does not establish his status as an elector.

Larivée v. St. Vincent de Paul, 8 Que. P.R. 150 (Robidoux, J.).

—Wilful making of erasures in voters' list.]—(1) When a returning officer, appointed to hold a Dominion election in an electoral district, selects one of the copies of lists of voters sent to him by the clerk of the Crown in Chancery pursuant to the Dominion Elections Act, as the one which he will certify and forward to the deputy returning officer, for use at one of the polling sub-divisions, the copy so selected becomes a voters' list within the meaning of s. 528, Revised Criminal Code, and it is an indictable offence for the returning officer wilfully to erase names of voters from it either before or after he certifies it and forwards it to the deputy.

The King v. Duggan, 16 Man. R. 440, 12 Can. Cr. Cas. 147.

—Voters' list—Who may appeal against.]—Under the Ontario voters' Lists Act, 7 Edw. VII., c. 4, ss. 14 and 15 (O.), no person is entitled to be entered as an appellant in respect of the voters' list of a municipality, except a person who is entered, or entitled to be entered, on such list as a voter. Discussion and application of the rule that the operation of the enacting clause of a statute must not be restrained or enlarged by the language of a form or schedule given by such statute.

Re South Fredericksburgh Voters' List, 15 O.L.R. 308.

—Voters' lists — Appellant — Non-qualification of—Abandonment of appeal—Right to substitute new appellant.]—By s. 33 of

the Ontario Voters' Lists Act, R.S.O. 1897, c. 7, where an appellant "entitled to appeal" dies or abandons his appeal, or having been on the alphabetical list, etc., is afterwards found not to be entitled to be an appellant, the Judge may, "if he thinks proper," allow any other person who might have been an appellant to intervene and prosecute the appeal, on such terms as he may think fit. This Act was repealed by the present Voters' Lists Act, 7 Edw. VII. c. 4 (O.), s. 33, being the same as the repealed section, except that the words "entitled to appeal" are omitted, and the words "in his discretion" are substituted for the words "if he thinks proper." S. 15 defines an appellant, namely, any voter whose name is entered or who is entitled to have his name entered on the list for the municipality:—Held, that the substituted section does not empower the Judge—where an appellant, after the time for appealing has elapsed, abandons his appeal by reason of not being properly qualified—to allow a duly qualified appellant to be substituted.

Re Ontario Voters' Lists Act and West York, 15 O.L.R. 303.

—Voters' lists—Manhood suffrage voters — Assessment roll—Change of domicile.] — If the assessor has placed the name of a person on the assessment roll as a rural "M. F." voter under s. 24 of the Assessment Act, 4 Edw. VII. c. 23 (O.), the duty of the clerk of the municipality is to place the name of such person on the voters' list thereof and the conditions of that section as to his residence and domicile are those to be regarded by the Judge when finally revising the list under s. 25 (3) of that Act and s. 14 of the Voters' Lists Act, 7 Edw. VII. c. 4 (O.). A. B. having been properly placed on the assessment roll for the township of Adolphustown as M. F., removed to an adjoining township in the same electoral district, and was domiciled there at the time of hearing complaints against the voters' list for the former township, and of the final revision thereof. No appeal was made to the Court of Revision for Adolphustown to have his name removed from the assessment roll and the municipal clerk placed his name on the voters' list. He took no steps to have his name entered on the assessment roll or voters' list of the township to which he had removed, nor was any application made to have his name so added. An appeal or complaint, however, was filed to have his name struck off the Adolphustown list:—Held, that his name should not be struck off the latter list. The conditions as to the residence of the rural M.F. voters are to be looked for in the Assessment Act, 4 Edw. VII. c. 23, s. 24 (O.), and the Election Act, 8 Edw. VII. c. 3, s. 16 (O.). See also the Voters' List Act,, 7 Edw. VII. c. 4, s. 6 (O.).

Re Adolphustown Voters' List, 17 O.L.R. 312.

—Provincial election — Voting — Counterfoil not detached from ballot paper.]—At an election held under the Ontario Election Act, 8 Edw. VII. c. 3 (O.), a deputy returning officer omitted in every instance to detach the counterfoil from the ballot paper when he received it from the voter, and to destroy it, as required by s. 104 of the Act, and placed the ballot paper with its attached counterfoil in the ballot box:—Held, that the official number printed on the back of the counterfoil, as required by s. 70 (2), (6), is not a mark on the ballot paper by means of which the voter can be identified within the meaning of s. 114 (c) of the Act, and that the ballot papers were properly counted.

Re Stormont Provincial Election, 17 O.L. R. 171.

—At municipal elections.]—
See MUNICIPAL LAW.

—For school trustees.]—
See SCHOOL LAW.

II. ELECTION PETITIONS.

Publication of petition.]—Posting a copy of an election petition in the vestibule of a building owned by the county, part of which is occupied as the county registry office and part as chambers of the County Court Judge and part for other county purposes is not "posting in the registry office," although such vestibule is within the main walls of the building and was designated by the registrar of deeds as the place for posting notices to be posted in his office. Publication by posting made by the sheriff thirty-five days after receipt of the copy of the petition from the clerk of the pleas is bad under s. 6 of the Act, requiring the petition to be published "forthwith," the delay not being accounted for.

Owens v. Upham (No. 3), 39 N.B.R. 344.

—Taxation of costs.]—The costs on a rule setting aside an order fixing time for hearing under The New Brunswick Controverted Elections Act, C.S. 1903, c. 4, s. 15, include the costs, if any, of the order set aside, and the application to set it aside, but not the costs of subpœnaing witnesses, etc., under the order. The Court will not rehear or alter its order after it has been made and entered provided that it accurately expresses the intention of the Court.

Owens v. Upham, 39 N.B.R. 281.

—Protested election—Regularity of nomination—Voter.]—The respondent was declared elected as a member of the Legislature, and a petition was filed against his return. On the trial it was proved that the respondent had been nominated by four persons, and it was sought to show that one of these was not qualified, not being

on the voters' list, and not having resided in the province for one year. The nominator objected to was called and sworn, and stated that he could not remember when he came to the province, nor did he know if he was qualified to vote. The voters' list was also produced and showed his name erased:—Held, that in an election held under the provisions of ss. 269 to 284 of the Saskatchewan Election Act the entry of a voter's name on the list is not an essential qualification as a voter, and therefore the absence of the name of the nominator from the list did not in itself disqualify him as a voter. 2. That the receipt given by the returning officer under the provisions of s. 122 is conclusive evidence only as to the matters in such receipt contained, and does not apply to the qualification of the nominators. 3. That the onus of proving lack of qualification being on the petitioner, in the absence of positive evidence of lack of qualification, the negative evidence given by the party whose qualification was attacked was not sufficient to discharge the onus and prove lack of qualification.

Boice v. Anderson; Last Mountain Election Case, 2 Sask. R. 245.

Controverted election petition — Preliminary objections—Affidavit of petitioners.]—Re Qu'Appelle Dominion Election, 1 W. L. R. 496 (N.W.T.).

—Trial—Enlarging time.]—McDonald v. Bell, 1 E.L.R. 262 (N.S.).

—Preliminary objections — Objections presented by agent of respondent—Copy of objections not filed for the petitioner.]—McDonald v. Fraser, 6 E.L.R. 140 (P.E.I.).

—Petition — Erroneous date of election.]—Moiyneaux v. Crosby, 7 E.L.R. 329 (P. E. I.).

—Preliminary objections—Right of petitioners to vote.]—When, in preliminary objections to an election petition (Dominion elections), it is alleged that the petitioner had no right to vote at the election to which the petition relates, the onus is cast on the petitioner to prove that he had it. The production before the Court of the actual list used in the polling division in which the petitioner claims to have had the right to vote, or of a copy thereof by the clerk of the Crown in Chancery or his deputy, and the identification of the petitioner's name thereon, fully proves the right to vote. The production of copies of the lists in the custody of the registrar of the county, or of the secretary-treasurer of the municipality in which the polling division is situated, makes no proof and is useless.

Lortie v. Turcotte, 37 Que. S.C. 193.

—Power of the Court to declare void an order made by a Judge.]—(1) The powers of the Superior Court and of its Judges in this province, with reference to an election petition, being declared by the Dominion Controverted Election Act to be the same as if such petition were an ordinary cause within their jurisdiction, no Judge can make an order in a Dominion controverted election case, in the nature of an order in Chambers, outside of the chef-lieu of the district, in which the case is depending. Hence, an order made by a Judge at Knowlton to enlarge the delay to serve an election petition addressed to the Court and presented therein, in the district of Bedford, of which the chef-lieu is Sweetsburg, is null and void. (2) The Superior Court, sitting as an election Court, has the power to declare an order, made by one of its Judges, null and void.

Robinson v. Fisher; the Brome Election Case, 37 Que. S.C. 19.

—Objection to particulars.]—It is too late on an appeal from the judgment on an election petition to object to the insufficiency or vagueness of the particulars.

Re North Waterloo, 2 Election Cases 70.

—Dismissal of petition at trial—Sheriff's cost of publication—Payment of petitioner—Claim of security deposited.]—Where an election petition is dismissed at the trial without costs, the petitioner must pay to the sheriff the costs incurred in the publication of the notice of trial thereof; and although the sum deposited as security is not security for such expenditure, payment out of Court will only be ordered on the condition of its being made good to the sheriff. No charge can be made by the sheriff for attending to the publication, no allowance therefor being authoried by the tariff.

Re East Middlesex, 2 Election Cases 150.

—Change of solicitors—Right to object to—Withdrawal of petition—Deposit as security for costs—Time to apply to substitute petitioner.]—The only person who can complain of an order changing solicitors in an election matter is the former solicitor, and his right is a limited right; and the Court will not consider it unless as a part of a scheme to get rid of the petition. An ordinary voter has no status to attack the order. Even if the applicant here had the right to move against an order allowing the petition to be withdrawn:—Held, on the evidence adduced, that there was no irregularity in the application to withdraw. Semble, even if there was reason to suspect collusion, the petitioner has the right to withdraw, but the Judge might order that the deposit should remain as security for the costs of a substituted petitioner. The proper time to make an application to substitute a petitioner is at the time the motion is made to withdraw the petition, and the Judge's power is limited in that respect. If no application is then made, and the order for withdrawal is granted, the peti-

tion is out of Court and cannot be revived. Even if there was power to make such an order at a later period it should be applied for within a reasonable time and full explanation of the delay given, neither of which conditions being complied with and a delay of more than two months occurring:—Held, that the application here was too late.

Re South Leeds, Kelly v. Taylor, 2 Election Cases 1.

—Substituting new petitioner—Jurisdiction—Dominion.]—The Court has no power in a proceeding under the Dominion Controverted Elections Act to substitute a new petitioner unless either no day has been fixed within the time prescribed by statute or notice of withdrawal has been given by the petitioner; and where a petition came regularly down to trial and the petitioner stated he had no evidence to offer, an application of a third surety to be substituted as petitioner upon vague charges made on information and belief, of collusion in the dropping of the petition, which were contradicted, and of corrupt practices, was refused and the petition dismissed with costs.

Re South Essex, Tofflemire v. Allan, 2 Election Cases 6.

—Cross petition — Security for costs.]—Under s. 13 of the Controverted Elections Act, R.S.O. 1887, c. 10, security for costs is required only in the case of the original or principal petition, and not in that of a cross petition.

Re Kingston, Vanilstine v. Harty, 2 Election Cases 10.

—Petition—Service out of jurisdiction.]—A petition to unseat a member may be duly served out of the jurisdiction of the Court; and it is not essential that an application should be made for leave to elect such service, or for allowing the service so made.

Re West Algoma, Whitacre v. Savage, 2 Election Cases 13.

—Notice of endorsement on petition.]—It is not essential under the Ontario Act, R.S.O. c. 11, s. 15, that a notice of the presentation of a petition should be served, where such notice is indorsed on the petition.

Re Ottawa Randall v. Powell, 2 Election Cases 64.

—Rules of Court—Validity of—Payment into Court—Appointment of master.]— Payment into Court in the usual way is a good payment in, within the meaning of Rule 16 of the Parliamentary Election Petition Rules, 1868 (Imperial). A rule made by the Judges empowering the senior puisne Judge, or any other Judge of the Court to perform the duties devolving by the rules on the chief justice whenever the office of chief justice is vacant, or he is absent from the province, is valid. Appointment of a new master under said rules operates ipso facto as a rescission of any former appointment, it being unnecessary to rescind any former appointment by express writing. The full Court on appeal allowed evidence to be adduced to prove status of petitioners although the matter was not gone into in the Court below.

Jardine v. Bullen, Esquimalt Election Case, 7 B.C.R. 471.

— Petition — Affidavit — Bond — Particulars.]—(1) If a petition contesting an election is served within fifteen days from such election, and another service is ordered, the delay given for the presentation of the petition being insufficient, the petition shall not be dismissed on the ground that the second service of the petition was made more than five days after the election. (2) Such petition need not be accompanied by affidavit. (3) The absence of justification showing a surety to be qualified as required by law is not a ground of nullity of the bond justifying a demand for dismissal of a petition in contestation of election, but the respondent is entitled to have the said surety justify that he complied with the requirements of the law. (4) The fact that some allegations of the petition are not sufficiently detailed does not constitute ground for the rejection of the petition.

Therien v. Senecal, 4 Que. P.R. 66.

—Rules of Court—Validity of—"Proposed security."]—In s. 216 of the Provincial Elections Act "proposed security" means "intended security" and a notice by petitioner informing respondent that security would be given by depositing $2,000.00 with the registrar was held a good notice pursuant to the section. The additional rules made 27th January, 1875 (i.e., in addition to the Parliamentary Election Petition Rules, Michaelmas Term, 1868), are in force in British Columbia. The petitioner after serving notice of the presentation of the petition and of the proposed security omitted to file an affidavit of the time and manner of such service thereof:—Held, by Martin, J., that the petition should not be struck off the files of the Court on that ground.

Stoddart v. Prentice, Lillooet Election Case, 7 B.C.R. 498.

—Preliminary objections — Proof of status of petitioner.]—On the trial of the preliminary objection to an election petition, filed under the Dominion Controverted Elections Act, that the petitioners were not persons entitled to vote at the election in question, it is not necessary since the passing of The Franchise Act, 1898, and The Dominion Elections Act, 1900, to prove that the names of the petitioners were on the list of voters which was actually used by the deputy returning officer at the particular polling division; but it will be sufficient to show that their names were on the original list trans-

mitted under s. 16 of the Franchise Act, 1898, by the custodian thereof after final revison to the clerk of the Crown in chancery, as this is declared by sub-s. 2 of s. 16 to be "the original and legal list of voters for the polling division for which the list of which it is a copy was prepared;" and under s. 10 of the same Act this list may be proved by the production of a copy authenticated by the ordinary imprint of the Queen's printer. The Richelieu Case (1892), 21 S.C.R. 168, and the Winnipeg and Macdonald Cases (1897), 27 S.C.R. 201, distinguished on the ground of changes in legislation.

In re Provencher Dominion Election, 13 Man. R. 444.

—Petition — Signature — Preliminary objections.]—A petition may be set aside upon summary application upon grounds other than those contained in s. 10 of the Controverted Election Ordinance, 1898, c. 4.

Re Banff Election, Brett v. Sifton (No. 2), 4 Terr. L.R. 253.

—Stay of proceedings — Time for particulars—Jurisdiction to extend.]— Under the provisions of s. 18 of the Controverted Elections Ordinance and Rule 548 of the Judicature Ordinance, the Judge has jurisdiction to extend the time for applying for particulars even after the time limited by s. 11 of the former Ordinance has elapsed. Proceedings stayed pending appeal, time for applying for particulars enlarged, typewritten instead of printed appeal books allowed and costs directed to abide result of appeal.

Re Banff Election, Brett v. Sifton (No. 3), 4 Terr. L.R. 263 (Scott, J.).

—No return of member—Illegal deposit—Parties to petition.]—A petition under the Dominion Controverted Elections Act (R.S. C. c. 9) alleged that T., a respondent, who had obtained a majority of the votes at the election, was not properly nominated, and claimed the seat for his opponent, and that if it should be held that T. was duly elected his election should be set aside for corrupt acts by himself and agents:—Held, that the petition as framed came within the provisions of s. 5 of the Act and that T. was properly made a respondent.

Re West Durham, Thornton v. Burnham, 31 Can. S.C.R. 314.

—Preliminary objections — Prejudice.]—A party is not obliged in preliminary exceptions and with greater reason to those made to a petition against the return in an election, to specifically alleged prejudice.

Sweeney v. Lovell, 3 Que. P.R. 422 (S.C.).

—Special circumstances of difficulty in effecting service of petition—Order extending time.]—A petition under the Dominion Controverted Elections Act was filed against respondent's return on December 17 last. On December 22 the petitioner's attorney at St. John mailed—registered—to the petitioner's address at Campbellton a copy of the petition and accompanying papers with directions to hand them to the sheriff for service. The petitioner was absent from home at the time and his attention was not called to the arrival of the registered letter until December 27, when he received it from the post office. As this was the last of the ten days allowed by s. 10 of the Act, for service, and it was impossible on account of the respondent living some thirty-six miles distant to effect service that day, the petitioner wired to his solicitor in St. John, who on affidavit of the facts applied for and obtained from a Judge on the same day an order extending the time for service:—Held, that the circumstances were such as to justify the Judge making the order under s. 10 of the Act. Rule to rescind the order and remove the petition from the files of the Court refused.

McAllister v. Reid, 37 C.L.J. 204 (S.C. N.B.).

—Order for substitute service.]—An order for substitute service of the notice of the presentation of an election petition under s. 10 of the Dominion Controverted Elections Act, as amended by s. 8 of c. 29 of the Acts of 1891, is not invalid by reason of its being applied for and made after the expiry of the time allowed for personal service. Rule nisi to rescind order discharged with costs.

York Election Case, 37 C.L.J. 430 (S.C. N.B.).

—Petition against returning officer—Nomination—Postponement of election—Claiming seat—Prerogative.]—On the day fixed for the nomination the returning officer announced that there would be no meeting for the purpose of making nominations as there were no proper voters' lists. He made a special return to the executive government, which issued a new writ, under which the present member was declared duly returned by acclamation. A petition was filed against the returning officer claiming the seat for the petitioner who claimed to be a candidate on the day of the abortive nomination:—Held, that there could be no relief under the circumstances. There had been no nomination, and there was no vacancy in the representation of the riding, and there was probably no jurisdiction to entertain the petition.

In re Nipissing Election (Dominion); Klock v. Varin, 37 C.L.J. 355.

—Controverted election — Lost record — Substituted copy—Judgment on preliminary objections—Discretion of Court below—Jurisdiction.]—The record in the case of a controverted election was produced in the Supreme Court of Canada on an appeal against the judgment on preliminary objections, and, in re-transmission to the Court

below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was reconstructed in the substitution of the lost record, and upon verification as to its correctness, the Court below ordered the substituted record to be filed. Thereupon, the respondent in the Court below raised preliminary objections, traversing the correctness of a clause in the substituted petition which was dismissed by the judgment appealed from:—Held, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to revise the discretion of the Court below in ordering the substituted record to be filed.

Two Mountains Election Case (No. 2), Ethier v. Legault, 32 Can. S.C.R. 55.

—Controverted election—Trial of petition—Extension of time—Appeal—Jurisdiction.]—On 25th May, 1901, an order was made by Mr. Justice Belanger for the trial of the petition against the appellant's return as a member of the House of Commons for Beauharnois thirty days after judgment should be given by the Supreme Court on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on 29th October and on 19th November, on application of the petitioner for instructions, another order was made by the said Judge which decided that juridical days only should be counted in computing the said thirty days, stating that such was the meaning of the order of 25th May, and that 6th December would be the date of trial. On the petition coming on for trial on 6th December appellant moved for peremption on the ground that the six months limit for hearing had expired. The motion was refused and on the merits the election was declared void. On appeal to the Supreme Court:—Held, Davies, J., dissenting, that an appeal would not lie from the order of 19th November; that the Judge had power to make such order, and its effect was to extend the time for trial to 6th December, and the order for peremption was, therefore, rightly refused.

Beauharnois Election Case, Loy v. Poirer, 32 Can. S.C.R. 111.

—Appeal—Controverted election — Judgment dismissing petition.]—An appeal does not lie to the Supreme Court of Canada from a judgment dismissing an election petition for want of prosecution within the six months prescribed by s. 32 of The Dominion Controverted Elections Act (R.S.C. c 9).

Richelieu Election Case, Vanasse v. Bruneau, 32 Can. S.C.R. 118.

—Election petition—Deposit of copy—Preliminary objections.]—Where a copy of an election petition was not left with the prothonotary when the petition was filed and, when deposited later, the forty days within which the petition had to be filed had expired: — Held, Gwynne, J., dissenting, that the petition was properly dismissed on preliminary objections (8 B.C. Rep. 65). Lisgar Election Case (20 Can. S.C.R. 1) followed. Per Gwynne, J.—The Supreme Court is competent to overrule a judgment of the Court differently constituted if it clearly appears to be erroneous.

Burrard Election Case, Duval v. Maxwell, 31 Can. S.C.R. 459, affirming 8 B.C.R. 65.

—Controverted election — Preliminary objections—Status of petitioner.]—The principal contention on preliminary objections to a controverted election petition was that the petition had been guilty of corrupt practices before and during the election, and that, by the effect of the statutes 61 Vict. c. 14, and 63 & 64 Vict. c. 12, the Dominion Franchise Act was repealed, and the provisions of the Quebec Elections Act regulating the franchise in the Province of Quebec substituted therefor so as, thereby, to deprive the petitioner of a right to vote under 59 Vict. c. 9, s. 272, and being so deprived of a vote that he had no status as petitioner. In the Election Court, evidence was taken on issues joined, and the Judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada:—Held, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise. Per Gwynne, J.—The amendment to the Dominion Franchise Act by 61 Vict. c. 14 (D.), and 63 & 64 Vict. c. 12 (D.), has not introduced into that Act the provisions of s. 272 of "The Quebec Elections Act" so as to deprive a person properly on the list of voters for a Dominion election of his right to vote at such election.

Beauharnois Election Case, Loy v. Poirer, 31 Can. S.C.R. 447.

—Election petition—Presentation of—Time—Computation of.]—An election petition under R.S.B.C. 1897, c. 67, s. 214, must be filed within the twenty-one days of the exact time of the return. Decision of Martin, J., 8 B.C.R. 273, affirmed.

Rae v. Gifford, 9 B.C.R. 192.

—Controverted election — Status of petitioner—Evidence—Certified copy of voters' list—Imprint of Queen's printer—Form of petition—Jurat.]—On the hearing of preliminary objections to a controverted election petition the production of a list appearing on its face to be an imprint emanating from the Queen's printer, certified by the clerk of the Crown in Chancery to be a copy of the voters' list used at the

election, and upon which the name of the petitioner appeared as a person having a right to vote at such election, is sufficient proof of the status of the petitioner. A copy of a list of electors bearing upon its face a statement that it is issued by the Queen's printer makes proof of its contents without further verification. The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le Districte de Terrebonne." Per Gwynne, J.—An objection to the regularity of the subscription to the jurat does not constitute proper matter to be inquired into by way of preliminary objection to the petition.

Two Mountains Election Case, Ethier v. Legault, 31 Can. S.C.R. 437.

—Petition — Copy — Service.] — In the printed copy of the petition served upon the respondent the concluding prayer had, by mistake of a clerk, a pen stroke drawn through it:—Held, that though the copy was not a "true copy" of the original, yet as the defect was a purely formal one, and could not possibly have misled the respondent, it was not fatal, and leave to amend was given.

Re Centre Bruce Provincial Election, 4 O.L.R. 263.

—Controverted election—Service — Deposit —54 and 55 Vict. c. 20, s. 8 (D.)—Superior Court R. of P. 12.]—The Dominion statute, 54 & 55 Vict. c. 20, s. 8, provides three modes for serving notice of an election petition: —(a) If service is made within ten days after the petition is filed it is analogous to a writ in a civil action. (b) If by reason of special difficulty the petition is not served within the ten days the Court or Judge may extend the time, in which case the service should be personal. (c) If within the extended time it has been found impossible to effect personal service the Court or Judge may order it to be made in some other manner. Rule 12 of the practice of the Superior Court does not apply to a deposit made in contesting a federal election of the money of the petitioner's attorney.

Belanger v. Carbonneau, 5 Que. P.R. 8 (Sup. Ct.).

—Petition — Misdescription of electoral district—Surplusage — Amendment.]—The petition and other proceedings in an election case were headed in the proper Court, and purported to be under The Ontario Controverted Elections Act, as to the "Election of a member of the Legislative Assembly for the Province of Ontario for the electoral district of Lincoln and Niagara, holden on the 22nd and 29th days of May, 1902." No such provincial electoral district as Lincoln and Niagara existed, but there was an electoral district for Lincoln, being the district intended:—Held, that the misdescription was not fatal; that the additional words might be treated as surplusage and struck out, leave being given to the petitioner to make such amendment.

Lincoln Provincial Election, McKinnon v. Jessop, 4 O.L.R. 456.

—Election petition—Service—Extension of time.]—The petitioner contesting an election may, after the defendant has appeared and filed preliminary exceptions based on the irregularity of service of the petition, obtain ex parte a Judges' order extending the time for service and that without abandoning the previous proceedings.

Labelle v. Leonard, 5 Que. P.R. 77 (Sup. Ct.).

—Controverted election petition—Affidavit of petitioners' bona fides—Commissioner — Qualification—Agent for solicitor.] — The respondent to a petition under the Ontario Controverted Elections Act moved to set aside or dismiss the petition and to set aside the service thereof and of the affidavit of bona fides and of notice of presentation, because the commissioner before whom the affidavit was sworn was the solicitor by whom the petition and affidavit were prepared, and by whom, as agent for the petitioners' solicitors, the petition was presented:—Held, that the commissioner was not disqualified.

Re Lennox Provincial Election, Perry v. Carscallen, 4 O.L.R. 647 (Osler, J.A.).

—Controverted election — Appeal — Settlement of case.]—No machinery has been provided by the Ontario Controverted Elections Act or by the Rules for the settlement of a case upon an appeal to the Court of Appeal from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court. Semble, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal.

Re South Oxford Provincial Election, McKay v. Sutherland, 5 O.L.R. 58.

—Costs — Attendance of official to produce documents which might have been proved by certified copies.]—Since the Franchise Act, 1898, provides that the voters' lists used at an election of a member of the House of Commons may be proved by the production of certified copies, it is unnecessary to procure the attendance of the clerk of the Crown in Chancery from Ottawa to produce the lists at the trial of an election petition, and the costs occasioned by procuring his attendance will not be allowed to the successful petitioner as against the respondent, but instead thereof only what the certified copies of the necessary parts of the lists, if procured, would have cost.

Re Lisgar Election, 14 Man. R. 268.

—Stay of proceedings pending appeal on preliminary objections—Trial within six

months — Extension of time — Disqualification.]—Preliminary objections to an election petition filed on 22nd February, 1902, were dismissed by Loranger, J., on April 24th, and an appeal was taken to the Supreme Court of Canada. On 31st May, Mr. Justice Loranger ordered that the trial of the petition be adjourned to the thirtieth judicial day after the judgment of the Supreme Court was given, and the same was given dismissing the appeal on October 10th, making November 17th the day fixed for the trial under the order of 31st May. On November 14th a motion was made before Loranger, J., on behalf of the member elect, to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on 17th November, but the Judge held that the trial could not proceed on that day, as the order for adjournment had not fixed a certain time and place, and on motion by the petitioner he ordered that it be commenced on December 4th. The trial was begun on that day and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial Judges was renewed:—Held, that the effect of the order of May 31st was to fix November 17th as the date of commencement of the trial; that the time between May 31st and October 10th, when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun, and that December 4th, on which it was begun, was, therefore, within the said six months. Held, also, that if the order of 31st May could not be considered as fixing a day for the trial, it operated as a stay of proceedings and the order of Mr. Justice Lavergne, on November 17th, was proper. As to the disqualification of the member elect by the judgment appealed from, the members of the Court were equally divided and the judgment stood affirmed.

St. James Election Case, Brunet v. Bergeron, 33 Can. S.C.R. 137.

—Order for substituted service—Jurisdiction to make order after time for personal service expired.]—Under s. 8 of c. 20 of 54 & 55 Vict., substituted for s. 10 of the Dominion Controverted Elections Act, the Court has jurisdiction to make an order for substituted personal service where the application for the order is not made until after the time allowed for personal service has expired. The order is not bad because it omits to fix a time within which the substituted service must be made. Where the petitioner, by reason of a deception practiced upon him, erroneously believed a personal service had been effected, and allowed five days after the extended time to elapse before taking out the order for substituted service:—Held, that it was not too late.

McLeod v. Gibson, 35 N.B.R. 376.

—Dominion election petition—Difficulty in effecting service — Extending time.] — An election petition filed in the clerk's office on the 17th December, was sent to the petitioner at C. by registered letter on the 20th, and was received at the postoffice at C. on the evening of that day, but for some reason that was not explained, the letter was not delivered, and the petitioner had no knowledge of its receipt until the 27th, the last day for service:—Held, that an order extending the time for service was properly made.

McAllister v. Reid, 35 N.B.R. 390.

—Controverted Dominion election—Appeal to Supreme Court—Preliminary objections.] —If the respondent in a contested Dominion election appeals to the Supreme Court of Canada from the judgment dismissing his preliminary objections, the Superior Court cannot, so long as the appeal remains undecided, fix a day for the hearing on the merits, but it should, on the contrary, suspend the proceedings and postpone the hearing of the petition.

Bergeron v. Brunet, 5 Que. P.R. 156.

—Controverted Dominion elections — Fees of sheriff and criers.]—1. The sheriff has no right to claim fees in the matter of a contestation of a Dominion election unless his presence in Court has been requisitioned. 2. Criers' fees may be taxed as part of the costs in a contestation of a Dominion election.

Bergeron v. Brunet, 5 Que. P.R. 433.

— Dominion Elections Act — Advocates' fees.]—1. The fee of an advocate or counsel on a controverted election can not exceed, for hearing on the merits, the amount provided by the Act, 54 & 55 Vict. c. 20, s. 15 (D.). 2. The fee allowed by the above section does not include either the disbursements in the case nor fees upon preliminary procedure.

Bergeron v. Brunet, 5 Que. P.R. 434.

— Preliminary objections — Particulars.] —1. Where the contestation of an election petition sets up that the petitioner's name has not been legally entered upon the list of electors, the respondent is bound to state wherein such alleged illegality consists. 2. The respondent must also give particulars of corrupt practices of which he accuses the petitioner, of expenses alleged to have been incurred by him, and the names of electors whom it is charged that he treated. 3. The respondent must also set out the intriguing charged against the petitioner, payments and promises of payments of money or of rewards which he is charged to have made and to give the circumstances,

with particulars of each such offence charged.

Ste. Marie v. Perrault, 5 Que. P.R. 430.

—Disagreement of trial Judges on charge of corruption—Right of appeal — Ontario Elections Act.]—The Judges at the trial of an election petition having reserved judgment in respect of five charges, subsequently dismissed four of them, both judges agreeing as to the result. As to the fifth charge—payment of money by the candidate to a voter to induce the latter to vote for him—the Judges disagreed; one being in favour of the dismissal of the charge; the other being of opinion that the charge was proved. On an appeal to the Court of Appeal:—Held, that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, as to which there would otherwise be no right of appeal. Held, also, that the provisions of the Ontario Controverted Elections Act relating to the right of appeal in cases of disagreement between the Judges, must be construed in connection with the other provisions of the same Act; and also with the provisions of the Ontario Elections Act which are in pari materia; and that there is no right of appeal to the Court of Appeal in respect of a charge of corrupt practices where the two Judges who try the charge fail to agree.

Re Lennox Provincial Election; Perry v. Carscallen, 6 O.L.R. 203 (C.A.).

—Election petition — Application to fix day for trial — Extending time for trial — Grounds for.] — The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from March 10th to June 27th. On November 5th applications were made by the petitions to a Judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the Judge was unable then to fix dates, and the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before the same Judge (one of the Judges of the Court of Appeal) for, and obtained orders extending the time for the commencement of the trials, upon affidavits showing that the petitioners believed that the Court would fix days for trial suitable to the Judges' other engagements; that bribery was extensively practised on behalf of the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were made bona fide and not for delay:—Held, that the applications to the rota Judge were in time to enable the trials to be commenced within six months from the date of the presentation of the petition (excluding the time occupied by the session) within the meaning of ss. 47 and 48 of the Ontario Controverted Elections Act; and the failure to fix days could not be attributed to the petitioners; ss. 16 and 47 of the Act and Rules 26 and 27 leaving the fixing of days in the hands of the rota Judges. It was not open to the respondents to complain of lack of diligence by the petitioners within the six months, no days for trial having been fixed. Much of what was necessary to be shown on the application to extend the time, transpired in the presence of the Judge, and the facts were within his own knowledge; there was no reason why he should not act upon that knowledge in considering the applications. And having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders; the Judge rightly exercising his discretion upon sufficient grounds and for sufficient reason appearing before him, and his orders should not be interfered with. The appropriate form of the orders would be to extend the time for fixing the days of trial, rather than the time for the commencement of the trial.

In re North Norfolk Provincial Election, 40 C.L.J. 31, 6 O.L.R. 597.

—Presentation of petition — Copy for returning officer — Omission — Extension of time.] — Election petitions filed with local registrars under 62 Vic. (2nd sess.) c. 6 (O.) are received by them as registrars of the Court of Appeal. Although a petitioner who does not leave with the local registrar a copy of the petition at the time of filing the petition to be sent to the returning officer is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the Court or a Judge in a proper case to enlarge the time appointed. And when through inadvertence the solicitor for a petitioner had omitted to leave the copy and applied without delay, the time was extended, and an order for the dismissal of the petition was discharged.

Re North Grey Election; Boyd v. MacKay, 6 O.L.R. 273 (C.A.).

—Controverted election petition — Particulars — Costs — Witness fees — Failure of charges — Uninvestigated charges.] —At the trial of a controverted election petition sixteen witnesses were examined for the petitioner generally and with special reference to six charges, which were investigated. The total number of charges in the particulars of record was 685, and application was made at the trial to add eight or ten more. Upon one case of brib-

ery being proved, or perhaps two, the respondent admitted responsibilty for the corrupt act of an agent, and did not claim the protection of the saving clause of the statute. Thereupon the Court declared the seat vacated, and no further evidence was given. Two charges were proved; all the others taken up failed. It was said that 225 witnesses were subpœnaed and paid in all $530:—Held, that the number of charges was excessive. The practice of heaping up particulars should not be encouraged. No costs were allowed of the charges which failed, nor of witnesses subpœnaed for the supplemental charges. The petitioner was allowed as against the respondent a reasonably approximate apportionment of the outlay for witness fees in respect of the charges not taken up, fixed at $230.

Re North Norfolk Provincial Election; Snider v. Little, 8 O.L.R. 566.

—Examination of respondent for discovery —Inquiry into corrupt practices committed at former election — Scope of.] — Corrupt practices said to have been committed by the respondent to a controverted election petition at a former election, on the petition against which he was declared to have been duly elected, cannot, as such, and as committed with reference to that election, be inquired into for the purpose of invalidating the election in question. Therefore, the petitioner has no right, upon the examination of the respondent for discovery, to make a general inquiry into such corrupt practices, unless it can be shown that they are in some way connected with and are still operative upon the election in question. Where a question was asked with reference to a discussion between the respondent and another person before the previous election, coupled with a statement that the discussion was alleged to have been renewed at the election in question:—Held, that the question should be answered. If an examination for discovery is not conducted with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed. Where the examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it:—Held, that the respondent must attend for further examination.

Re North York Provincial Election, 6 O. L.R. 714.

—Qualification of petitioner — "Reside."] —One of the petitioners was the owner of a farm situate in the electoral district, but the dwelling house and part of the land was in one township and the main part of the land in another township. The part on which was the dwelling was assessed for $750 only, but the aggregate assessment of the whole farm exceeded $1,000: — Held, that the petitioner was not qualified under s. 3 of the Controverted Elections Act, R. S.O. c. 11, as amended by 62 Vict. (2), c. 6, s. 1, 1897.

In re North Renfrew (Provincial), 7 O. L.R. 204 (Moss, C.J.O.).

— Fixing time for trial — Application by petitioner — Extending time.] — While there is nothing to prevent a petitioner from making an application to fix the time and place of trial, he cannot be said to be in default for not having done so. The obligation and initiative in that respect are cast upon the rota Judges, the only penalty upon the petitioner being, that if three months elapse after the presentation of the petition without the day for the trial being fixed, any elector may on application be substituted for the petitioner on proper terms. And where the Judges' other engagements are such as to make it difficult for them to fix a time to try the petition, an application to extend the time for proceeding to trial will be granted almost as a matter of course.

Re Centre Bruce Provincial Election; Stewart v. Clark, 7 O.L.R. 28.

— Presentation of petition — Subsequent denial by two of the petitioners of the statements contained therein — Absence of corroboration.] — Within a few days after the presentation of an election petition, signed in a solicitor's presence, with the affidavits accompanying it, sworn to before another solicitor, deposing to the presentation of the petition being in good faith, and with reason to believe the statements contained in it were true in substance and in fact, and after a retainer of the first named solicitor to conduct the proceedings, two of the petitioners made affidavits virtually contradicting their former affidavits, one of them deposing to having been intoxicated at the time and unable properly to realize what he was doing, the petition having been partially read over to him, some of the statements in which he had since found were wholly untrue, while as to others he knew nothing; the other petitioner stating that he was an old man, unable to read or write, and without the petition being read over or explained to him, and without his having any independent advice and without his appreciating his position, he was induced by the first-named solicitor and a hotelkeeper to sign the petition and swear to the affidavits:—Held, that, in the absence, not only of any corroboration of the statements made in the subsequent affidavits, but in the face of their denial by the parties interested, as well as by another person then present, they were not sufficient to support an application made by the respondent, to set aside the petition.

Re North Renfrew Provincial Election; Wright v. Dunlop, 8 O.L.R. 359 (C.A.).

— Status of petitioner — Court fees — Deposit — Power of attorney — Qualifica-

tion of bailiff.]—(1) A party who contests a Federal election has only to show that he had a right to vote at the election in question, and the fact that he is on the voters' list as a tenant instead of as an occupant does not affect his status. (2) No court house tax is payable upon an election petition. (3) The respondent has no interest in urging that the prothonotary gave credit to the petitioner's attorney, instead of claiming his fee on the election petition at once. (4) A copy of an election petition which is followed by an affidavit is not invalid by the mere fact that a copy of the petition itself is not certified with the words "true copy" when the signature appears at the end of the last document, the affidavit. (5) A deposit of bank bills accepted by the prothonotary is regular. (6) It is regular to serve a copy of the election petition and affidavit, not a duplicate thereof. (7) A bailiff will not be declared unqualified by the mere fact that no proof has been shown that his guarantee policy has been renewed.

Re Missisquoi Election; Morin v. Meigs, 6 Que. P.R. 372.

—Election petition—Service—Extension of time for—Special circumstances.] — Under substituted s. 10 (s. 8 of c. 20, Statutes of Canada, (1891) of the Dominion Controverted Elections Act, a Judge of the Election Court has jurisdiction to extend the time for personal service of the petition on the ground of special circumstances of difficulty in effecting service, if it appears there was a bona fide attempt to serve and ordinary diligence is used in trying to effect a service, even though it is shown that the petition was not delivered to the officer for service for four days after it was filed, and during the whole period allowed by the section for service the respondent was at or in the vicinity of his residence, and made no attempt and colluded with no person to avoid service, and might have been served if more than ordinary diligence had been used.

Re Sunbury and Queens Election; Nason v. Wilmot, 35 N.B.R. 457.

—N. W. T. Controverted Elections Ordinance — Petition — Deposit — Bank bills.] —A petition under the Controverted Elections Ordinance (C. O. 1888, c. 5) was filed with the clerk of the Court at Calgary under s. 3, he being the clerk whose office was nearest to the residence of the returning officer, and afterwards forwarded to the deputy clerk at Edmonton. The deposit of $500 required by s. 5 was made with the deputy clerk, who thereupon issued the writ of summons under s. 7:—Held, that the deputy clerk was, by virtue of s. 3 of Ordinance 10 of 1891-2, the proper person to receive the deposit and issue the writ of summons. The deposit was made in bills of a chartered bank. Held, that a payment or deposit of a sum of money required by statute need not, in the absence of express provision, be made in gold or legal tender; and that, therefore, the deposit was sufficient.

Prince v. Maloney, 2 Terr. L.R. 173.

— Election petition — Preliminary objections—Motion to strike out.]—Preliminary objections to an election petition having, on summons to strike them out or otherwise dispose of them, been struck out on the ground that they were not filed in time inasmuch as they were filed after office hours on the last day limited for filing; and an appeal from the order to the Supreme Court of Canada being pending:—Held, that inasmuch as the preliminary objections had not been considered upon their merits, and one of the objections if sustained would finally dispose of the petition, the Court should not fix a time for the trial of the petition.

West Assiniboia Dominion Election Case; McDougall v. Davin, 2 Terr. L.R. 417.

— Judgment voiding election — Dissolution of Legislature — Effect of pending appeal.] — Where, after an appeal from the judgment of the trial Judges voiding the election of the respondent had been argued, and while it was standing for judgment, the Legislative Assembly was dissolved:—Held, that the Court of Appeal could make no order, as to costs or otherwise.

Re North York Provincial Election; Kennedy v. Davis, 10 O.L.R. 93 (C.A.).

— Preliminary objections — Status of petitioner — Time of trial — Notice.]—Under the Quebec Election Act an allegation that the deposit required was not made by the petitioner and that the latter was only a prete-nom for another cannot avail as a preliminary objection. If the respondent alleges that the petitioner is not a British subject and a qualified voter the petitioner must prove his status to contest the election. The production of the original list on which the voting took place, or of a copy duly certified by the official who has the custody of the original is the best proof of the status of the petitioner; and if the latter voted at the election without objection his capacity of elector cannot afterwards be questioned. The production of a baptismal certificate, giving the date of the petitioner's birth and the domicile in the province of his parents at the time, is sufficient proof that he is a British subject notwithstanding the baptism took place more than twenty-four years after his birth; and the onus is on the respondent of proving that, although baptised in the province, he was born in a foreign country. The law not having provided procedure for hearing preliminary

objections the evidence of the witnesses should be taken by a stenographer appointed by the Judge, occupying his proper place, and the witnesses may be sworn by the clerk of the Court (deputy prothonotary of the Superior Court) in presence of the Judge; this procedure conforms to the spirit of the law as indicated in articles 473 and 500 of the Quebec Controverted Elections Act. To prove the holding of the election it is not necessary to produce the writ nor the proclamation and appointment of the returning officer; verbal evidence may be given of these facts. (Art. 515 Quebec Controverted Elections Act.) The Controverted Elections Act of Quebec and the rules of practice thereunder do not provide for any notice of the time for the hearing but leave to the Judge the duty of fixing the date for commencement of the trial on application of one of the parties as he considers convenient in the interest of the parties and the public; and the rules followed in England in this respect are not in accord with the law and rules of practice governing election petitions in the Province of Quebec. The Judge may, without causing prejudice to the parties, fix the day for trial of the petition at the same time that he grants a motion of the respondent for particulars, but the trial should be limited to the facts as to which particulars are not demanded and of which proof can be made by the production of public and official documents, and the enquete as to the other matters may be postponed until the particulars are filed. It is not necessary to give public notice of the date appointed for the trial, the only public notice required by law being that of discontinuance of the proceedings or abandonment of the petition.

Dyer v. McCorkill (Brome Election Cace), Q.R. 26 S.C. 392 (Ct. Rev.).

—**Election petition — Affidavit.**]—An affidavit stating that all the allegations in the election petition are true "to the best of my knowledge" is not a compliance with the terms of the Act requiring the deponent to swear "that he has good reason to believe and verily does believe," etc.

Lemieux v. Paquet, Q.R. 27 S.C. 159 (Sup. Ct.).

—**Status of petitioner — Proof — Notice of petition and deposit of security.**] — At the hearing of the preliminary objections to an election petition the petitioners were called and gave evidence that they were British subjects by birth and had resided in the North-West Territories and in the electoral district of Alberta for more than a year before the issue of the writ for the election, and that they were not in any way disqualified to vote and had voted at that election. There was also produced and put in evidence a copy of the voters' list for polling division No. 51 for the electoral district, and the petitioners identified their names thereon. The copy of the list was certified by the Clerk of the Crown in Chancery. Notice under the Canada Evidence Act of adducing this copy in evidence was proved to have been given to the respondent in due time. In the Territories the voters' list is not final; the real criterion of a person's right to vote is his ability to take the oath of qualification; if he is not on the list and takes the oath, he is put on by the deputy returning officer; if he is on, but refuses to take the oath, his name is struck off. The evidence given was therefore admissible to prove the status of the petitioners; held, also, that the voters' list was a public document, and, as the original could be received in evidence, the certified copy was also evidence under the Canada Evidence Act. It was further objected that no notice of the presentation of the petition nor of the nature of the security furnished nor of the time and manner of furnishing was given to the respondent. A notice was in fact served upon the respondent, but by a clerical error it described the respondent as member for West Assiniboia instead of for Alberta. It was held that this was not a notice of the presentation of the petition as required by the Act; but, attached to the petition served on the respondent, was a copy of the certificate of the Registrar of the Court to the effect that a proper deposit had been made in the matter of a petition delivered to the Registrar, etc. Held, that this was a sufficient notice, although not signed by the petitioners or their solicitor. Objections overruled.

Re Alberta Election, 1 W.L.R. 486 (Newlands, J.).

—**Service of petition abroad—Subsequent service in Canada.**] — Service of an election petition out of Canada being void, does not invalidate a subsequent legal service in Canada.

Shelburne-Queen's Election Case, 36 Can. S.C.R. 537.

—**Quebec Election Act — Delay for hearing.**] — The petitioner against the return of a candidate elected under the Quebec Election Act may take proceedings for hearing on the merits of the petition at any time within the four months following the notice of the result of the election provided for by s. 213 of the Election Act of 1895 (59 Vict. c. 11) and even during a session of the Legislature. After the trial has begun the Court may order its suspension during a session on the mere request of the sitting member.

Rochon v. Gendron, Q.R. 27 S.C. 163 (Sup, Ct.).

— **Preliminary objections — Service of petition — Agent — Affidavit.**] — The Dominion Controverted Elections Act not hav-

ing provided what shall be the grounds for objecting to the sufficiency of an election petition it follows that the Courts can only maintain preliminary objections when they are based on the absence or nullity of formalities essential to the existence of the petition. After the petition is filed the petitioner should get it from the clerk of the Court and send it to a bailiff in order that it may be served in the same manner as writs of summons in civil matters. The petitioner is not obliged to appoint an attorney and if he does so he need not designate the attorney's domicile. The affidavit of the petitioner in support of his petition sworn before a competent public official and within the territorial limits of the latter's jurisdiction is valid, although the place where it was sworn is imperfectly stated in the Jurat.

Bailey v. Hunt, Q.R. 27 S.C. 84 (Sup. Ct.).

— Status of petitioner — Proof.] — Leave may be given to adduce further evidence on the hearing of preliminary objections to a petition, to prove the petitioner's status where such proof is to be made by the production of a public document and not by the admission of oral evidence, and the case is one of public moment and the bona fides of the petitioner was established by his having made the deposit in Court of the sum required by law.

Re Yukon Dominion Election, 2 W.L.R. 156.

— Preliminary objection — Status of petitioner — Disqualification — Corrupt acts.] —S. 113 of the Dominion Election Act, 1900, provides that any person hiring a conveyance for a candidate at an election, or his agent, for the purpose of conveying any voter to or from a polling place shall, ipso facto, be disqualified from voting at such election:—Held, that the right of an elector to present a petition against the return of a candidate at an election may be questioned, by preliminary objection, on the ground that he is disqualified under the above section and that on the hearing of the preliminary objection evidence may be given of the corrupt act which caused such disqualification. Beauharnois Election Case, [31 Can. S.C.R. 447] distinguished. Held, also, that though, unless the commission of the corrupt act charged is admitted, it must be judicially established, such admission or judicial determination does not take effect merely from the time at which it is made but relates back to the commission of the act.

Cumberland Election Case, 36 Can. S.C. R. 543.

— Petition — Service out of jurisdiction— Second service on agents.] — Under the Dominion Elections Act service of an election petition cannot be made outside of Canada. Idington, J., dissenting.) By Rule 10 of the Nova Scotia Rules under the Election Act, a candidate returned at an election may, by written notice deposited with the clerk of the Court, appoint an attorney to act as his agent in case there should be a petition against him:—Held, that an agent so appointed is only authorized to act in proceedings subsequent to the service of the petition, and service of the petition itself on him is a nullity.

King's, N.S., Election Case, 36 Can. S.C.R. 520.

—Service of petition—Exhibition of original—Default to put date of service.] —1. There is nothing in the law requiring that the original of a petition contesting a Federal Election be exhibited to the respondent at the time of the service. 2. The omission by the bailiff to mention on the copy of the writ of summons or contestation of election the date of such service is no ground for exception to the form, unless prejudice is shown. 3. It is sufficient in the contestation of an election held in one of the divisions of Montreal, to state that the same took place within the judicial district of Montreal.

Darlington v. Gallery, 7 Que. P.R. 40 (Davidson, J.).

—Setting down preliminary objection — Jurisdiction of Chambers Judge.] — The words of O. 35 of the Rules of the Supreme Court, made under the Dominion Controverted Elections Act, and the Table of Chambers work indicating the order in which each Judge shall sit and the period of time during which he shall take the duties assigned, etc., fulfil the provisions of the Dominion Act, Acts of 1887, c. 7, s. 2, and, there being both a practice as to the order of business and an arrangement of the order of business, a Judge sitting at Chambers has jurisdiction to make an order setting down preliminary objections to an election petition to be heard before one of the Judges of the Supreme Court. It is not necessary in this province that there should be a rota before such an application can be heard, the English practice in that particular being different, and depending upon the wording of the English Act applicable in such cases. The words "order," "duties," and "arrange," as used in the Dominion Controverted Elections Act, are not used as conferring jurisdiction.

Ripley v. Logan, 37 N.S.R. 349.

— Preliminary objections — Answers.]— Answers to the preliminary objections are not contemplated by the Quebec Controverted Elections Act, and if filed will be dismissed on motion.

Dyer v. McCorkill, 7 Que. P.R. 167, (Lynch, J.).

—Ballots numbered by deputy returning officer—Dominion Elections Act.] — The prohibiton contained in sub-s. 2 of s. 80 of the Dominion Elections Act, 1900, 63 and 64 Vict. c. 12 (D.), against the counting of ballot papers "upon which there is any writing or mark by which the voter could be identified" applies to ballot papers upon which a deputy returning officer has placed (not in the cases specially provided for in the Act) numbers corresponding respectively with the numbers opposite the names of the respective voters in the poll book, and such ballot papers must be rejected. Where in consequence of this irregularity ballot papers sufficient in number to alter the result of the election had to be rejected, it was held, applying the principle of Woodward v. Sarsons (1875), L.R. 10 C.P. 733, that there must be a new election.

Re Wentworth Dominion Election, Sealey v. Smith, 9 O.L.R. 201.

—Application to substitute petitioner—Setting case down for trial — Necessary attendance of petitioner.] — Application was made on behalf of B. to be substituted as petitioner against respondent's return to the House of Commons. The application was based primarily on the ground that more than three months had elapsed since the presentation of the petition without the day for trial being fixed:—Held, dismissing the application: Per Fraser, J.—That the presence of respondent at the trial being shown to be necessary the time during which Parliament was in session was not to be computed and the period of three months had, therefore, not elapsed. Per Russell, J.—That the fact that respondent's presence at the trial was necessary, was a complete answer to the application to substitute another petitioner in so far as that application was based on the petitioner's assumed default in not having proceeded with the trial.

Brenton v. Laurence (Colchester Election Petition), 38 N.S.R. 232.

—Controverted Dominion election — Examination on discovery — Persons to be examined.] — Where the petitioner in a controverted Dominion election case declares that he is aware only by hearsay of the facts alleged in his petition, the respondent will not be allowed on a preliminary examination to examine the persons who have given such information.

Darlington v. Gallery, 7 Que. P.R. 329 (Lavergne, J.).

—Controverted election — Commencement of trial — Extension of time.] — An order fixing the time for the trial of an election petition at a date beyond the time prescribed under the Act operates as an enlargement of the time. St. James Election Case, 33 Can. S.C.R. 137; Beauharnois Election Case, 32 Can. S.C.R. 111, followed.

Halifax Election Cases, 37 Can. S.C.R. 601.

—Trial of petition — Evidence — Corrupt acts at former election — Agency—System of corruption.] — A petition against the return of a member for the House of Commons at a general election in 1904 contained allegations of corrupt acts by respondent at the election in 1900 which were struck out on preliminary objections. On the trial of the petition evidence of payments by respondents of accounts in connection with the former election was offered to prove agency and a system and was admitted on the first ground A question as to the amount of one account so paid was objected to and rejected:—Held, that such rejection was proper; that the question was not admissible to prove agency for agency was admitted or proved otherwise; nor as proof of a system which could not be established by evidence of an isolated corrupt act. Held, also, that where evidence is tendered on one ground other grounds cannot be set up in a Court of Appeal.

Shelburne and Queen's Election Case; Cowie v. Fielding, 37 Can. S.C.R. 604.

— Personal corruption—Charge in petition —Judge's report — Adjudication.] — On a charge of personal corruption by the respondent of the adjudication by the trial Judges does not contain a formal finding of such corruption this Court may insert it if the recitals and reasons given by the Judges warrant it. Respondent, the night before the election, took a sum of over $4,000 and divided it into several parcels of sums ranging from $250 to $1,500. He then, after midnight, visited all his committee rooms and gave to the chairman of each committee, personally and secretly, one of such parcels. His financial agent had no knowledge of this distribution and no evidence was produced of the application of the money to legitimate objects:—Held, that the inference was irresistible, that the money was intended for corruption of the electors and respondent was properly held guilty of personal corruption. Allegations in the petition that respondent had himself given and procured, undertaken to give and procure money and value to electors and others named, his agents, to induce them to favour his election and vote for him, for the purpose of having such moneys and value employed in corrupt practices were sufficient to cover the offence of which the respondent was found guilty.

St. Ann's Election Case; Gallery v. Darlington, 37 Can. S.C.R. 563.

—Death of petitioner — Appointment of substituted petitioner — Rival applications — Priority in point of time.]—The petitioner having died the Court was moved on behalf of two parties to be substituted in its place, one being a person qualified to

vote at the election, R., and the other the unsuccessful candidate, B. It was disclosed by the affidavits that R. was actively interested in securing the return of the respondent at the election, that he was a member of one of his committees, and that he associated with leading members of the political party with which the respondent was identified:—Held, that as R. was not, for these reasons, a person by whom the inquiry under the petition was likely to be prosecuted without partiality and with effect, his application, although prior in point of time, should not be granted, and that the interests of the electors concerned in the prosecution of the petition would be better served by the appointment of B. Held, further, Fraser, J., dissenting on this point, that the appointment of B. should not be refused on grounds which would not have been available against him if he had been the original petitioner.

Murray v. McDonald (Pictou Election Petition), 38 N.S.R. 242.

—Dominion elections — Hearing on election petition — Absence of record — Certified copy — Admissions by respondent — Withdrawal of admission — Election expenses—Agents—Criminal offences — Presumptions —Knowledge by candidate of acts of agent.]—The Act permitting, on the one hand, appeals from decisions on preliminary objections, and, for that purpose, the transmission of the record to the Appellate Court, and providing, on the other hand that such appeal shall not have the effect of suspending proceedings nor delaying the hearing of the petition, without, at the same time, providing any method for supplying the absence of the record so transmitted, the Court seized of the case must of necessity, in order to comply with the statute, proceed with the hearing, pending the appeal, upon certified copies of the necessary portions of the record. (2) An admission made and filed by the respondent that unlawful acts were committed by electors and agents of a nature to avoid the election cannot be withdrawn. An application to that effect unsupported by reasons, not even that there was error, must be refused. (3) A candidate at a Dominion election cannot incur any expenses except through an agent or agents appointed in conformity with s. 143 of the Dominion Statute, 62 & 63 Vict. c. 12; violation of this provision is an indictable offence and, moreover, gives rise to a presumption of fraud which cannot be rebutted. (4) A candidate, having a duly appointed agent, who furnishes money, for alleged lawful election expenses, to another person without keeping control of the manner in which it is to be employed of requiring an account, and who causes the vouchers returned by the person who received the money, to show how it had been used, to disappear, is presumed to have approved or permitted of the latter making use of the money for illicit purposes. (5) A person who, to the knowledge of a candidate, takes part for him among the electors, assumes some important part in the election, by canvassing or otherwise, becomes an agent for the candidate so that he is responsible for and must bear the consequences of the acts of such person. The candidate cannot plead ignorance of such acts, and his failure to exercise control, his carefully closing his eyes in order to maintain such ignorance, is equivalent to express authorization for the committing of such acts. (6) Such authorization or implied agency results from infinitely varied circumstances, the appreciation of which rests with the Court. (7) It being proved that the respondent's agent had been guilty of corrupt acts, personation and fraudulent practices, the respondent was held responsible, and, in consequence, disqualified, the election being likewise declared void.

Bergeron v. Brunet, Q.R. 27 S.C. 389 (Sup. Ct.).

[See St. James Election Case (33 Can. S.C.R. 137)].

—Preliminary objections — Information of petitioner — Affidavit — Receipt of clerk for deposit.]—(1) The total absence or lack of information of the petitioner necessary to enable him to make the affidavit required in support of an election petition under the Dominion Controverted Elections Act, affords no ground of preliminary objection to such a petition. (2) The receipt of the clerk of the Court for the deposit made as the security required on the presentation of an election petition is sufficient if it state that a deposit of $1,000, has been made, though it should go on to give an erroneous description of the bills of which that sum consisted.

Pleau v. Ames, 28 Que. S.C. 455 (Curran, J.).

—Petition against return — Jurisdiction— —Province of Saskatchewan.]—The Court has no jurisdiction to entertain a petition against the return of a member of the Legislative Assembly of Saskatchewan. It is an essential principle of the common law of Parliament that that body as a whole is the guardian and arbiter of its prerogatives and privileges, and having regard to ss. 14 and 16 of the Saskatchewan Act and the fact that the former section expressly continues in force the Legislative Assembly Ordinance and the Election Ordinance, the Controverted Elections Ordinance was not continued in force, and as a consequence, the Court had not the jurisdiction in question.

Re Prince Albert City Provincial Election, Strachan v. Lamont (N.W.T.), 3 W.L.R. 571.

—Preliminary objections — Status of petitioner — Evidence — Premature service.]

—On the hearing of preliminary objections to an election petition the status of the petitioner may be established by oral evidence not objected to by the respondent. A petition alleging "an undue election" or "undue return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning offier. Girouard and Idington, J.J., dissenting.

Yukon Election Case; Grant v. Thompson, 37 Can. S.C.R. 495.

—Scrutiny — Supplementary particulars—Invalid votes — Transfer certificates obtained without request.]—The word "particulars" in Rule 24 of the General Rules respecting the trial of election petitions means particulars of "votes intended to be objected to," this being the language in Rule 20, and is not confined to further details of particulars already given. Where for the purpose of a scrutiny the respondent had filed and served particulars of votes objected to by him, and the scrutiny had been begun but not completed, he was allowed (upon terms) to add new particulars of other votes objected to. Semble, that the votes of persons who voted on transfer certificates obtained from the returning officer without any personal or written request were invalid.

Re Port Arthur Provincial Election (No. 2), 12 O.L.R. 508 (Teetzel, J.).

—Enlargement of time for trial — Power of Court to order — Petition — Laches.]—On application by the petitioner to have a day fixed for the trial, or, in the alternative, to have the time enlarged for the commencement of the trial, the Court dismissed the application to set the case down for trial but made an order enlarging the time for the period of six months, and by a subsequent order enlarged the time for the commencement of the trial for the period of eight months:—Held, that the orders so made were within the jurisdiction of the Court, and that it was not essential to the exercise of the jurisdiction to enlarge the time under the statute that the case should have first been set down for trial. The petition was entitled "Election of a member for the House of Commons for the Electoral District of . . . " and the objection was taken that there were two members to be returned for the county and that the title should read "Election of members, or election of two members, etc." Quære, Whether this was an irregularity. But, if so, the objection was too late, not having been raised until after a number of steps had been taken in the case.

Hetherington v. Roche, 39 N.S.R. 383.

—Preliminary objections — Corrupt practices—Returning officer as party respondent to petition.]—Each petition alleged, among other things, that the returning officer, acting in collusion with the elected member, unlawfully established different polling divisions from those arranged by the provincial authorities for provincial elections; that, instead of supplying the deputy returning officers with the copies of the voters' lists received from the clerk of the Crown in Chancery, he made changes and erasures therein and removed therefrom the names of many persons entitled to vote and so prevented such electors from voting at the election; that he had given copies of the voters' lists so improperly made out to his co-respondent and refrained from furnishing such copies to the opposing candidate and concealed these matters entirely from the latter, and that all this had been done in furtherance of a design previously arranged between the respondents to embarrass and hinder those opposed to the election of the elected member; also that the returning officer had signed a large number of certificates in blank to enable voters to vote at polling places for which their names did not appear, and that the respondents had, in these and other ways, conspired to impede and interfere with the free exercise of the franchise of many voters:—Held, 1. That the acts complained of might constitute corrupt practices within the meaning of sub-s. (f) of s. 2 of the Dominion Controverted Elections Act, R.S.C. c. 9, for, although they were not so declared by the Dominion Elections Act, or by any other Act of the Parliament of Canada, yet they were infractions of subsequent statutory provisions as to the conduct of elections and may amount to corrupt practices within the common law of Parliament, as they might be of such extent that the constituency had not had a fair and free opportunity of electing the candidate whom the majority might prefer, this being the test applied by Lord Coleridge, C.J., in Woodward v. Sarsons (1875), L.R. 10 C.P. at p. 743, and therefore the paragraphs of the petition setting forth such acts should not be struck out on preliminary objections. (2) The conduct of the returning officer in connection with the election being complained of, he was properly joined as a respondent under s. 7 of the Act. (3) An allegation in the petition that the returning officer, with the knowledge and consent of the elected member, in many ways improperly aided in the election of the latter is too vague and should be struck out.

Re Lisgar Election Petition, 16 Man. R. 249.

—Election petition — Enlargement of time —Appeal—Effect.]—An order may be made enlarging the time for commencing the trial of an election petition, if within the six months, although the case has not been set down for trial. Where an order was made dismissing the petition and an ap-

peal was taken to the Supreme Court of Canada:—Held, that, during such time as the case was before the Appeal Court, the period of six months from presentation of the petition within which the petition is required to be brought on for trial would not run against the petitioner.

Cowie v. Fielding; Shelburne Election Case, 39 N.S.R. 517.

—Election petition — Service — Domicile or residence of defendant.]—When an order was made by a Judge for the service of an election petition "on the defendant in person, or at his domicile or at the place of his ordinary residence, speaking to a reasonable person belonging to the family of the defendant or by posting in a conspicuous place on the residence of the defendant, in the presence of a witness, the election petition and proceedings attached thereto," a service effected at the residence of the defendant's father where his wife and children were temporarily residing, the defendant's house in which he had lived during the eight previous years not having been closed, is not in compliance with the order and on preliminary objection made thereto, will be declared null and void.

Wetherall v. Hunt, 30 Que. S.C. 32.

— Controverted election — Appeal — Fixing time for trial.] — No appeal lies to the Supreme Court of Canada from an order of the Judges assigned to try an election petition fixing the date for such trial.

Halifax Election Case, 39 Can. S.C.R. 401.

— Contestation—Preliminary objection — Corrupt practices.]—Charges of corrupt practices against the petitioner in a contestation of an election for the provincial legislature cannot be the subject of preliminary objections, and even if established, could not affect petitioner's status as such, because the evidence in support of said corrupt practices is irrelevant and inadmissible.

Walsh v. Tansey, 10 Que. P.R. 32.

—Preliminary objections to petition — Reopening trial to let in further evidence—Dismissal for want of prosecution.]—(1) Under the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, and ss. 92 and 93 of the King's Bench Act, R.S.M. 1902, c. 40, the Judge, at the trial of preliminary objections to an election petition, may, even after the petitioners have closed their case, re-open it and allow them to put in further evidence to prove their status as petitioners. (2) The requirement in s. 39 of the Dominion Controverted Elections Act, R.S.C. 1906, c. 7, that an election petition must be brought to trial within six months from the time of its presentment, is not imported into the law governing election petitions under the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, by the language of s. 13 of the latter Act. Such a provision would require a positive statute, as it deals with something more than a mere matter of practice and procedure.

Re Morris Election Petition, 17 Man. R. 330.

—Dominion election—Notice of presentation of petition and nature of security.]—Upon the hearing of preliminary objections to a petition against the return of a member of the Dominion Parliament for the electoral district of Alberta, due notice having been given, a copy of the list of voters for a certain polling sub-division returned by the returning officer of the electoral district to the clerk of the Crown in Chancery, duly certified by said clerk under his official seal, was put in evidence, and the petitioners identified their names thereon. They also swore that they were male British subjects, not Indians, of the full age of 21 years, and that they had resided in the North-West Territories for over twelve months, and in the electoral district for over three months immediately preceding the issue of the writ of election:—Held, that in view of the provisions of the North-West Territories Representation Act, R.S.C. (1886), c. 7, the evidence of the petitioners was admissible to prove their status, and that the voters' list was properly proved by a certified copy in spite of the absence in the Act referred of any provision, such as is found in the Franchise Act, 61 Viet. c. 14, s. 16, for certified copies of the list being evidence. Richelieu Election Case (1892), 21 S.C.R. 168, distinguished. The notice of the presentation of the petition, handed to the petitioner immediately before the copy of the petition, referred to the presentation of a petition against the return of the petitioner as member for electoral district of the west riding of Assiniboia (sic), but there was attached to the petition a certificate signed by and under the seal of the clerk of the Court that $1,000 had been deposited as security for the payment of costs, etc., in the matter of the petition against his return as member for the electoral division of Alberta. Held, that the first notice was bad, but that the certificate gave a notice sufficient to comply with the provisions of s. 10 of the Controverted Election Act, R.S.C. (1886), c. 9, although it was not signed by either the petitioners or their advocate. Ottawa Election Case (1898), 2 Ont. El. Cas. 64, referred to. Objection was taken that the evidence did not show that the security was given in bills of a chartered bank. Held, that the evidence was sufficient, and that the fact that the bank was a chartered bank sufficiently appeared from the Dominion Statute extending its charter. The cost of publishing the petition was not paid to the registrar at the time that the petition was presented. Held, that this was no objection to the proceedings. No evidence was given that any

election had been held or that the respondent had been returned as elected. Held, that no such evidence was necessary. Objection was taken to certain paragraphs of the petition on the ground that even if true they would not justify a declaration that the seat was vacant or the disqualification of the member. Held, that the clauses should nevertheless not be struck on preliminary objection.

Re Alberta Election, 6 Terr. L.R. 329.

—Petition—Status—Preliminary objection.] —Every person whose name is on the list of electors for the district which was used at an election is qualified to petition against the return under the provisions of the Controverted Elections Act of Canada, R.S. [1906] c. 7. The respondent to the petition cannot, by preliminary objection, set up acts of corruption committed by petitioner during the election. The deputy prothonotary of the Superior Court has all the powers of the prothonotary respecting election petitions. He can, therefore, receive a petition and witness the accompanying declaration in the presence as well as in the absence of the prothonotary. A deputy de facto has full powers, especially those above mentioned, notwithstanding the omission of a formality (e.g., affixing the prothonotary's seal) in the document appointing him.

Boulet v. Roy, Q.R. 36 S.C. 89.

—Protested election—Regularity of nomination.]—The respondent was declared elected as a member of the legislature, and a petition was filed against his return. On the trial it was proved that the respondent had been nominated by four persons, and it was sought to show that one of these was not qualified, not being on the voters' list, and not having resided in the province for one year. The nominator objected to was called and sworn, and stated that he could not remember when he came to the province, nor did he know if he was qualified to vote. The voters' list was also produced and showed his name erased:—Held, that in an action held under the provisions of ss. 269 to 284 of the Saskatchewan Election Act the entry of a voter's name on the list is not an essential qualification as a voter, and therefore the absence of the name of the nominator from the list did not in itself disqualify him as a voter. (2) That the receipt given by the returning officer under the provisions of s. 122 is conclusive evidence only as to the matters in such receipt contained, and does not apply to the qualification of the nominators. (3) That the onus of proving lack of qualification being on the petitioner, in the absence of positive evidence of lack of qualification, the negative evidence given by the party whose qualification was attacked was not sufficient to discharge the onus and prove lack of qualification.

Boice v. Anderson (Last Mountain Election Case), 2 Sask. R. 245.

—Motion to strike out particulars of corrupt practices.]—By an order under s. 11 of the Controverted Elections Act, the petitioner was directed to furnish particulars of the matters alleged in his petition, and it was further ordered that no evidence be given at the trial of any matter of which particulars were not delivered as ordered. The respondent moved to strike out the particulars delivered, on the ground that the order had not been sufficiently complied with, or for further and better particulars:—Held, that the legislature having made provision in the Controverted Elections Act for delivery of particulars, and having empowered the Judge to order that in default no evidence be given at the trial of any matters of which particulars were not given as ordered, and a Judge having made such order, no further or other order could now be made with respect to particulars. (2) That as the practice provided by the Controverted Elections Act in respect to delivery of particulars differed from that prescribed by the rules of Court, and the practice under the Act was sufficient, the provisions of the rules of Court could not be invoked to support the application and must be deemed to be excluded by the specific provisions of the Act.

Bowe v. Whitmore, 2 Sask. R. 82.

—Preliminary objections—Order extending time for service of petition—Application after expiry of ten days from presentation of petition—Order for substitutional service.] — Under the Dominion Controverted Elections Act, R.S.C. 1906, c. 7, a single Judge of the High Court of Justice has jurisdiction in Ontario to hear and determine all preliminary objections to a petition, where an order is made extending the time of service of a petition under the said Act and for substitutional service. Objections that there was no jurisdiction to make such order under the circumstances, and that, even if there were, the order made was not authorized by the facts, and that substitutional service made under it should not be deemed personal service or allowed, are preliminary objections within the meaning of the Act, or, at all events, objections which a single Judge of the High Court of Justice has, in Ontario, power to deal with. Montmagny Dominion Election Case (1888), 15 S.C.R. 1, followed. The time for service of notice of the presentation of a petition under the Dominion Controverted Elections Act may be extended on application made after the expiry of the ten days allowed for such service by s. 18 of the Act. Such order allowing further time is not bad by reason of substitutional service being also directed in it, notwithstanding the words of sub-s. 2 of s. 18.

Re West Peterborough Dominion Election, 17 O.L.R. 612.

—Service of petition—Extension of time—Substitutional service.]—The provision in s. 18, sub-s. 2 of the Controverted Elections Act (R.S.C. [1906], c. 7), for substitutional service of an election petition where the respondent cannot be served personally is not exclusive and an order for such service on the ground that prompt personal service could not be effected as in the case of a writ in civil matters may be made under s. 17. The time for service may be extended, under the provisions of s. 18, after the period limited by that section has expired. Gilbert v. The King (38 Can. S.C.R. 207), followed.

Stratton v. Burnham, 41 Can. S.C.R. 410.

—Publication of petition—"Three consecutive days."]—Publication of an election petition in three consecutive issues of a weekly paper is not publication "for three consecutive days," and, therefore, not sufficient under s. 81 of the New Brunswick Controverted Elections Act, C.S. 1903, c. 4. And where publication of the petition is insufficient, an order cannot be made fixing the date of trial.

Owens v. Upham, 39 N.B.R. 198.

—Election petition—Grounds of preliminary objections—Corrupt practices by the petitioner.]—Corrupt practices in the course of the election by the petitioner afford no valid grounds of preliminary objections to an election petition under the Quebec Election Act, 1903.

Walsh v. Tansey, 35 Que. S.C. 89.

—Preliminary objections — Cross-petition —Sufficiency of charge of corrupt acts—Particulars.] — By a preliminary objection to an election petition it was claimed that the petitioner was not a person entitled to vote at the election and the next following objection charged that he had disqualified himself from voting by treating on polling day:—Held, that the second objection was not merely explanatory of the first but the two were separate and independent; that the second objection was properly dismissed as treating only disqualifies a voter after conviction and not ipso facto; and that the first objection should not have been dismissed the respondent to the petition being entitled to give evidence as to the status of the petitioner. The respondent, by cross-petition, alleged that the defeated candidate personally and by agents "committed acts and the offence of undue influence." Held, that it would have been desirable to state the facts relied on to establish the charge of undue influence but as these facts could be obtained by a demand for particulars a preliminary objection was properly dismissed.

Quebec West Election Case, 42 Can. S.C.R. 140.

—Delay for bringing counter-petition—Delay expiring on a Sunday.]—(1) When the last of the fifteen days for filing and serving a cross-petition in a contested election (Dom.) case is a Sunday, the filing and service may be legally effected on the following day. (2) An allegation of undue influence in an election petition may be made in general words, the party charged having the right to ask for particulars.

Belleau v. Price, 36 Que. S.C. 13.

—Preliminary objections — Petition presented too late — Application to extend time.]—The petition was delivered to the registrar, not at his office, but at his residence, after office hours, on the last day upon which, according to s. 12 of the Dominion Controverted Elections Act, it could be filed:—Held, that the petition was presented too late. The North Bruce Case (1891), 27 C.L.J. 538, distinguished. The Court has no power to extend the time for presenting a petition after the expiration of the time for presenting it prescribed by the Act has elapsed, and to such a case s. 87 of the Act has no application. The principle of the Glengarry Case (1888), 14 S.C.R. Re North Perth Dominion Election, 18 453, applied and followed. O.L.R. 661.

III. OFFENCES AND PENALTIES.

—Action for penalty — Conclusion.]—The Superior Court has jurisdiction over an action to recover the fine imposed on a candidate at an election, who is guilty of treating; the demand for the fine need not be made by a petition contesting the election. The conclusions of a penal action against the candidate elected, for treating, demanding that the election be avoided and the candidate disqualified, are illegal and will be struck out on inscription en droit.

Bourbonnais v. Lortie, 11 Que. P.R. 145.

—Corrupt practices—Proceedings by summons—Limitations.]—The limitation of one year for bringing action prescribed by s. 195, sub-s. 3 of the Ontario Election Act applies only to actions for penalties under that section and not to proceedings by summons for corrupt practices under ss. 187-8, nor are the latter within the limitations of two years for actions prescribed by R.S.O., c. 72, s. 1. On such proceeding under ss. 187-8 the Judges may, if they see fit, hear the evidence on all the charges before giving judgment on any of them.

In re Cross, 2 Election Cases 158, 4 Can. Cr. Cas. 173.

—Corrupt practices — Treating — Candidate—Corrupt intent — Habit.] — The undisputed evidence showed that the respondent from the time of his nomination as the candidate of his party frequently treated the electors and others in the bar-rooms

of hotels whilst engaged in his canvass. He was not a man whose ordinary habit it was to treat, nor one who, in the course of his ordinary occupation, frequented bar-rooms:—Held, Osler, J.A., dissenting, that the trial Judges properly drew the inference that the treating was done with corrupt intent, so as to avoid the election of the respondent. Remarks by Burton, J.A., on the amendment to the Election Act, in respect to "the habit of treating," by 58 Vict. c. 4, s. 21(O.).

Re West Wellington, McQueen v. Tucker, 2 Election Cases 16.

—Nova Scotia Election Act — Bribery — Action for penalty—Discretion of Judge as to amount.]—

Davidson v. Armstrong, 2 E.L.R. 73 (N. S.).

—Nova Scotia Election Act — Bribery — Action for penalty—Evidence of status of person bribed.]—

Davidson v. Hall, 2 E.L.R. 75 (N.S.).

—Treating a meeting — Distinction between bribery and treating—Saving clause.] Where, after a meeting of electors had broken up, an alleged agent of the respondent had treated at the bar of the hotel, where it had been held, a mixed multitude comprised of some who had been at it, and others who had not:—Held (Maclennan, J.A., dissenting), that this was not treating "a meeting of electors assembled for the purpose of promoting the election," within s. 161 of the Ontario Election Act, R.S.O. c. 9. Per Maclennan, J.A.—Seeing that several persons assembled at the bar waiting for the meeting were treated before the meeting by the hotelkeeper, whom the respondent's agent had asked to treat "the boys" before himself leaving to attend a meeting elsewhere, and whom the agent afterwards paid, and that several who were treated after the meeting had been at the meeting, and then in company with the respondent went very much in a body to another hotel, where they were treated again. Held, that this was a treating of the meeting within the last mentioned section. Held, also, by the Court of Appeal, reversing the decision of the trial Judges, that such treating was not "bribery" within R.S.O. c. 9, s. 159. Corrupt treating in its nature runs very close to bribery on the part of the treater, but the circumstances in which a treat can be said to be a valuable consideration within s. 159 so as to amount to bribery on the part of the person accepting it, must be unusual. Where only two acts of bribery were proved, but the perpetrators were both active, and one an important agent of the candidate, neither of whom was called at the trial, and one of the bribes, though only $2, was paid out of a general election fund, to which the respondent had contributed $250, and the respondent's majority was 65 out of a total vote of about 5,000. Held, that the election was rightly avoided, notwithstanding the saving clause in s. 172 R.S.O. c. 9.

Re North Waterloo, Shoemaker v. Lackner, 2 Election Cases 76.

—Corrupt practices—Voting without right —Knowledge — Bribery — Inference from evidence—Providing money for betting—Loan—Agency—Proof of—Party association —Saving clause—Ont. Election Act, ss. 164 (2), 168, 172.]—It was charged that a person had voted at the election, knowing that he had no right to vote, by reason of his not being a resident of the electoral district. He knew that his name was on the voters' list, and that it had been maintained there by the County Judge, notwithstanding an appeal, and he believed that he had, and did not know that he had not, a right to vote:—Held, affirming the decision of the trial Judges, that a corrupt practice under s. 168 of the Election Act, R.S.O. 1897 c. 9, was not established. Under that section the existence of the mala mens on the part of the voter, "knowing that he has no right to vote," not merely his knowledge of facts upon the legal construction of which that right depends, must be proved. The offence does not depend upon his having taken the oath; it may be proved apart from that; nor does the fact that he has taken the oath, even if it be shown in point of law to be untrue, necessarily prove that the offence has been committed. Haldimand Case (1888), 1 Elec. Cas. 529, distinguished. 2. Held, affirming the decision of the trial Judges, that the bribery by L. of two persons to abstain from voting against the respondent was established by the evidence, although it was not shown that anything was said to them about voting; L. having paid them, for trifling services which he engaged them to perform upon election day, sums considerably in excess of the value of such services, knowing them to be voters and to belong to the opposite political party. 3. As to the agency of L., it appeared that the respondent was brought into the field as the candidate of his party, having been nominated at a convention of the party association for the electoral district; L. was not a delegate to, nor was he present at, the convention; and he was not upon the evidence connected with the association or its officers; he was not brought into touch with the candidate, nor any proved agent of his, either as regards his or their knowledge of the fact that he was working or proposing to work on behalf of the candidate, or as regards any actual authority conferred upon him to do so. But he was present at three meetings of electors when the voters' list was gone over; he acted as chairman of a public meeting called in the respondent's interest; he canvassed some voters; and, from his antecedents, the respondent hoped or believed or expected that he would be an active supporter. Held, affirming the decision of the trial Judges,

Boyd, C., dissenting, that L. was not an agent of the respondent. Haldimand Case (1880), 1 Elec. Cas. 572, distinguished. 4. Three persons, T. being one of them, each lent $10 to R. L., knowing that the monies so lent were intended to be used by him, as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs, and he was to return the money in a couple of days. He did not succeed in getting any one to bet with him, and he returned the money to each on the following day. Held, affirming the decision of the trial Judges, that this was providing money to be used by another in betting upon the election, and was a corrupt practice within the meaning of s. 164 (2) of the Election Act. 5. As to the agency of T., it appeared that he was one of the local vice-presidents of the party association above referred to; he had been present at two meetings of local party men calling themselves a "Conservative Club," who were interesting themselves in the election and had contributed towards the cost of hiring the club-room; at these meetings he had gone over the voters' list with others, which was the only work done; at a meeting held by the respondent in the place where T. lived, he had presided, having been elected chairman by the audience, and he made a speech introducing and commending the respondent; before the meeting he had met the respondent in the street, had shaken hands with him, and asked him how things were going. The respondent did not know that T. was local vice-president, and had never heard of the "Conservative Club." T. was not a delegate to the nominating convention nor present thereat. The association, as such, was not charged with any definite duty in connection with the election except the selection of a candidate. Held, reversing the decision of the trial Judges, Burton, C.J.O., and Maclennan, J.A., dissenting, that T. was an agent of the respondent. 6. The total vote polled was over 4,500, and the majority for the respondent was 29. The trial Judges had reported one person guilty of an act of undue influence, three of being concerned in acts of bribery, and T. and two others of providing money for betting. Held, that s. 172 of the Election Act could not be applied to save the election.

Re East Elgin, Easton v. Brower, 2 Elec. Cas. 100.

—Intoxicating liquor at card party—Payment by subscription—German custom.]—A number of voters met at a voter's house for the purpose of going over the voters' list and then of having a card party. After the lists were disposed of the card party took place, and meat and drink were supplied by the host, but the drink, a quarter cask of beer, was paid for by subscription, according to the custom of the locality, which was a German settlement:—Held, not a corrupt practice within the meaning of s. 161 of the Elections Act, R.S.O. 1897 c. 9.

Re South Perth; Ellah v. Monteith, 2 Election Cases 144.

—Evidence to disqualify—Proof that candidate took all reasonable means to prevent the commission of corrupt practices.—At the trial of a petition to set aside the election of the respondent and for the disqualification of the respondent and for the disqualification or connived at the corrupt practices complicity in corrupt practices, the Judges found on the evidence that corrupt practices had been committed by five or six different agents of the respondent; but it was urged on his behalf that, under s. 127 of the Dominion Elections Act, 1900, the election should not be declared void. The Judges, however, found that, as regards at least two of the said agents, the respondent had given no orders or cautions against the commission of corrupt practices, and that the circumstances were such as to throw upon him the suspicion of having sanctioned or connived at the corrupt practices committed by a third agent, although he denied on oath having been guilty of any such conduct:—He..., 1. That the offences proved could not be deemed to have been of a trivial, unimportant and limited character, and that the onus was on the respondent to prove affirmatively, for the purpose of saving the election, that the particular offences proved were committed contrary to his orders and without his sanction and that he had taken all reasonable means for preventing the commission of corrupt practices, and that, as he had failed to satisfy the Court in that regard, the election must be set aside under s. 123 of the Act. 2. That, as to disqualification of the candidate, the onus was on the petitioner to prove beyond a reasonable doubt the guilt of the respondent, and that there was not sufficient evidence to warrant an affirmative finding that he had personally been guilty of corrupt practice. Centre Wellington Case (1874), Hodg. Elec. Cas. 579; Russell Case (1875), Ib. 199; Welland Case (1875), Ib. 187, followed. 3. That the omission from the election accounts furnished under s. 146 of the Election Act of certain payments made by the respondent and his personal payment of the sums directly and not through his election agent, although forbidden by the Act, are not expressly constituted as corrupt practices avoiding the election. The Lichfield Division Case (1895), 5 O'M. & H. 34, and the Lancaster Division Case (1896), Ib. 39, distinguished on the ground that the Imperial Statute under which they were decided expressly makes these things illegal practices and declares that an election shall be avoided for such practices. 4. That the payment by a candidate of an agent's legitimate expenses while engaged in promoting his election is not a corrupt practice; and quære, whether payment for the services of such an agent would be so where not colourably made to secure the agent's vote. Costs awarded ac-

cording to the findings. In view of the wording of sub-s. 4 of s. 15 of 54 and 55 Vict., c. 20, the Court subsequently made an affirmative order allowing to the respective parties the witness fees and other actual, necessary and proper disbursements incurred in respect of the issues on which the findings had been in their favour respectively.

Re Lisgar Dominion Election, 13 Man. R. 478.

—Hiring teams and conveyances—Wife's authority to contract on behalf of her husband—Evidence.]—The plaintiff, a livery stable keeper, sued the defendant on an account for horses and rigs furnished by him to the defendant, who was a candidate at an election for a member of the House of Commons of Canada. The evidence showed that to the knowledge of the plaintiff his account was for horses and rigs furnished by him to the defendant during the time he was a candidate and solely for the purposes of and in connection with the election:—Held, that the contract of hiring was an executory one and that it came therefore within the terms of s. 131 of the Dominion Elections Act, which is incorporated with the North-West Territories Representation Act by 57-58 Vict. (1894), c. 15, s. 10, and that the contract was therefore void in law, and the plaintiff could not recover. The plaintiff also sued the defendant on an account for horses and rigs furnished by one Pepper, some of them to the defendant, others to the defendant's wife, and some to both of them, which account Pepper had assigned to the plaintiff. These horses and rigs were not clearly shown to have been furnished in connection with the election, though the evidence led to a strong suspicion to that effect. Held, that when the defendant seeks to rely upon provisions of the statute to avoid liability upon an executory contract alleged to have referred or arisen out of an election, nothing should be intended in favour of such a defence, and it must clearly appear that such contract did refer to an election held under the Act.

Parslow v. Cochrane, 4 Terr. L.R. 312.

—Provincial Act—Federal Election—Corrupt practices — Preliminary objections — Interrogatories.]—Corrupt practices by the petitioner against the return in a federal election does not ipso facto deprive him of his right to vote at the said election nor to be a petitioner against the return except in the cases provided for in ss. 8 and 9 of 63 and 64 Vict., c. 12 (D). Therefore the disabilities resulting from corrupt practices other than those enumerated in said ss. 8 and 9 cannot be set up by preliminary objections. (It is otherwise in case of provincial elections.) Section 113 of the Dominion Election Act of 1900 should be construed strictly and cannot be enlarged by analogy. On the hearing of a contested election a party is not subject to interrogatories sur faits et articles; if he refuses to obey an order to answer such interrogatories they will not be taken as admitted on motion to that effect.

Poirier v. Loy (Beauharnois Election), 4 Que. P.R. 23 (S.C.).

—Personation—Bail after commital—Fixing amount of—Elections Act, 1900 (Can.) s. 114.]—Where there is danger that accused persons, committed for trial for alleged offences against the election laws, may purposely allow their bail to be forfeited with the view of avoiding scandal, the Court, on an application to admit them to bail, should require the bail to be of a substantial amount.

The Queen v. Stewart, 4 Can. Cr. Cas. 131 (Killam, C.J.).

—Corrupt offer—Proof of agency.]—A witness said first that the agent Fisit, told him that the other side was poor "but if you come with us we have lots of money," and afterwards testified: "He said our side was poor and that I wanted money and if I wanted to go on their side they would give me some money:"—Held, too indefinite and vague on which to base a finding of a corrupt offer. The respondent was nominated at a meeting of delegates from different portions of the constituency and, at a public meeting, after the close of the convention, he stated that he expected all the delegates to help at the election, and that he looked for assistance not only from them, but from all supporters of the Government. Held, that these and other general remarks made by the respondent were not sufficient to constitute all his supporters his agents, but that the persons promoting his election from a central agency or committee room in Winnipeg recognized and visited by him and persons sent out from that agency should be deemed to be his agents for the purposes of the election.

Re Lisgar Dominion Election, K.B. Man., Oct. 30, 1902.

—Procuring personation of voter—Ontario Election Act, 1902, ss. 167, 168—Procuring person to vote knowing that he has no right.]—The defendant was convicted of having unlawfully induced and procured another person to vote at a certain polling place on a certain day upon the question of bringing into force the Ontario Liquor Act, 1902, well knowing that such other person had no right to vote at the said time and place upon the said question:—Held, that the conviction was justified under s. 168 of the Ontario Election Act, R.S.O. 1897, c. 9 (made applicable by s. 91 of the Liquor Act), although the evidence showed that the defendant's offence consisted in inducing one R., who was himself a voter, but had no vote at the polling place mentioned, to personate a voter at such polling place. S. 167 (1) makes the counselling or pro-

curing of personation a corrupt practice, but does not provide a punishment; and s. 168 is in terms wide enough to cover the offence.

Rex v. Coulter, 6 O.L.R. 114.
7 Can. Cr. Cas. 288.

—Corrupt practices—Intoxicating liquor in vicinity of polls—Treating habit — Corrupt intent — Agency — Evidence of return.]—Where a person who was held to be an agent gave two bottles of whiskey to an elector the day before polling day, the inference of fact was drawn that they were given with the corrupt intent of influencing the voter, although there was no direct evidence to show the object for which they were given. Where a quantity of whiskey was obtained from one agent of the respondent and taken to the home of another in the vicinity of one of the polling places, where it was drunk freely on election day by the electors generally, the inference of fact was drawn that it was provided by both these agents for the purpose of influencing the electors, though there was not direct evidence to that effect, and it was held to be a corrupt practice notwithstanding that apparently it did not have that effect. The evidence also showed that a quantity of whiskey was taken to a place in the vicinity of another polling place by an agent, where it was consumed by the agent and others on polling day:—Held, that this showed a scheme on the part of the respondent's agents to influence the voters generally, and procure the election of the respondent by providing whiskey at each of the polling places. The following were held to be agents:—One who accompanied the respondent on a canvassing trip during which he spent a day canvassing for the respondent and spoke on his behalf at an election meeting at which the respondent was also present and spoke. One who accompanied the respondent on a canvassing trip, acting as interpreter (the respondent being under the impression that he was one of his supporters), and actually worked and canvassed for him with his authority. The son of the respondent, who took an active interest in the election on behalf of the respondent with his knowledge, acted as scrutineer, and was furnished with a sum of money by the respondent when leaving for the polling place at which he was to act. Quære, whether an agent accustomed to carry about with him a bottle of whiskey to treat those whom he should happen to meet, should not, if following this custom while actually engaged in canvassing, be held to have treated with a corrupt intent. It is not necessary that proof should be given that the respondent had been returned as a member.

Leblanc v. Maloney (No. 2), 5 Terr. L.R. 402 (Scott, J.).

—Agency—Delegates to nominating convention—Authorization — Treating by "candidate"—Previous habit of treating—Rebuttal of presumption — Absence of corrupt intent.]—The respondent was nominated as a candidate for election as a member of the Legislative Assembly for Ontario by a party convention, and, in acknowledging and accepting the nomination, he said:—"There are three things essential to success: first, a good cause; second, proper organization; third, hard work. The first we have; the second and third will largely depend on you":—Held, that the respondent by these words constituted every delegate who was present his agent, and became responsible for all that was afterwards done by them in organization and work for the purpose of the election. The respondent requested M., who was at the convention as a delegate, to go with him to a factory and introduce him to the workmen, some of whom were voters. M. did this, and the respondent addressed the workmen on behalf of his candidature. After the meeting was over, and the workmen had dispersed, M. asked the foreman to have a drink at a neighbouring inn, which the foreman declined. M. also said that if the workmen who went home in that direction would come over, he would "leave a drink for them there." This conversation was not in the presence of the respondent, nor heard by him. When the men were leaving their work for the day, the foreman told them what M. had said, and eight or ten of them called at the inn and got a drink of beer without paying for it:—Held, that a charge of treating a meeting assembled to promote the election, under s. 161 of the Ontario Election Act, failed upon this evidence, for the meeting had come to an end before anything was said about the treating, and the men were not told anything about it till nearly three hours afterwards. Nor did the evidence support a charge under s. 162 (1) of corrupt treating of individuals in order to be elected, M. being a customer of the factory and following a previous habit in his intercourse with the men. Upon a charge of treating a committee meeting held at a hotel, the evidence was that McC., one of the delegates to the convention, brought into the room where the meeting was being held a box of cigars for the use of the members of the committee. He said he did it at the request of the landlord. It was not shown by whom payment was made. Held, that the charge was not proved, for it is the person at whose expense the treat is supplied, or who pays or engages to pay for it, who alone is guilty of the offence. The respondent admitted that he had treated on the day of the convention, after the convention was over, several times, at at least two hotels, several persons, some of whom might have been electors. He denied, however, that the treating had any relation to the election. Held, that under sub-s. 2 of s. 162 (added by 62 Vict. (2), c. 5, s. 7 (O.), treating generally or extens-

ively or miscellaneously is only prima facie a corrupt practice. If it be shown that the treating was not in fact done corruptly in order to be elected or for being elected or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of sub-s. 2. There may still be innocent treating, though, if it be general or extensive or miscellaneous, the onus of showing that it is innocent is upon the respondent. And an antecedent habit of treating must still help, among other things, to rebut the inference of corrupt intent. Held, also, that, although the respondent did not become a "candidate," within the meaning of s. 2, sub-s. 8, until the 27th March, yet if any corrupt acts in relation to the election were done by him before that date, they would affect the election, for the Act applies to everything done at any time before an election by a person who is afterwards elected. Youghal Election (1869), 3 Ir. R.C.L. 530, 1 O'M. & H. 291, followed. It was shown that the respondent and his chief agent had on several occasions in the course of the canvass treated in bars. The respondent was a physician, with a large country practice, and constantly on the road. He was also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating, and he continued to treat after his nomination by the convention on the 1st February until the writ for the election was issued on the 22nd April. Held, that no corrupt intent having been shown in any of the instances of treating proved, the election was not thereby avoided. West Wellington Case (1895), 2 E.C. 16, distinguished.

Re East Middlesex Provincial Election; Rose v. Rutledge, 5 O.L.R. 644.

—Corrupt practices—Bribery — Treating—Furnishing transportation—Proof of agency of person guilty of corrupt practice—The Dominion Elections Act, 1900.]—1. A charge of bribery, whether by a candidate or his agent, is one which should be established by clear and satisfactory evidence, as the consequences resulting from such a charge being established are very serious. (2) To prove agency, the evidence should also be clear and conclusive and such as to lead to no doubtful inference. (3) To constitute agency in election cases, as in other cases, there must be authority in some mode or other from the supposed principal. It may be by express appointment or direction or employment or request, or it may be by recognition and adoption of the service of one assuming to act without prior authority or request. It may be directly shown, or it may be inferred from circumstances. It may proceed directly from the alleged principal or it may be created indirectly through one or more authorized agents. (4) The fact that a person is a delegate to, or member of, the convention or body which selects a candidate does not of itself make such person an agent of the candidate chosen. (5) Canvassing, speaking at meetings, or other work in the promotion of an election does not per se establish agency, although, according to degree and circumstances, it may afford cogent evidence of agency. (6) Accompanying a candidate in his canvass is not sufficient in itself to constitute agency. (7) S. 109 of the Dominion Elections Act, 1900, is new and goes far in advance of the former law as to treating voters at an election in omitting the element of corrupt intent, and should be strictly construed. Under that section the providing or furnishing of refreshments or drink would not be an offence unless done at the expense of the candidate. (8) The treating of electors prior to and on polling day by an agent of the respondent, although done on a liberal scale, will not be assumed to have been done with the corrupt intent necessary to make it an offence, when the Court is satisfied that he was accustomed to keep at all times considerable quantities of liquors on hand and to supply them quite freely to others in the way of hospitality or as a matter of business, and there is no other evidence to show that the treating was done in order to influence a voter or voters. The same rule applies to treating when done in compliance with a custom prevalent in the country and without express evidence of any corrupt intent in so treating; also to the supplying of meals at a private house to electors who have come from a distance, in the absence of evidence that this was done for the purpose of influencing the election. (9) The taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, or the giving to a voter of a free pass or ticket by railway, boat or other conveyance, if unaccompanied by any condition or stipulation affecting the voter's action in reference to his vote is not a corrupt practice, and the onus is on the petitioner to prove that the railway tickets supplied had been paid for. (10) Where a charge is made of an offer not accepted of money to influence a voter the evidence is required to be particularly clear, and conclusive.

In re Lisgar Dominion Election, 14 Man. R. 310.

—Penalties—Person voting knowing that he has no right to vote—Agent at poll—Certificate — Neglect to take oath of qualification.] — The defendant, having shortly before an election for the Legislative Assembly of Ontario removed from his farm in the neighbourhood of a city into the city itself, applied for and obtained registration as a city voter, not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situ-

ated, at a polling place other than that for the sub-division in which he had formerly resided, and received from the returning officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, and voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could not vote:—Held, that the defendant was not liable to the penalty imposed by s. 168 of the Ontario Election Act, R.S.O. 1897, c. 9, for voting knowing that he had no right to vote. South Riding County of Perth (1895), 2 Ant. Elec. Cas. 30, followed. (2) That the defendant was not liable to the penalty imposed by s. 181 of the Act, for wilfully voting without having at the time all the qualifications required by law. "Wilfully voting" as in this section, and applying it to the facts of the case, was practically the same as voting knowing that he had no right to vote. (3) That the defendant was liable to the penalty of $400 imposed by s. 94, sub-s. 5, of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate; but, as the defendant was not asked to take the oath, the deputy returning officer not having been aware that it was necessary, and the plaintiff himself was present when the defendant voted, and did not object, the provisions of R.S.O. 1897, c. 108, should be applied, and the penalty reduced to $40.

Smith v. Carey, 5 O.L.R. 203.

—Ontario Election Act — Recovery of penalty by action — Reduction of penalty.] — An action will not lie under s. 195 of the Ontario Election Act,, R.S.O. 1897, c. 9, for the pecuniary penalty for the offence of bribery prescribed by s. 159, sub-s. 2, as amended by 63 Vict. c. 4, s. 21, until after conviction. The defendant was found guilty of bribery, on the evidence, and the claim for a penalty was dismissed without costs. The defendant was held liable to a penalty of $400 under s. 94, sub-s. 5, of the Act, for voting at a polling place where he was acting as an agent of a candidate, under a certificate of the returning officer, without having taken the oath of qualification, but the penalty was reduced to $40.

Carey v. Smith, 5 O.L.R. 209.

—Election petition — Examination for discovery — Inquiry into corrupt practices.]—

See ELECTION LAW II.

—Setting aside an election.]—

See ELECTION LAW II.

—Corrupt practices—American citizens — Tort committed within province — Service out of jurisdiction.]—American citizens having intervened in the conduct of provincial elections, and having committed illegal acts in the province in connection therewith:—Held, that their foreign nationality or residence did not exempt them from the penal consequences of their violations of the Election Act, R.S.O. 1897, c. 9. Held, also, that they had been properly served outside the jurisdiction under Con. Rule 162 (e) made applicable to proceedings in Election Courts by Rule LXIV., passed December 23rd, 1903. Held, further, that transportation by public steamboat does not come within the words "hire a horse, cab, cart, waggon, sleigh, carriage, or other conveyance . . . for the . . . transportation of voters," in s. 165 of the Ontario Election Act, R.S.O., 1897, c. 9, making illegal the hiring of such vehicles by candidates to convey electors to or from the polls.

Re Sault Ste. Marie Provincial Election, 1903, Galvin and Coyne Cases, 10 O.L.R. 356.

—Corrupt practices — Incriminating evidence—Certificate of Judge.]—Where upon a summons calling on the defendant to show cause why he should not be found guilty of certain alleged corrupt practices under the Ontario Election Act, R.S.O., 1897, c. 9, the only evidence taken was his own, and was given by him under the general objection that he should not be called on to criminate himself:—Held, that by virtue of s. 189 (a) (b) of the Election Act, R.S.O., 1897, c. 9, the defendant having answered truly all questions put to him, was entitled to be indemnified against any penal results of his disclosures, and could not be convicted on his own testimony. Held, also, that s. 21 of the Evidence Act, 4 Edw. VII., c. 10 (O.), had no application, inasmuch as this was not a case where "but for that section the witness would have been excused from answering."

Re Sault Ste. Marie Provincial Election, Lamont's Case, 10 O.L.R. 85.

—Ontario Election Act — Bribery — Recovery of penalty by action.]—The effect of this amendment of s. 159 (2) R.S.O. 1897, c. 9, made by 63 Vict. c. 4 (O.) by which persons committing various forms of bribery enumerated in the section (a to c inclusive) become on conviction liable to a fine of $200 and imprisonment is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under s. 195. Only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed. Both must follow on the conviction in one and the same proceeding taken to enforce them. Imprisonment cannot be adjudged in an action under s. 195 which intends a proceeding by action to recover the money penalty only. Judgment by Boyd, C., which followed that of Britton, J., in Carey v. Smith (1903), 5 O.L.R. 209, in dismissing the action varied; and the action held maintainable under s. 195 only

for penalties imposed by ss. 162, 163, 165, 166.

Asseltine v. Shibley, 9 O.L.R. 327 (C.A.).

—Corrupt practices—Agency—Scrutineer — Disqualification of voter — Persons voting on transfer certificates.]—A. was found guilty of corrupt acts at H., a polling place, on polling day. Before that day his sole connection with the respondent was that, being a livery stable keeper, he had driven the respondent on a day before the nomination, from one place in the electoral division to another. The respondent on that occasion canvassed A. for his vote, but A. made no promise, and the respondent did not ask him to vote for him. On the day before the polling, A. and one G. drove to H., arriving there in the evening. The trip was undertaken at the instance of G., who was held not shown to be an agent of the respondent. In order to persuade A. to go to H., G. said he would procure a transfer of A.'s vote to H., and he afterwards brought and handed to A. a printed paper, signed by the respondent, apparently one of a number of scrutineer appointments which the respondent had signed in blank and left with one B., his agent. A.'s name was not inserted by the respondent, and there was no evidence to show by whom it was filled in. The number of the polling place was left blank, and never was filled in. G. was not examined as a witness, and there was no proof of the means by which he became possessed of this paper:—Held, Meredith, J.A., dissenting, that the petitioner had failed to establish that A. was an agent for whose acts the respondent was responsible. It was contended that the election should be set aside under the common law of Parliament because of the corrupt acts of A. and G. and of a number of irregularities in the conduct of the election by the officials, among which were the appointment of a non-voter as deputy-returning officer at one poll and of a clergyman at another, contrary to the statute. The operations of A. and G. were, however, confined to a small portion of the electoral district; A. was the only person found by the trial Judges to have been guilty of corrupt practices, and they also found that there was no reason to suppose that corrupt practices extensively prevailed at the election:—Held, that if, in such circumstances, an election could be avoided, it should only on overwhelming proof of corrupt acts of so extensive a nature as virtually to amount to a repression or prevention of a fair and free opportunity to the electors of exercising their franchise and electing the candidate they wished to represent them; and that all irregularities of the kind indicated, not affecting the result, were cured by s. 214 of R.S.O. 1897, c. 9. In request of votes attacked upon a scrutiny: Held, that a Crown land agent under the Free Grants and Homesteads Act, authorized to take entries and make locations for free homesteads, but not to sell or to receive moneys for the sale of public lands, was not disqualified as a voter by s. 4 of the Ontario Election Act. An elector engaged by a deputy returning officer to drive voters to the poll is not an agent within the meaning of the s. 94 (1) and (4) of the Act, who is entitled to the certificate of the returning officer enabling him to vote at a polling place other than the one where by law he is otherwise entitled to vote.

Re Port Arthur Provincial Election, 12 O.L.R. 453 (C.A.).

—Personation — Perjury in taking oath of identity — Double prosecution.]—See RES JUDICATA. R. v. Quinn, 11 O.L.R. 242 (C.A.).

—Returning officer at provincial election—Defrauding candidate from being returned as member — Conspiracy.] — (1) The offence of conspiracy to defraud under the Revised Code s. 444 does not include a conspiracy to defeat a candidate's chances of election by the employment of unlawful devices. (2) A charge of conspiracy the particulars of which severally allege that the accused conspired to defraud a candidate at an election to the Saskatchewan Legislature, the electors of the division and the public, by illegally obtaining the return of the opposing candidate, does not disclose an offence under s. 573 of the Revised Criminal Code, for the acts alleged as the object of the conspiracy do not constitute an indictable offence either by statute or at common law. (3) Personation of a voter is not an offence at common law. (4) Particulars furnished under s. 859 of the Revised Code (former s. 616) have not the effect of amending or extending the scope of the original indictment or charge, and the inclusion of a separate and distinct offence as a particular under a charge of conspiracy will not authorize a conviction which would otherwise not be within the scope of the indictment.

The King v. Sinclair, 12 Can. Cr. Cas. 20.

—Proceeding to recover penalty — Insufficient particulars furnished.] — Plaintiff sought to recover a penalty of $400 from defendant in respect of an offence against the provisions of the Nova Scotia Elections Act, the ground alleged being a promise by defendant of valuable consideration to a male person entitled to vote at an election in order to induce such person to vote at such election, etc. In response to a demand by defendant for particulars of the name, residence, and occupation of the person referred to, the place where the offence was committed, and the date of the making of the promise and the giving of the valuable consideration alleged, plaintiff furnished particulars charging defendant with having promised valuable consideration to one or other of twelve persons named:—Held, reversing the judgment of the Chief Justice,

that the particulars given were insufficient. Semble, where the seat is attacked the policy of the law is to favour and promote a thorough investigation into the circumstances attending the election, but where that course is not adopted and particular offences against the law are singled out for punishment, the general principles adopted in the interpretation and application of all criminal and penal statutes must be applied.

Patriquin v. Covert, 42 N.S.R. 66.

—Penal action for unlawful treating.] — No penal action for unlawful and corrupt treating in a Dominion election shall be commenced unless the person suing has given good and sufficient security to the amount of $50 for costs. This condition is a precedent one to the commencement of the action and is mandatory; if not complied with, the action will be dismissed on exception to the form.

Bourbonnais v. Lortie, 10 Que. P.R. 345.

IV. ELECTION EXPENSES.

—Claim against candidate—Claim made after one month from declaration of election.]— A party who has a claim against a candidate at an election for the Legislative Assembly of the province, in relation to the election, and has not sent it in to the agent of the candidate within one month after the day of the declaration of the election, but who afterwards obtains an approval of the same by a competent judge, under s. 231 of the Quebec Election Act, 1903, has an action against the candidate to recover the amount. The true purport of s. 231, notwithstanding its permissive form, is to take the claim out of the operation of the preceding s. 230, by which it would be barred and to restore the right to enforce it at common law.

Pigeon v. Chaurest, 28 Que. S.C. 469 (Archibald, J.).

ELECTRIC LIGHT AND POWER.

Rate chargeable to consumers—Act requiring schedule to be filed.]—By the Acts of 1907, c. 4, all companies supplying light were required on or before July 1st of that year, and of each succeeding year, to file with the provincial secretary a schedule of the prices then charged for light and energy, which were to be the charges collected, unless altered by the Governor-in-Council after a hearing in that behalf:—Held, July 1st being a statutory holiday, that it was a sufficient compliance with the Act, to file the statement on the following day. Also, that a statement addressed to the provincial secretary and signed by the chief officer of the company stating the charges made by the company at that time, was a certificate within the meaning of the Act. Semble, that the only effect of the Act was that, after the filing of the certificate, the company could not, at least, before the date of a new filing, increase the charges as specified, and perhaps not even then, without the consent of the Governor-in-Council. Prior to the 1st July, 1907, the plaintiff company charged and collected a rate per M. k. w., making no charge for "readiness to serve," but subsequently to that date they adopted a new system, reducing the charge per M. k. w., and adding a readiness to serve charge based upon the requirements of the place using the light. Held, that the two rates taken together, being simply a method of arriving at a fair rate for the energy supplied, based upon a different calculation as to the cost of supplying it, it was open to the plaintiff to make the change and to charge defendant for power or current ready for service, but which, in fact, was never supplied.

Chambers Electric Light Co. v. Cantwell, 43 N.S.R. 419.

Hydro-Electric Power Commission—Entry on private lands.]—Plaintiff brought action for trespass to her land. Defendants pleaded justification and relied on the legislation respecting the Hydro-Electric Com., 7 Ed. VII. c. 19, and 9 Edw. VII. c. 18, s. 10. The whole question resolved itself into the single question of whether the above statutes or either of them, authorized an entry, under the direction of the commission, upon private property, against the will of the owner before payment of compensation. At trial, Falconbridge, C.J.K.B., held, that the statutes were a good defence, and dismissed the action. The Court of Appeal dismissed plaintiff's appeal therefrom.

Felker v. McGuigan Construction Co., 16 O.W.R. 417.

—Electric current supplied by municipality—Defective system—High tension current.]—In 1903 the defendants, a town corporation, acquired an electric light plant then supplying the town and vicinity. In 1904 the defendants passed a by-law constituting a Board of Commissioners under the Municipal Light and Heat Act, and the Municipal Waterworks Act, R.S.O. 1897, cs. 234, 235; and the Board, in and after 1905, took charge of the electrical plant, etc., of the defendants:—Held, that the liability of a body created by statute must be determined upon a true interpretation of that statute; and, upon the statutes referred to, the position of the defendants was that of principal, and that of the Board of agent; and the defendants were liable for damages occasioned by the act of the Board. Mersey Docks Trustees v. Gibbs (1866), L.R. 1 H.L. 93, followed. Held, also, that if it were beyond the powers of the Board to get their supply of electricity from a point

eight miles distant, it was not open to the defendants, who knew all about it and adopted it, to set up that they were not liable for the acts of the Board; and, even if this manner of procuring power were ultra vires the defendants, they could not set this up as an answer to a claim based upon the negligence of their servants, in a business carried on by them for the benefit and with the knowledge of the corporation; and in any case the causative negligence was within the municipality. On the 8th March, 1910, one of the plaintiffs, a boy, lying in bed in the house of his mother, the other plaintiff, was burned by a current of electricity from the town supply. Held, upon the evidence, that the system was a defective one; that the current which caused the injury was not a low tension current of about 110 volts—a current which, without negligence on the part of the defendants, might have been looked for—but a current of high tension which should not have been in the house at all. The defendants, having taken it upon themselves to conduct an electric light plant, must conduct it without negligence. Quære, whether the doctrine of Fletcher v. Rylands (1866), L.R. 1 Ex. 265, Rylands v. Fletcher (1868), L.R. 3 H.L. 330, could be applied to electricity. Any one dealing in electricity is bound to the public to exercise the utmost degree of care in the construction, inspection, repair, and operation of his apparatus and appliances; the defendants, on the evidence, were not careful in construction, they failed in inspection and in repair; and, without reference to the doctrine of Fletcher v. Rylands or the principle of res ipsa loquitur, the defendants should be considered liable for negligence. Held, also, that there was no contributory negligence; for, although the bed upon which the boy lay was in an iron bedstead, and the bedstead itself in contact with a radiator, the radiator being in contact electrically with the earth, there was nothing to indicate that such a state of affairs could be dangerous—it was usual and common, and no warning of danger to be anticipated from it had been given. Semble, that supplying the high tension electricity was a breach of contract with the owner of the house, the boy's mother, and she at least could sue in contract. Damages assessed at $2,250 for the mother's disbursements on account of the injury to her son and her trouble and inconvenience; and at $7,500 for the son's injuries—the loss of a hand and two holes burned through his skull to the brain.

Young v. Town of Gravenhurst, 22 O.L.R. 291.

Supply — Tolls and charges — Change of system of charges—Charges added to meter rate—Schedule of rates.]—

Chambers Electric Light Co. v. Cantwell, 6 E.L.R. 529 (N.S.).

—Supply of electricity — Municipal corporation — Failure of contractor to perform contract.]—

Town of Fort Saskatchewan v. Higman, 11 W.L.R. 713 (Alta.).

—Ownership of electric light works—Light supplied to house—Remedy for non-payment —Lien — Enforcement against landlord on tenant's default.]—

Stennett v. City of Edmonton, 8 W.L.R. 62 (Alta.).

—Supplying electrical energy—Delivery—Condition—Payment at flat rate—Obligation to pay for pressure not utilized.]—A contract for the supply of electrical energy provided that the company should furnish to the city at the switchboard in its pumping station, through a connection to be there made by the city with the company's wires, an electrical pressure equivalent to a certain number of horse-power units during specified hours daily, and the city agreed to pay for the same at a flat rate of "$20 per horse-power per annum for the quantity of said electrical current or power actually delivered" under the contract:—Held, that by supplying the pressure on their wires up to the point of delivery the company had fulfilled their obligation under the contract and was entitled to payment at the flat rate per horse-power per annum for the energy so furnished notwithstanding that the city had not utilized it. Per Girouard and Anglin JJ:—The agreement was a contract for the sale of a commodity. Appeals from King's Bench, Quebec, dismissed, and respondent's action maintained.

City of Montreal v. Montreal Light, Heat and Power Co., 42 Can. S.C.R. 431.

—Authorizing municipal corporations to acquire and distribute electric energy—Validation of contracts with Hydro-Electric Power Commission.]—The statutes 6 Edw. VII. c. 15, as to electrical power, 7 Edw. VII. c. 19, superseding the former, except as to contracts already entered into, 8 Edw. VII., c. 22 and 9 Edw. VII. c. 19, both providing for the validation of by-laws and contracts made under the former Acts, are intra vires of the Ontario Legislature. By s. 8 of the last-mentioned Act, it is provided that every action theretofore brought and then pending wherein the validity of a contract or by-law validated by the Act was attacked, shall be forever stayed:—Held, that it was open to the Court, notwithstanding the wide language used—referring to this very action—to inquire into the legislative competence to deal with the whole subject-matter. The supply of light is a proper function of municipal administration; and a municipal corporation may be authorized to engage in the business of acquiring and distributing electric energy, as one of the

incidents of municipal government, and coming within the words "Municipal Institutions in the Province:" s. 92 (8) of the British North America Act. The Provincial Legislature has power to establish electrical works as a local work or undertaking under clause 10 of the same section; and consequently it has power to delegate this undertaking to a competent municipal body. This does not infringe upon "Trade and Commerce," as used in s. 91 (2)—these words point to political arrangements in regard to trade, regulation of trade in matters of inter-provincial concern and the like. The provisions of the statutes abovementioned, validating the by-law and contract of the defendants and staying the action, are within the competence of the Legislature. When the Provincial Legislature exercises plenary power within the constitutional limits of the Imperial Federation Act, any statute so enacted is not to be revised or supervised by the judicial body. Declaration that the statutes are within provincial competence, but no further order and no costs.

Smith v. City of London, 20 O.L.R. 133 (D.C.).

—Electricity—Supply for lighting purposes —Schedule of rates—Discounts.]—In an action by plaintiff company to recover for electric light supplied to defendant's place of business (wholesale), plaintiff's claim covered two periods of time during which light was supplied under different schedules. The charge for the first period included a charge per k.w. for the energy supplied and a "readiness to serve charge" of ten cents for each socket:—Held, (following The Chambers Electric Co. v. Cantwell, 43 N.S.R., 419, for the reasons there given) that the charges were recoverable. As to the second period plaintiff's schedule included among other subjects, "wholesale places, banks, offices, etc., using light up to six o'clock p.m. and a good deal in the evenings. Held, that defendants' place of business was clearly embraced in this description. Also, that it was not relevant that one or two other descriptions in the schedule, which had to do with other subjects, were not very definite. The schedule contained, at the end of it, provisions for certain options to be given to customers to enable them to come in and make special agreements in lieu of the rates previously fixed. Held, that this was valid in the absence of anything in the statute to prevent a cutsomer from contracting himself out of the first provisions, and that such offers to customers did not in any way invalidate the fixed rates, which were to prevail unless one of the options was accepted, and in the absence of anything in the evidence to show that the rates under the optional provisions were higher than the fixed rates. Held also, that where under the schedule, consumers were to be entitled to a discount of 10 per cent. "for payment of account within five days" defendant must show that no account was rendered to be entitled to claim the discount as of right.

The Chambers Electric Light Co. v. Patillo, 44 N.S.R. 351.

— Hydro-Electric Power Commission.] — In an action similar to Smith v. City of London, 20 O.L.R. 133, the decision in that case was followed, and a declaration made that the statutes in question in both actions were intra vires of the Ontario Legislature: —Held, that the single point of difference, in that there was an existing electric light company in Toronto, was not a material difference.

Beardmore v. City of Toronto, 20 O.L.R. 165.

—Powers of Provincial Legislature—Authorizing municipal corporations to acquire and distribute electric energy—Validation of contracts with Hydro-Electric Power Commission.]—Held, affirming the judgments of Boyd, C., and a Divisional Court, 20 O.L.R. 165, and approving the judgments of Riddell, J., and a Divisional Court in Smith v. City of London (1909), 20 O.L.R. 133, that the statutes in question in both actions were intra vires of the Ontario Legislature.

Beardmore v. City of Toronto, 21 O.L.R. 505.

—Grant of franchise.]—The grant by the municipal council of a town to a company of the exclusive right to establish and operate, for a period of twenty years, a system of electricity and electrical motive power, can be validly made by by-law. Moreover, an application to set it aside cannot be made by incidental demand in an action to which the grantees are not parties. The grant of a perpetual right, though not exclusive, made for the same purpose and in the same manner, is ultra vires of a town corporation and void.

Dubuc v. Town of Chicoutimi, Q.R. 37 S.C. 281.

Accounts, Re-opening of—Delay.] — The company appellant contracted with respondent to furnish them with electric lighting at three quarters of a cent per ampere hour, the bill to be rendered monthly. At this time the current was 52 volts, but it was soon after doubled, without any notice to the respondents and without any change in the lighting. Accounts were rendered at the original rate during about two years and a half, when the appellant pretended that in consequence of the increase of the voltage the quantity of the light furnished was doubled, and the action was to recover the value of the additional light from the date of the change:—Held, affirming the judgment of the Superior Court, Davidson, J., 16 Que. S.C. 377, that the appellants having, during a lengthened period, placed its own interpretation upon the contract, and the respondents having there-

by been deprived of any opportunity to abandon the agreement, it was too late for appellant to complain that it had followed a wrong principle in calculating the light furnished.

Royal Electric Company v. Davis, 9 Que. Q.B. 445.

—**Commodity of a dangerous character — Duty imposed by law.**]—The respondent's husband was instantly killed by a shock received when he took hold of an electric lamp in his house, for the purpose of turning the light on. The light was furnished in the ordinary way by the company appellant. The cause of the unusual intensity of the electric current was not clearly established. The respondent claimed damages for the death of her husband: —Held (affirming the judgment of the Superior Court, Curran, J.) that however the current originated the appellants should be held responsible, having failed to exercise the special diligence, care, and skill required of a company carrying on a business recognized to be of a dangerous character. A company which holds itself out to the public as the supplier of electric current for lighting purposes and which contracts with individuals to furnish light or power over a system constructed and controlled by itself, is bound to a supervision and diligence proportionate to the peculiar character and danger of the commodity in which it deals.

Royal Electric Co. v. Heve, 11 Que. K.B. 436.

—**Exclusive franchise — Municipal grant.**] —A provincial legislature has the power to authorize a municipality to grant the exclusive right of establishing and operating a system of electric lighting for a term of years within the municipality.

Hull Electric Co. v. Ottawa Electric Co. (1902), A.C. 237, reversing 10 Que. Q.B. 34.

—**Electric companies — Concurrent powers —Distance between wires.**]—When the legislative power given to two or more companies with similar powers comes to be exercised in the same territory, the Court should necessarily conclude that the legislature intended to give them concurrent power; in such a case the Courts being bound to submit to the power of the legislature, should only interfere between these different companies when one of them has encroached upon rights acquired by the other. Three feet between the wires should, according to the experts or persons skilled in such matters, be a sufficient distance to avoid any immediate danger.

Jacques Cartier Water and Power Co. v. Quebec Railway, Light and Power Co., 11 Que. K.B. 511.

—**Contract—Supply of electric power—Continued existence of property — Condition precedent.**]—Where under the terms of an agreement the plaintiffs were to supply the defendants with electric current "to the extent of fifty horse power" in the premises of the defendants, to be used by them for operating their machinery and for use in their business, and for no other purpose: —Held, that such limitation was for the purpose of confining the use of the power to the defendants' premises, and not to any existing mill thereon, and the fact that such mill was afterwards destroyed by fire did not dispense with the defendants' obligation to receive and pay for the power. Taylor v. Caldwell (1863), 3 B. & S. distinguished.

Ontario Electric Light and Power Co. v. Baxter & Galloway Co., Ltd., 5 O.L.R. 419, 2 C.L.R. 125 (D.C.).

—**Negligence—Electric plant — Defective appliances — Electric shock —Engagement of skilled manager—Contributory negligence.**]—An electrician engaged with defendants as manager of their electric lighting plant and undertook to put it in proper working order, the defendants placing him in a position to obtain all necessary materials for that purpose. About three months after he had been placed in charge of the works he was killed by coming in contact with an incandescent lamp socket in the power house, which had been there during the whole of the time he was in charge, but, at the time of the accident, was apparently insufficiently insulated:—Held, that there was no breach of duty on the part of the defendants towards deceased, who had undertaken to remedy the very defects that had caused his death, and the failure to discover them must be attributed to him. The judgment appealed from, 14 Man. R. 74, ordering a new trial, was affirmed, but for reasons different from those stated in the Court below.

Davidson v. Stuart, 34 Can. S.C. 215.

—**Reading of meter to be supplied to consumer—Burden upon party supplying to prove compliance with Act — Stat. Can., 1904, c. 13.**]—The Dominion Acts, 1894, c. 13, s. 13, sub-s. 2, enact that "Whenever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser the contractor shall cause a duplicate of such reading to be left with the purchaser." In an action by the plaintiff company seeking to recover for electric lighting and rent of meter:— Held, by the Court, that the burden was upon plaintiff to show compliance with the Act, and that non-compliance was not excused by the fact that the person to whom the duplicate reading was required to be delivered might not be able to understand it. Also, that an offer to compromise, made on the part of defendant, could not in any sense be treated as a waiver of the right conferred by the statute. Also (per Townsend, J.), that the fact of previous bills

having been paid could not be taken as dispensing with the requirement of the statute for more than the particular bills paid.

Cape Breton Electric Co. v. Slayter, 36 N.S.R. 513.

—Allowing guy wires to hang loose — Contact with live wire.]—The defendants' workmen while straightening a pole to which a guy wire was attached, cut the wire, allowing it to hang loose, and, either by these workmen, or some third party, as to which there was no evidence, it was thrown across a power wire so as to become a live wire, whereby the plaintiffs coming in contact therewith were injured:—Held, that the original negligence of the workmen of the defendants was an effective cause of the injury to the plaintiffs and that the defendants were liable therefor.

Labombarde v. Chatham Gas Company, 10 O.L.R. 446 (Anglin, J.).

—Electrical installations — Cause of fire—Defective transformer — Improper installations.]—In an action to recover the amount of a policy of fire insurance paid by the plaintiffs upon the destruction of the premises insured by fire caused, as alleged, through the defective condition of a transformer of the defendant company, whereby a dangerous current of electricity was allowed to enter the insured building, the evidence failed to show conclusively that the transformer was out of order previous to the occurrence of the fire, and at the same time it appeared that the wiring of the building may have been defective:—Held, affirming the judgment appealed from, cf. Union Assurance Co. v. Quebec Railway, Light and Power Company, Q.R. 28 S.C. 289, that the onus of proof upon the plaintiffs had not been satisfied and that they could not recover. Abrath v. The North-Eastern Railway Company, 11 Q.B.D. 440, referred to.

Guardian Fire and Life Assurance Company v. Quebec Railway, Light and Power Company, 37 Can. S.C.R. 676.

—Quebec Act, 1 Edw. VII. c. 67—Construction — Powers of company — Purchase — Effect of resolution by an insufficient quorum.]—Held, that under Quebec Act, 1 Edw. VII. c. 67, the appellant company was empowered to acquire and hold for the purpose of its business real or immovable estate not exceeding a specified sum in yearly value in any part of the province except the judicial district of Quebec; and that, acting bona fide, it was the sole judge of what was required for that purpose. Where a purchase intra vires of the above Act had been effected by the company under a resolution of the directors at a meeting on July 17, 1901, which authorized the completion thereof, subject to an option of reconveying within a specified time:—Held, that after the lapse of the specified time the purchase was absolute and that the company which had furnished the vendor with a copy of the said resolution as one which had been duly and regularly passed, could not avoid it by showing that it had been passed by an insufficient quorum.

Montreal & St. Lawrence Light & Power Co. v. Robert, [1906] A.C. 196, 15 Que. K.B. 137.

—Wires on public highway—Proximity to bridge — Injury to child.] — Several years ago the owners of land in the Township of York built a bridge over a ravine for access to and from the City of Toronto and about 1894 the Toronto Electric Light Co. placed wires across the ravine about ten feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires, which had become worn and ceased to be insulated. G., a boy under nine years of age, while playing on the bridge, put his arm through the railing and his hand touching the wire he was badly injured:—Held, reversing the judgment of the Court of Appeal, 12 Ont. L.R. 413, that the plans and deeds in evidence showed a dedication as a public highway of the bridge and land of each side of it and such highway included the land over which the wires passed. Held, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway and the company were liable for the injury to G.

Gloster v. Toronto Electric Light Company, 38 Can. S.C.R. 27.

—Insulation of wires—Negligence in exercising statutory powers — Evidence.] — A derrick used in putting up a house in one of the streets of Montreal was brought into contact with the overhead wires of the respondent company, with the result that a current of electricity was diverted to the street and killed the appellant's husband:—Held, that the respondents, being authorized by Quebec Act, 1 Edw. VII. c. 66, s. 10, in the alternative to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precaution would have been effectual to avert the accident.

Dumphy v. Montreal Light, Heat and Power Co., [1907] A.C. 454, 16 Que. K.B. 527.

—Negligence — Electric current — Dangerous system — Protection of workmen.]—Where a company making use of electricity has allowed an unprotected wire, charged with a current of 11,000 volts, to remain in a position dangerous to persons employed in their power-house, they will be held responsible in damages for the death

of an employee caused by coming into contact with such unprotected wire.

Vézina v. North Shore Power Co., Q.R. 29 S.C. 305 (Ct. Rev.). (Affirmed on appeal by Supreme Court of Canada, sub nom. North Shore Power Co. v. Duguay, 37 Can. S.C.R. 624.)

—Loss by fire—Proof.] — A company furnishing electric light to a city which conducts its electricity over its wires by a primary current of 2,000 volts from its power house to its transformers where it is reduced to a secondary current of 110 volts before passing through the connections installed in the houses by their owners is only responsible for a fire caused in one of these houses by the electric current in so far as it is due to its fault. Therefore, an action against it for damages in which it is established that the injury could have been produced in two ways, one imputable to the fault of the company and the other to that of the owner of the burned house without giving the Court the material necessary for conviction in either sense must be dismissed.

Quebec Railway, Light and Power Co. v. Union Assurance Society, Q.R. 15 K.B. 440, reversing Union Assurance v. Quebec Ry. Q.R. 28 S.C. 289.

—Dangerous currents—Trespass—Breach of contract — Surreptitious installations.] — P. obtained electric lighting service for his dwelling only, and signed a contract with the company whereby he agreed to use the supply for that purpose only, to make no new connections without permission and to provide and maintain the house-wiring and appliances "in efficient condition, with proper protective devices, the whole according to Fire Underwriters' requirements." He surreptitiously connected wires with the house-wiring and carried the current into an adjacent building for the purpose of lighting other premises by means of a portable electric lamp. On one occasion, while attempting to use this portable lamp, he sustained an electric shock which caused his death. In an action by his widow to recover damages from the company for negligently allowing dangerous currents of electricity to escape from a defective transformer through which the current was passed into the dwelling:—Held, that there was no duty owing by the company towards deceased in respect of the installation so made by him without their knowledge and in breach of his contract and that, as the accident occurred through contact with the wiring which he had so connected without their permission, the company could not be held liable in damages.

Montreal Light, Heat and Power Company v. Laurence, 39 Can. S.C. 326.

—Supply of electric light—Cancellation of contract—Condition for terminating service —Interest in premises ceasing.]—The electric company and S. entered into an agreement for the supply of electric lighting in a hotel for ten years from 1st May, 1902, and it was provided that either party might cancel the agreement by notice in writing, if, after the expiration of five years, neither S nor his heirs, executors, administrators or assigns should be owner, tenant or occupier of the hotel, alone or with other persons. The lease to S. extended only until 1st May, 1907; it gave him no right to a renewal, and he had no other interest in the building. He sold a half interest in the lease to two persons with whom he formed a partnership in the hotel business, which was carried on till 1904, when the partnership terminated by his death, and the defendants were appointed administrators of his intestate estate. The affairs of the partnership were settled between the defendants and the surviving partners who became transferees of the business, exclusive owners of the lease and sole occupants of the hotel for the unexpired term. They gave notice to the plaintiffs to cancel the agreement on 1st May, 1907, and, on that date, obtained a new lease of the premises under which they continued in occupation and possession:—Held, that after 1st May, 1907, the new tenants of the hotel were not assigns of S., and, consequently, were entitled to cancel the agreement for electric lighting by notice according to the proviso.

Deschenes Electric Company v. Royal Trust Co., 39 Can. S.C.R. 567.

—Municipal corporation — Hydro-Electric Power Commission Acts—Refusal of fiat by Attorney-General.]—The plaintiff, a ratepayer of a city corporation, brought an action against the corporation to have declared void a contract entered into between the corporation and the Hydro-Electric Power Commission of Ontario, for the supply of electrical power to the inhabitants of the city, and in his statement of claim alleged that the contract could be validly entered into by the corporation only with the assent of the electors, and that there was a material variation between the contract attacked and that set for in the by-law which had been approved by the electors, inasmuch as the latter contained a limitation as to the price at which the power was to be supplied, which was not contained in the contract proposed to be entered into between the defendants and the Commission. The statutes by which the Commission was appointed provided that no action should be brought against it or any of its members without the consent of the Attorney-General, who refused to grant the plaintiff's application for a fiat permitting the joinder of the Commission as a defendant. The defendants having moved under Con. Rule 261 for an order that the statement of claim should be struck out, on the ground that it disclosed no reasonable cause of action, and for an order staying all proceedings until

the Commission should be added as a defendant:—Held, that, as the statement of claim appeared to disclose a substantial cause of action (see Scott v. Patterson, 1908, 17 O.L.R. 270), it should not be struck out under the Rule in question, which applies only to pleadings which are obviously unsustainable, or to cases in which the Court is satisfied that a statement of claim discloses no cause of action at all. Held, further, that, even assuming the existence of a contract binding upon the corporation and the Commission, the Court should not, in the exercise of the discretion vested in it under Con. Rule 206, stay the action until the Commission should be added as a co-defendant, inasmuch as the plaintiff had done all in his power to have it so added, having applied to the Attorney-General for a fiat permitting such joinder, which application had been strenuously opposed by the defendants, and refused. Con. Rule 206 (1), which provides that "an action shall not be defeated by reason of the misjoinder of parties," applies also to nonjoinder, which is expressly included in the corresponding English Rule, and the authorities upon the latter are therefore applicable in our Courts. Semble, that, as the defendants' application should, under the practice, have been made before a Judge in Chambers, it was open to doubt whether they could have maintained their appeal to a Divisional Court without special leave under Con. Rule 1278.

Beardmore v. City of Toronto, 19 O.L.R. 139.

—Dangerous wires—Assistance volunteered at accident.]—Decision, 17 Que. K.B. 471, reversed and new trial ordered.

Dumphy v. Martineau, 42 Can. S.C.R. 224.

—Contribution or indemnity — Joint tort-feasors — Negligence — Injury by electric wire.]—The plaintiff recovered judgment against two of the defendants, a town corporation (the appellants) and an electric company, for damages for the death of her husband by contact with a live wire in a street of the town. The appellants carried their fire alarm wires upon the poles of a telephone company. The electric company carried their electric current by means of wires strung upon poles, at a lower level than the fire alarm wires. Through negligence on the part of the appellants the fire alarm wire was allowed to fall and remain upon or across the wires of the electric company, passing beneath. There were no guards between the two sets of wires, and the electric company's wires were either improperly insulated in the first instance, or had become worn, and were negligently left in that condition. The fire alarm wire resting upon the live electric wire, both were melted at the point of contact, and the severed live wire fell to the sidewalk and came in contact with the deceased. It was found that his death was due to separate acts of negligence on the part of the two defendants, the combined effect of which was to bring about the fatal result:—Held, that the appellants were not entitled at common law to contribution or indemnity from the electric company; nor were they so entitled under an agreement whereby the electric company undertook to indemnify and hold the appellants harmless against all damages, actions, etc., by reason of any danger or injury from the company's electrical system, if incurred by or consequent on the negligence of the company. Per Moss, C.J.O., that the rule against contribution between wrong-doers has not been qualified to the extent of entitling one who is himself a wilful or negligent wrong-doer to indemnity from another involved with him in causing the injury or wrong in respect of which judgment has gone against them. Per Meredith, J.A., that s. 609 (1) of the Municipal Act, 3 Edw. VII. c. 19 (O.), did not apply to the claim of the appellants against the electric company.

Sutton v. Town of Dundas, 17 O.L.R. 556.

ELECTRIC RAILWAY.

Ontario.

Injury to person crossing track—Contributory negligence.]—In an action for damages for injuries sustained by the plaintiff, owing, as he alleged, to the negligence of the defendants, whereby he was struck by a car operated by their servants, while crossing a highway on foot:—Held, that there was, at the close of the plaintiff's case, some evidence proper to be passed upon by the jury both of negligence on the part of the defendants and of contributory negligence on the part of the plaintiff; and that a nonsuit was properly set aside and a new trial directed. Judgment of a Divisional Court, 20 O.L.R. 71, affirmed. Per Garrow, J.A., that it is the well-established rule that, where reasonable evidence is given of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff, these issues must be determined by the jury. The cases which at first sight seem to qualify this rule are cases in which the Court was able to reach the conclusion that the negligence of the plaintiff was the sole cause, or that the conduct of the plaintiff was per se negligent, or the evidence so clear and undisputed that only the one inference could be reasonably possible.

Jones v. Toronto and York Radial R.W. Co., 21 O.L.R. 421 (C.A.).

Excessive speed of car—Crossing the hind car without looking for approaching car—Joint negligence.]—R. alighted from an eastbound car of the defendants on the south

side of Gerrard street, in the city of Toronto, and in attempting to cross the north track of the defendants, opposite the gate of the Toronto General Hospital, which he was about to visit, he was struck by a west-bound car and so injured that he died. In an action by R.'s executors to recover damages for his death, the jury, in answer to questions, found: that R.'s injuries were caused by the negligence of the defendants, which consisted in excessive speed; that R. could by the exercise of reasonable care have avoided the accident; that R. was negligent "by not looking for approaching car;" that the motorman of the west-bound car, after he became aware, or, if he had exercised care, ought to have been aware, that R. was in a position of danger, could have prevented the accident by the exercise of reasonable care, and that in that respect the motorman's negligence consisted in "too great a speed":—Held, that, as the primary and ultimate negligence of the defendants were one and the same—excessive speed—and as that negligence was concurrent with the negligence of the deceased, there could be no recovery. No question of ultimate negligence arose upon the findings of the jury. Upon the findings of the jury, the action was dismissed, but without costs. Per Boyd, C.:—At places like the Hospital the cars should not be driven at such a rate as to imperil those who have to cross the track in the visitation of the sick.

Rice v. Toronto R.W. Co., 22 O.L.R. 446.

Toronto Railway Agreement — Ontario Act 8 Edw. VII. c. 112, s. 1—Construction.]—An order in council in pursuance of the judgment of the Judicial Committee [1907] A.C. 315, ordered that subject to certain conditions contained in their agreement it was for the respondents and not the appellants to determine what new lines should be laid down on streets within the city of Toronto. Thereafter an order was made by the Ontario Railway and Municipal Board that the respondents construct between ten and fifteen additional miles of single track, and the company selected certain streets for that purpose. Subsequently the Court of Appeal for Ontario affirmed a decision of the said Board that the company had the right to select:—Held, that the judgment in (1907) A.C. 315 was perfectly clear and that the order in council thereon was unaffected by the Ontario Act 8 Edw. VII. c. 112, s. 1.

City of Toronto v. Toronto Railway Co., [1910] A.C. 312.

—Contract for construction—Sanction of contract by shareholders.]—Action for damages for breach of contract for construction of electric railway. Plaintiff proved execution of the contract under corporate seal signed by president and secretary. The contract was never carried out:—Held, that R.S.O. (1897), c. 209, s. 17, had enacted that no such contract should be of any force or validity until sanctioned by a resolution passed by the votes of the shareholders, in person or by proxy, representing two-thirds in value of the paid-up stock, at a general meeting specially called, and not having been complied with, action should be dismissed, but under the circumstances without costs.

Thomas v. Walker, 1 O.W.N. 1094, 16 O.W.R. 751.

—Powers of provisional directors—Contract under seal—Sanction of shareholders.]—Section 9 of the special Act, 1 Edw. VII., c. 92 (O.), incorporating the defendant railway company, is an enabling enactment, enlarging the powers of the provisional directors, and authorizing them to act for and on behalf of the company to an extent much beyond the scope to which provisional directors are limited by s. 44 of the Electric Railway Act, R.S.O. 1897, c. 209. The language of s. 9 distinctly implies that the provisional directors are authorized, with the sanction of the shareholders, to engage the services of promoters or other persons for the purpose of assisting them in furthering the undertaking; and the power to engage servies implies the power to pay or agree to pay for such services. The services of the plaintiffs which were engaged under the agreement sued upon were within the class of purposes requiring the sanction of the shareholders if the agreement had been to pay in paid-up stock or bonds. If the sanction of the shareholders was necessary in order to make the agreement binding upon the company, it was given in substance. Monarch Life Assurance Co. v. Brophy (1907), 14 O.L.R. 1, distinguished. Apart from these considerations, the agreement being under the seal of the company, and the services having been rendered in fact by the plaintiffs and accepted in fact by the company, there was ample consideration to support the claim against them for the sum mentioned in the agreement. Township of East Gwillimbury v. Township of King (1910), 20 O.L.R. 510, followed. Judgment of a Divisional Court, 21 O.L.R. 109, affirmed. The defendant company having appealed from the judgment against them, and the plaintiffs, as the direct result of the company's appeal, having appealed from the dismissal of the action as against the individual defendants, both appeals were dismissed with costs, but the company were ordered to pay to the plaintiffs the costs to be paid by the latter to the individual defendants.

Selkirk v. Windsor, Essex and Lake Shore Rapid R. W. Co., 22 O.L.R. 250.

—Street railway—Assumption by municipality—Principle of valuation—Operation in two municipalities—Compulsory taking.]—By s. 41 of the Ontario Street Railway Act

(R.S.O. [1897] c. 208), no municipal council shall grant to a street railway company any privilege thereunder for a longer period than twenty years, and at the expiration of a franchise so granted, or earlier if so agreed upon, it may, on giving six months' previous notice to the company, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value of the same to be determined by arbitration:—Held, reversing the judgment of the Court of Appeal, Re Berlin Railway and Berlin, 19 Ont. L.R. 57, that the proper mode of estimating the value of the "railway and all real and personal property in connection with the working thereof," was not by capitalizing its net permanent revenue and taking that as the value, but by estimating what it was worth as a railway in use and capable of being operated, excluding compensation for loss of franchise. Held, also, that in view of the provisions in the "Street Railway Act" authorizing the municipality to assume ownership of a street railway operating in two or more municipalities the company in this case whose railway was taken over by the town of Berlin was not entitled to compensation for loss of its franchise in the municipality of Waterloo. On the expiration of its franchise the company executed an agreement extending for two months the time for assumption of ownership by the municipality, but did not relinquish possession until six month more had elapsed. During the extended time an Act was passed by the Legislature reciting all the circumstances, ratifying and confirming the agreement for extension and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the Court. Held, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immediately on the expiration of the franchise its effect was, not to confer on the municipality a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions. The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent. over and above the actual value of the property.

Town of Berlin v. Berlin and Waterloo Street Railway Co., 42 Can. S.C.R. 581.

—Personal injuries—Loss of business profits.]—The plaintiff, a married woman, was injured while a passenger on one of the defendants' cars, by reason of the negligence of the defendants' servants, as found by a jury, who assessed her damages at $1,900 for her injuries and $600 for loss of business. The separation of the two items was made by the jury, and the Judge entered judgment for $2,500:—Held, notwithstanding the form of the judgment, that the Court was enabled, by the division made by the jury, to consider the propriety of the allowance made for loss of profits. The plaintiff was fifty-six years old, and was in business as a baker. After her injury she sold the business. Some evidence was given as to profits being earned in the business at the time of the injury, but there was nothing to show a reasonable certainty of future profits. Held, that the allowance for loss of profits was not supportable, the alleged damages being remote and conjectural, and the judgment should be varied by reducing the amount to $1,900. Held, as to the $1,900, that the amount was not so large as to show that the jury neglected their duty or were actuated by any improper motive or did not appreciate the grounds on which they might act in awarding damages.

Wright v. Toronto R.W. Co., 20 O.L.R. 498.

—Refusal of passenger to pay fare—General and special Act—Inconsistency.]—The Ontario Railway Act of 1906 (6 Edw. VII. c. 30) is, by s. 5, made applicable to street railway companies incorporated by the Legislature, but, by the same section, if provisions of the general and special Acts are inconsistent, those of the latter shall prevail. By s. 116 of the general Act, a passenger on a railway train or car who refuses to pay his fare may be ejected by the conductor; and by s. 17 of the Act incorporating the Toronto Railway Co., a passenger in such case is liable to a fine only:—Held, that these two provisions are not inconsistent, and the conductor of a street railway car may lawfully eject therefrom a passenger who refuses to pay his fare. In this case the company was held liable for damages, the passenger having been ejected from a car with unnecessary violence. Appeal dismissed.

Toronto Railway Co. v. Paget, 42 Can. S.C.R. 488.

—Injury to person crossing track—Excessive speed—Failure to give warning.]—The plaintiff, who was somewhat hard of hearing, attempted to cross from the east to the west side of a highway on which the defendants' single track was laid. Before he began to cross he observed a car of the defendants standing upon a siding about 550 feet north of him, and, from his knowledge of the practice of the defendants, inferred that it was waiting there for a car from the south to pass it. He, therefore, just before crossing the track, looked south for a car, but did not look north, and had almost passed over the track when he was struck by a car coming from the north, and injured. There was evidence that the gong was not sounded nor the whistle blown nor the speed of the car slackened as he approached the track. He could have seen the car approaching had he turned and looked, and the motorman must have seen him ap-

proaching the track. Had the brakes been applied and the car delayed for a second or two, he would have escaped. There was evidence that it was going at from 16 to 18 miles an hour:—Held, that there was some evidence of negligence on the part of the motorman which should have been submitted to the jury; and a nonsuit was set aside. Per Mulock, C.J.Ex.D., that the plaintiff was not to assume that the motorman would start his car from a point enabling him to see the plaintiff walking in a direction that would soon bring him upon the track, and, nevertheless, that the car would be driven at such a speed as to overtake him, and that without giving any warning of its approach. Per Clute, J., that there was evidence to submit to the jury of negligence on the part of the motorman in not sounding the gong, in not exercising more care in keeping an look-out, and in not applying the brakes before the car struck the plaintiff. He could not but see that the plaintiff was approaching the track, and it was to be inferred from the evidence that he ought to have known that the plaintiff was oblivious of the approaching car.

Jones v. Toronto and York Radial R.W. Co., 20 O.L.R. 71.

—Passenger fares—Ontario Railway and Municipal Board.]—The Ontario Railway and Municipal Board, upon an application by the Board of Trade above-named, made an order compelling the International Railway Company, owning and operating an electric railway along the bank of the Niagara River from Queenston to Chippawa, and incorporated by 55 Vict. c. 96 (O.), to comply with s. 171 of the Ontario Railway Act, 1906, by accepting a five-cent cash fare for conveying passengers for any distance not exceeding three miles, etc.:—Held, reversing the order of the Board, that the company came within sub-s. 5 of s. 171, providing that "this section shall not apply to a company whose tariff for passenger fares is subject to the approval of any commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario;" and, s. 171 being thus excluded, that the Board had no power, on an application such as was made in this case, to direct what fares the company should charge. The effect of the incorporation into the company's Act of s. 31 of the Railway Act of Ontario, R.S.O. 1887, c. 170, was not to abrogate clause 32 of the agreement with the Commissioners for the Queen Victoria Niagara Falls Park, set out as schedule B to the company's Act. They should be read together in such a way as to give effect to both, and reading them as subjecting the company's tariff to the approval of both the commissioners and the Lieutenant-Governor in council (or the Board substituted therefor) was not inconsistent with the intention of the parties.

Re Niagara Falls Board of Trade and International R.W. Co., 20 O.L.R. 197.

—Powers of provisional directors—Contract—Sanction of shareholders.]—Section 9 of the special Act 1 Edw. VII. c. 92 (O.), incorporating the defendant company, enacts that the provisional directors may agree to pay for the services of persons who may be employed by the directors for the purpose of assisting the directors in furthering the undertaking, or for the purchase of the right of way, and any agreement so made shall be binding on the company:—Held, that the express language of the special Act prevails over the general provision (s. 44) of the Electric Railway Act, R.S.O. 1897, c. 209, all the clauses of which, except so far as inconsistent, were, by s. 12 of the special Act, incorporated with and deemed to be a part of the special Act; and, therefore, the provisional directors had power to bind the company by making the contract sought to be enforced, a contract to pay the plaintiffs for services in furthering the company's undertaking. The special Act, s. 9, says that this can be done by the provisional directors "when sanctioned by a vote of the shareholders at any general meeting." Held, approving and following McDougall v. Lindsay Paper Mill Co. (1884), 10 P.R. 247, 252, that the plaintiffs' contract was not affected by the non-observance of this direction; and, apart from that, the contract was approved, before and after it was made, by the whole body of shareholders, though not formally assembled in general meeting. Judgment of Riddell, J., 20 O.L.R. 290, which was in favour of the plaintiffs against the individual defendants, reversed, and judgment directed to be entered for the plaintiffs against the company.

Selkirk v. Windsor, Essex and Lake Shore Rapid R.W. Co., 21 O.L.R. 109.

—Injury to passenger—Sudden jerk in starting car.]—The plaintiff, immediately after entering a car of the defendants, and before she had reached a seat, was, from some cause, thrown down backwards and injured. In an action against the defendants for damages, the negligence charged in the statement of claim as the cause of the fall was "the sudden jerking forward of the car," and this was supported by the evidence of the plaintiff herself and of two other eye-witnesses of the occurrence. Evidence was called for the defence to show that the car was new and in good condition, that only the lowest notch was used in putting on the power, and that there was no unusual jerk. The trial Judge in his charge practically withdrew from the jury the consideration of the alleged jerk as the cause of the fall, but told the jury to consider whether the conductor was negligent in starting the car before the plaintiff (an aged person) was seated. The jury found that the defendants' servants were negligent in starting the car before the plaintiff was in

a position to save herself from falling; and the trial Judge directed judgment to be entered for the plaintiff. There was some mention in the evidence of the premature starting of the car, but it was not put forward as an independent cause of complaint until the Judge emphasized it in his charge. Neither party made any objection to the charge. The defendants appealed from the judgment, but the plaintiff did not, by cross-appeal or otherwise, raise an objection to the practical withdrawal from the jury of the chief cause of complaint:—Held, that the question of the jerk should not have been withdrawn from the jury; there was but one incident, made up of the conduct of the conductor in giving the signal and that of the motorman in obeying it; and it should have been left as one question to the jury. The finding actually made could not, upon the evidence, be supported. Held, also, that the circumstance that an objection was not taken at the proper time was not necessarily fatal. Brenner v. Toronto R.W. Co. (1907), 15 O.L.R. 195, 198, and Woolsey v. Canadian Northern R.W. Co. (1908), 11 O.W.R. 1030, 1036, followed. Held, also, that it was to be inferred that the jury (influenced by the Judge's remarks) did not consider the evidence upon the question of the jerk, and that their finding did not imply that that question was determined in favour of the defendants. Held, also, that the real question in issue not having been passed upon by the jury, there was power to direct a new trial; Meredith, J.A., dissenting. Jones v. Spencer (1897), 77 L.T.R. 536, followed. Per Meredith, J.A., that the defendants' appeal should be allowed and the action dismissed: the case was the rare one of an accident for which no one could be justly blamed; and the Court had, in the circumstances, no power to direct a new trial.

Burman v. Ottawa Electric R.W. Co., 21 O.L.R. 446 (C.A.).

—Injury to passenger alighting from car—Unauthorized signal to start.]—The plaintiff was a passenger upon a crowded open car of the defendants, who operated an electric railway upon the streets of a city. The plaintiff wished to alight at N. street, and the car stopped there, upon the signal of the conductor, who was upon the footboard, engaged in collecting fares. While the plaintiff was in the act of alighting, the car started, upon a signal given by an unauthorized person who was standing on the rear platform, and the plaintiff was thrown down and injured. The car had previously, on the same trip, been started, after a stop, by the same unauthorized person, and the conductor had not interfered or reprimanded him. The plaintiff alleged negligence in starting the car too soon and in overcrowding the car so that the conductor was not able to perform his duties, and claimed damages for her injuries. The facts were not in dispute, and the trial Judge withdrew the case from the jury, and gave judgment for the defendants:—Held, that it did not follow that, because there were no facts in dispute, the matter to be decided was a pure question of law; it might be for the jury to say what they found to be the true inference from these facts, e.g., whether there was negligence causing the accident; there was at last one question which should have been submitted to the jury, viz., whether there was any negligence of the conductor in failing to hear or to countermand the unauthorized signal for starting the car, in time to have prevented injury to the plaintiff, particularly in view of what had previously taken place. And semble, that there was at least one other question which might be submitted to the jury, viz., whether the defendants failed in their duty in not taking due precautions to prevent the starting of the car through the unauthorized act of a passenger in ringing the bell, which might involve the question (not raised by the pleadings) whether the system adopted by the defendants was defective. Held, therefore, that there should be a new trial, with leave to the plaintiff to amend as she might be advised.

Haigh v. Toronto R.W. Co., 21 O.L.R. 601.

Negligence — Motorman — Workmen's Compensation Act (Ont.)—Injury to conductor.]—The motorman of an electric car may be a "person who has charge or control" within the meaning of s. 3 of the Workmen's Compensation Act (R.S.O. [1897] c. 160), and if he negligently allows an open car to come in contact with a passing vehicle whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured, the electric company is liable in damage for such injury. Judgment of the Court of Appeal (Snell v. Toronto Ry., 27 O.A.R. 151) affirmed.

The Toronto Railway Co. v. Snell, 31 Can. S.C.R. 241.

—Maintaining a nuisance—Running cars without proper fenders—Negligence endangering life.]—The omission of an electric railway company operating their cars upon a highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company, is a breach of legal duty constituting a common nuisance under the Criminal Code, ss. 191 and 213, for which an indictment will lie.

R. v. Toronto Railway Company, 4 Can. Cr. Cas. 4 (McDougall, Co. J.).

—Contract to construct—Prevention by effect of legislation—Unlawful occupation—Duty of municipality—Bond—Substituted agreement—Discharge of obligation.]—Specific performance of an agreement by a street railway company with a municipal corporation to construct, equip and

operate a line of railway along certain streets in the municipality cannot be enforced, nor can damages be awarded for non-performance of the contract if the construction of the street railway has been rendered impossible through the action of the Railway Committee of the Privy Council in refusing to sanction a crossing, or by reason of the occupation of the street by another railway company whether with or without lawful authority; the duty of the municipality in the case of unlawful occupation being to restore the street to a condition to permit of the construction. When the obligor in a bond agrees, of required by the obligee, to perform certain works and subsequently by agreement between the successors in law of the obligor and the obligee an absoulte obligation to do the work is substituted, the effect of the later agreement is to discharge the obligation created by the bond.

City of Ottawa v. Ottawa Electric Railway Company, 1 O.L.R. 377.

—**Mortgage—Future acquired property—Fixtures—Rolling stock—Execution—Company.**]—An electric street railway company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1887, c. 157, and subject to the provisions of the Street Railway Act, R.S.O. 1887, c. 171, gave to trustees for holders of debentures of the company a mortgage upon the real estate of the company, together with all buildings, machinery, appliances, works and fixtures, etc., and also all rolling stock and all other machinery, appliances, works and fixtures, etc., to be thereafter used in connection with the said works, etc. The by-laws of the directors and shareholders (who were the same persons and only five in number) authorizing the giving of the mortgage directed it to be given upon all the real estate, plant, franchises, and income of the company, and the debentures stated that they were secured by mortgage of the real estate, franchises, rolling stock, plant, etc., acquired or to be acquired:—Held, that s. 38 of R.S.O. 1887, c. 157, does not restrict the power of mortgaging to the existing property of the company and that a company is invested with as large powers to mortgage its ordinary after acquired property as belong to a natural person; that the mortgage in terms covered after acquired property, and even if not authorized in this respect upon a strict reading of the by-laws had been acquiesced in and ratified and was binding. Judgment of a Divisional Court affirmed. Held, also, that the rolling stock, poles, wires, etc, formed an essential part of the corpus of what must be regarded as an entire machine, and were therefore fixtures and not seizable under execution to the prejudice of the mortgagees. Judgment of Armour, C.J., affirmed.

Kilpatrick v. Cornwall Electric Street Railway Company (Limited); Bank of Montreal v. Kirkpatrick, 2 O.L.R. 113 (C.A.).

—**Negligence—Frightening horse.**] — The motorman of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is being frightened either at the car or at something else. All that can be expected is that the motorman shall proceed carefully, and it is in each case a question whether that has been done. Upon the facts of this case the majority of the Court held that there was no evidence to justify a finding of negligence and set aside a judgment in the plaintiff's favour. Judgment of Falconbridge, C.J., reversed.

Robinson v. Toronto Railway Company, 2 O.L.R. 18.

—**Highway — Removal of snow from tracks.**]—By the provisions of a municipal by-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snow-fall the company removed the snow from their tracks, the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street:—Held, that the company had not discharged their obligation and that they were liable to indemnify the city against damages recovered against the city by a person who had in consequence of the bank been upset while driving along the street. Judgment of Rose, J., affirmed.

Mitchell v. City of Hamilton, 2 O.L.R. 58 (C.A.).

— **Negligence — Collision — Contributory negligence.**]—The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross the track, and the waggon was struck by a car which had been coming behind. The plaintiff said that about one hundred feet from the point at which he tried to cross he looked back, and that no car was to be seen, and he did not look again before trying to cross:—Held, that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part, which disentitled him to recover damages. Danver v. London Street Railway Co. (1899, 30 O.R. 493, applied. Judgment of Britton, J., reversed. Per Boyd, C.:—A driver of a vehicle moving along a street in which cars are running, and who knows when and where he intends to cross the car tracks, is bound to be vigilant to see before crossing that no car is

coming behind him. A greater burden in this regard rests on the driver than on the motorman, who is not to be kept in a state of nervousness and apprehension lest some one may at any moment cross in front of the moving car.

O'Hearn v. Town of Port Arthur, 4 O.L.R. 209 (Divl. Ct.).

—Negligence—Neglect to give notice by bell—Excessive damages.]—The plaintiff travelling by electric railway along a country road on a dark night, got off at a regular stopping place. He then turned back along the road, and after he had walked some distance along it, and was moving towards the railway track, the car by which he had travelled, backing up, struck him. There was a light at both ends of the car, which was travelling at the rate of three or four miles an hour, but the current was very weak and the light slight, and the motorman came within four or five feet of the plaintiff before seeing him, and he did not sound the gong or give any other warning of his approach: —Held, that there was evidence of negligence on the part of the defendants, and the appeal from a trial judgment was dismissed and a new trial refused, on the plaintiff consenting to reduce his damages.

Ford v. Metropolitan Railway Co., 4 O.L.R. 29 (C.A.).

—Negligence—Findings of jury—Contributory negligence.]—In an action founded on personal injuries caused by a street car the jury found that defendant's negligence was the cause of the accident, and also that plaintiff had been negligent in not looking out for the car:—Held, reversing the judgment of the Court of Appeal (2 O.L.R. 53, 1901, C.A. Dig. 340) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover. Appeal allowed with costs.

London Street Railway Co. v. Brown, 31 Can. S.C.R. 642.

—Negligence—Car running backwards—Jury—Answers to questions.]—The plaintiff was injured by a waggon in which he was being driven, being struck by an electric car of the defendants, which was running backwards in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the Judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed:—Held, that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded and was not merely a specific finding in answer to a question. Per Armour, C.J.O.:—Questions to the jury must be in writing. Per Osler, J.A.:—While it is more convenient that questions to the jury should be in writing, the Judge is not bound to adopt that course.

Balfour v. Toronto Railway Co., 5 O.L.R 735, affirmed 32 Can. S.C.R. 239.

—Conductor's authority — Evidence.]—Plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down but did not stop, and as it was passing the conductor seized her hand and while attempting to help her on board signalled the car to go on again which it did and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently:—Held, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it was slowing up; that the scope of a conductor's authority is one of evidence; that there was evidence to go to the jury, and that the effect of it was for them to consider, and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority. Judgment of Street, J., at the trial, reversed.

Dawdy v. Hamilton, Grimsby and Beamsville Electric R. W. Co., 5 O.L.R. 92 (D.C.).

—Street railway cars—Assessment.]—

See ASSESSMENT.

Toronto Railway Co. v. City of Toronto, [1904] A.C. 809.

—By-laws as to routes and speed—Ratio of track mileage to increased population—Newly acquired territory.]—The defendants passed a resolution authorizing certain extensions and changing some of the routes of the plaintiffs' railway, and the plaintiffs, relying upon a by-law being passed later to carry out the resolution, performed certain work and incurred expense. The by-law was subsequently passed, read a first, second, and third time at one meeting of the defendants, signed by the clerk, sealed with the municipal seal, but not signed by the mayor. In an action to compel the mayor to sign it and the defendants to accept an agreement to

carry it out:—Held, that the company took the risk of a by-law being passed, and that they were not mislead; and that without the mayor's signature it was incomplete and invalid. Held, also, that two by-laws set out in the judgment of MacMahon, J., as to the routes and speed of the plaintiffs' cars were, under the circumstances, valid as being within the defendants' power and authority under 59 Vict. c. 105 (O.), which validated a by-law of the defendants and an agreement between plaintiffs and defendants under which the plaintiffs built and operated their railway. By the original by-law, under which the road was authorized to be built and operated, as set out in the judgment of MacMahon, J., the defendants were bound to establish new lines, as might be directed by by-law of defendants, in the proportion of one mile of track to every 2,000 inhabitants of the city then existing or thereafter extended, the population to be ascertained as mentioned in the by-law, and that in the event of any local municipality being annexed, the railways of the company within the annexed municipality, and the company in relation thereto should have all the rights and be subject to the terms of the by-law. A local municipality was annexed to the defendants' municipality in 1898, and at the time of annexation had a street railway trackage of 5,900 feet. The population of the city in 1901 was 39,183, being an increase of 4,183, and the proportion of additional trackage to population was 11,043 feet. By a subsequent by-law defendants were directed to construct 7,380 feet of additional track. —Held, Maclennan, J.A., dissenting, that under the original by-law the mileage of the local municipality must be added to the mileage of the lines in the city at the time of the annexation, and the amount deducted from the amount required by the last mentioned by-law, which was consequently bad as being in excess of the mileage the defendants could require.

The London Street Railway Company v. City of London, 4 Can. Ry. Cas. 171, 9 O.L.R. 439 (C.A.) (Ont.).

—Extension of railway—Time tables—Open cars — Heating — Night cars — Rights of city as to—Specific performance.]—Under the agreement between the plaintiffs and defendants, which is set out in 53 Vict. c. 99 (O.), the right to determine what new lines should be established and laid down is vested in the city, and applies as well to the streets within the city as it existed at the time of the making of the agreement, as to the streets in the territory from time to time brought within it; and for the company's failure to establish and lay down such new lines, the city is not limited merely to the right provided for in the agreement of granting such privilege to others. The right, under such agreement, to settle the time tables, and to fix the routes of the cars, to determine when open cars should be taken off in the autumn or resumed in the spring, and as to when and how cars should be heated, is for the city engineer, subject to the approval of the city council. The city have no power to compel the company to continue to run after midnight any car which, having started before midnight, cannot in due course finish its route by that time. On a special case stated in an action only such questions will be answered as must necessarily arise in the action. The Court, therefore, in view of 63 Vict. c. 102, ss. 1 and 5 (O.), being made applicable to the city declined to answer a question raised in a special case as to the right of the city to have specifically performed those provisions of the agreement herein found in its favour; and an expression of opinion previously given against granting such specific performance, following Kingston v. Kingston Electric R.W. Co. (1898), 25 A.R. 462, was withdrawn.

City of Toronto v. Toronto Railway Company, 9 O.L.R. 333 (Anglin, J.).

—Accident by street car—Crossing track —Negligence.] — Plaintiff in returning home at two o'clock in the morning on a west bound car on the north track of defendants' street railway alighted from the car and proceeded to cross the north and south tracks on the street in front of an approaching east bound car on the south track then about 100 feet away. There was evidence that the approaching car was going at the rate of 8 to 10 miles an hour, and that there was a bright electric light near by that the plaintiff, if careful, could have seen the car. The motorman did not apply the brakes or sound the gong before the plaintiff was struck:—Held, that a nonsuit was properly directed.

Gallinger v. The Toronto Railway, 8 O.L.R. 698 (D.C.).

—Contract with municipality—"Workmen's tickets"—Specific performance.]—Held, affirming the judgment of Street, J., 8 O.L.R. 642, that the agreement of which the enforcement was sought in this action was intra vires; that by the terms of the agreement the defendants were bound to sell on their cars tickets known as "workmen's tickets" or "limited tickets," and to receive them from all persons tendering them as fares during certain specified hours of the day; that the plaintiffs could maintain the action without the aid of the Attorney-General; and that performance of the contract could be enforced by the Court by injunction. City of Kingston v. Kingston, etc., Electric R.W. Co. (1898), 25 A.R. 462, distinguished.

City of Hamilton v. Hamilton R.W. Co.

(No. 2), 10 O.L.R. 594, affirmed 39 Can. S.C.R. 673.

—Operation of cars—Fender—"Front" of motor car.]—By 1 Edw. VII. c. 25, s. 1 (O.), it is provided that a street railway company, when operating any portion of their line by means of electricity, shall use "in the front of each motor car a fender":—Held, that what is meant by the "front" of the car is that end of it which when the car is in motion is the furthest forward, that is to say, furthest forward in the sense that it would first meet a person or an object moving in the opposite direction; and the defendants operating a car for a distance of twelve hundred feet with the fender at the back instead of the front, as so defined, were liable to the penalty prescribed by the statute. Judgment of County Court of York affirmed.

City of Toronto v. Toronto R.W. Co., 10 O.L.R. 730 (D.C.).

—Negligence—Married woman — Personal injury to—Damages awarded husband—Excessive amount.]—The female plaintiff, 62 years of age, wife of the male plaintiff, who was 70 years of age, in attempting to alight from one of the defendants' cars, was through the defendants' negligence thrown to the ground and seriously injured. She was in the doctor's hands for several months, and her arm and hand which were injured were not likely to be as useful to her as before the accident. The jury awarded the wife $1,000 and the husband $1,200:—Held, that the amount awarded the wife could not be deemed to be unreasonable; but, as regarded the husband, after due allowance for the medical expenses and for nursing and attendance, and considering the age of the parties, the amount awarded him was excessive and there would have to be a new assessment unless he agreed that the damages be reduced to $400.

Clarke v. London Street Railway Co., 12 O.L.R. 279 (C.A.).

—Streets in newly annexed territory—By-law—Passing of, before date of Act—Engineer—Authority of—Stopping places—Right to fix.]—By s. 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 Viet. c. 99 (O.) the defendants are required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be from time to time recommended by the city engineer and approved by the city council within such period as may be fixed by by-law to be passed by a vote of two-thirds of all the members of the council; and all such extensions and new lines shall be regulated by the same terms and conditions as relate to the existing system, etc. A recommendation was made by the city engineer to the city council that a double line of tracks should be laid down and the car service extended on the continuation of one of the streets in the city, and a by-law was passed duly approving thereof and fixing the date for such service, of which the defendants were duly notified. The continuation of said street was in territory brought into the city subsequently to the entering into of the agreement:—Held, that the agreement applied as well to streets brought within the city subsequently to the entering into of the said agreement as to those then within its limits.

Corporation of Toronto v. Toronto R.W. Co. (1904), 5 O.W.R. 130, affirmed by Privy Council; Corporation of Toronto v. Toronto R.W. Co. (1904), 9 O.L.R. 333, followed. Held, also, that it was not essential that the city should pass a by-law as required by s. 16 of 2 Edw. II. c. 27 (O.) which provides that prior to the passing a by-law authorizing any electric railway company to lay out or construct its railway on, upon or along any public highway, road, street or lane, notice must be given similar to that required by s. 632 of the Municipal Act, for that section only applies to those electric railways which come within R.S.O. 1897, c. 209, and had no application to the defendants.

The by-law for the laying out and construction of the extension was passed on the 10th April, 1905, while the statute for the annexation of the territory in question was not passed until the 25th of May, 1905; but the Lieutenant-Governor's proclamation annexing the territory was issued on the 3rd March to take effect on the 10th March, 1905, to which no objection was ever taken:—Held, that the by-law was valid.

By s. 5 of 63 Viet. c. 102 (O.) it is provided that if the railway company neglect or fail to perform any of their obligations under the Act and the agreement, and an action is brought to compel performance, the Court before whom the action is tried shall, notwithstanding any rule of law or practice to the contrary, enquire into the alleged breach, and in case a breach is found to have been committed, shall make an order specifying what things shall be done by the defendants as a substantial compliance with the Act and agreement: which shall be enforcible in the same manner, etc., as a mandamus:—Held, that an order could be made specifying what was necessary to be done to constitute a substantial compliance with the agreement.

Corporation of Kingston v. Kingston & Cataraqui St. R.W. Co. (1903), 25 A.R. 462, specially referred to:—Held, also, that the corporation could enforce the laying out of such extension notwithstanding the option given by s. 17 of the agree-

ment to grant to another person or company the right of laying down lines on streets, after failure of the defendants, though duly notified, to do so. Held, also that the engineer for the time being and not the engineer who held office when the agreement was entered into is the one referred to therein, and that he does not act in a judicial capacity but as the executive officer of the corporation, to whom he must make his recommendation, which the council may approve or reject, as they see fit.

By s. 26 of the agreement it is provided that the speed and service necessary on any main line, part of same or branch is to be determined by the city engineer and approved of by the council; and by s. 39 it is provided that the cars shall only be stopped clear of cross streets, and midway between streets, where the distance exceeds 600 feet:—Held, that the regulation of the places at which cars are to stop to take on and let off passengers is part of the service within s. 26, and, therefore, subject to the limitations of s. 39, the defendants might be required to stop wherever the city engineer and city council might agree in requiring them to do so. The engineer reported to the council recommending that the cars should be required to stop at certain specified points, and his report was adopted by resolution of the council:—Held, that this was a determination and not merely a recommendation of the engineer, for it must be assumed that before making his recommendation he had determined the matter so far as he could; and that it was not essential that the adoption of such recommendation should be by by-law.

City of Toronto v. Toronto Railway Co., 11 O.L.R. 103 (Street, J.).

—Newly annexed territory—Extension of road into—Stopping places—Right to fix—Determination of engineer.]—S. 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 Vict. c. 99 (O.), whereby the defendants are required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be, from time to time, recommended by the city engineer and approved by the city council, does not apply to territory which was not within the limits of the city at the date of the agreement, but has subsequently been annexed to and become part thereof. Toronto R.W. Co. v. City of Toronto, 37 S.C.R. 430 (reversing the judgment of the Court of Appeal, 10 O.L.R. 657), followed. By s. 26 of the agreement the "speed and service" necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council; and by s. 39 the cars shall only be stopped clear of cross streets and midway between streets, where the distance exceeds six hundred feet:—Held, subject to the limitations of clause 39, that the regulating of the places at which cars shall be stopped came within condition 26 relating to the speed and service, and was therefore to be determined by the city engineer and approved of by the council. The engineer made a report to the council recommending that cars should be required to stop at certain specified points, which was adopted by resolution of the council:—Held, that the engineer did not occupy a judicial or quasi-judicial position between the parties to the agreement, and was not bound to consult with the defendants before determining what service should be supplied, and that such report, though somewhat informally expressed, was a sufficient determination on the part of the engineer, and that the adoption by resolution was sufficient, it not being essential that such adoption should be by-law. Held, also, that the plaintiffs were entitled to an order restraining the defendants from running the cars upon their railway, except in accordance with the determination of the engineer as to the stopping places.

City of Toronto v. Toronto Railway Company, 12 O.L.R. 534, 6 Can. Ry. Cas. 381 (C.A.).

But see Toronto v. Toronto Ry., [1907] A.C. 315.

—Ontario Judicature Act (R.S.O. 1897, c. 51) s. 115—Construction—Track rentals——Interest on payments in arrear.]—The Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51), s. 113, enacts that "interest shall be payable by law or in which it has been usual for a jury to allow it:"—Held, that under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been properly withheld, and compensation there for seems fair and equitable. An order by the Court below that the appellant company should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed.

Toronto Railway Company v. City of Toronto, [1906] A.C. 117.

—Piling snow at side of track—Contributory negligence—Plaintiff putting himself in peril.]—The plaintiff, a telegraph messenger, was riding a bicycle in a southerly direction behind a street car of the defendants on the west track, and the car stopping, in order to avoid running into it, and because he found snow was piled up on the road on the right side he turned to the left side, and was struck by a car coming north on the east track, and injured. It did not appear that the latter

car had sounded the gong or given any other warning. The plaintiff, however, was nonsuited at the trial:—Held, that the defendants were bound to adopt reasonable precautions to prevent accidents by sounding a gong or otherwise, although there was no statutory obligation; and although the plaintiff may have put himself in a position of peril, this was not per se an act of negligence; and there being evidence which might have satisfied the jury that the accident was caused by omission on the defendant's part to ring the gong, and also evidence from which they might have found that it was attributable to the plaintiff's own negligence, the case should not have been withdrawn from them. Dublin, Wicklow & Wexford R.W. Co. v. Slattery (1878), 3 App. Cas. 1155, specially referred to.

Preston v. Toronto R.W. Co., 11 O.L.R. 56, 5 Can. Ry. Cas. 30 (D.C.), affirmed, 13 O.L.R. 369.

—Street railway—Acquisition of land for car-barns—Right of city to expropriate—Action by company claiming declaratory judgment.]—The Toronto Railway Company, which has no powers of expropriation, acquired by purchase from the owners certain land in a residential locality, on which they proposed to erect car-barns, being a purpose authorized by the agreement with the city, as validated by 53 Viet. c. 90 (O.), and submitted the plans to the city for its approval, whereupon a petition was presented to the Board of Control, by the residents of the locality, asking the intervention of the city against such proposed use of the land, as well as against the laying of tracks on certain streets as a means of access to the barns, which was referred to the corporation's counsel for his opinion as to the city's powers. The city had at that time under consideration the acquisition of a specified block of land in the locality for park purposes, but subsequently to the presentation of the petition the Parks and Gardens Committee recommended the expropriation of the Company's land for such purpose, and under their instructions a by-law therefor was drafted by the city solicitor. On the matter coming before the council, the recommendation was struck out and the question of procuring park lands referred back to the committee, and on the following day, but after the plaintiffs had commenced this action, the architect was instructed by the board not to deal with the plans, pending the result of the proposed expropriation proceedings. There was nothing to show that the course pursued by the city was not actuated by good faith. In an action claiming a declaratory judgment of the company's right to so use the land:—Held, that while there was undoubted power in the Court to grant declaratory judgments, it was a discretionary power; and that in this case, the exercise of the discretion by the trial Judge, in refusing to grant such a judgment, would not under the circumstances be interfered with.

Toronto Railway Company v. City of Toronto, 13 O.L.R. 532 (D.C.)

—Excessive speed—Gong not sounded—Contributory negligence.]—A passenger on a street car in Toronto going west alighted on the side farthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow and seeing a car coming from the west as she was about to step on the track, she recoiled, and at the same time the car she had left started and she was crushed between two, receiving injuries from which she died. In an action by her father and mother for damages the jury found that the company was negligent in running the east bound car at excessive speed and starting the west bound car and not sounding the gong in proper time They found also that deceased was negligent, but that the company could, nevertheless, have avoided the accident by the exercise of reasonable care:—Held, that the case having been submitted to the jury with a charge not objected to by the defendants and the evidence justifying the findings the verdict for the plaintiffs should not be disturbed. The plaintiffs should not have had the funeral and other expenses incurred by the father of deceased allowed as damages in the action.

Toronto Railway Company v. Mulvaney, 38 Can. S.C.R. 337.

—"Ultimate" negligence—Injury to person crossing track—Neglect of motorman to shut off power on approaching crossing.]—Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is "ultimate" negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence. Scott v. Dublin and Wicklow R.W. Co. (1861), 11 Ir. C.L.R. 377, approved. Radley v. London and North Western R.W. Co. (1876), 1 App. Cas. 754, applied. The plaintiff in crossing a city street in front of an approaching motor-car of the defendants was admittedly guilty of negligence or contributory negligence,

but, on the evidence would have crossed safely if a moment more had been allowed her. As it was, she was struck by the corner of the car fender and injured. There was evidence of a rule of the defendants that motormen were to shut off power at a certain distance before reaching a crossing and that the motorman on this occasion did not do so and in an action for the defendants' negligence causing the plaintiff's injuries the trial Judge in his charge to the jury withdrew the evidence of this rule from their consideration:—Held, that the place where the plaintiff attempted to cross was a crossing, being opposite a street running at right angles to the street upon which the car was being operated, though not an intersecting street; and the withdrawal of the evidence as to the rule was misdirection, and misdirection which might have affected the result; the jury might, upon the evidence, have found that, but for the motorman's failure sooner to shut off power, or to reduce speed the momentum of the car would have been so lessened that he could, with the emergency appliance at his command, have avoided running down the plaintiff; and this failure, though anterior to the plaintiff's negligence, would be "ultimate" negligence, within the meaning of the rule which makes a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief.

Brenner v. Toronto R.W. Co., 13 O.L.R. 423 (D.C.).

—Sale and purchase of street railway system—Exclusive power of purchasers to operate—Construction.]—By agreement of sale and purchase between the Toronto City Corporation and the Toronto Railway Company dated September 1st, 1891, and confirmed by Ontario Act, 55 Vict. c. 99, the latter acquired, not merely the material of the railway undertaking in suit, but also, as was clearly provided, the exclusive right "to operate surface street railways in the City of Toronto" in the fullest possible way within the period of the agreement:—Held, that on its true construction, territorial additions to the city made during the term of the agreement were not within its scope. By clause 14 it was provided that the company might be required to lay down new lines or extend tracks and car service as approved by the city, and by clause 17 it was provided that on the company's failing so to do the privilege so abandoned might be granted to any other person or company without any resulting claim to the purchaser for compensation. Held, that under these clauses construed so as not to derogate from the exclusive right of the company the sole remedy in case of non-compliance was that provided by the latter clause and that a claim for damages was not maintainable. Held, also, that the exclusive power to operate included the right to determine the route and stopping of the different cars and their interrelations, which was not displaced by other provisions. In particular, clause 26 gave the city power to determine the speed and service necessary on each main line. But it was included amongst sections headed track, etc., and roadways all referring to the physical condition of those entities and not to the course or direction of the cars and should not be construed as intended to derogate from the company's exclusive powers.

City of Toronto v. Toronto Ry. Co., [1907] A.C. 315, reversing the decision of the Supreme Court of Canada, 37 Can. S.C.R. 430.

—Damages for personal injuries—Assignment of claim for—Chose in action.]—The plaintiff brought this action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time, and in respect of which he claimed under assignment from his master:—Held, that the action was properly dismissed as to the latter claim upon the ground that it was not an assignable chose in action.

McCormack v. Toronto R.W. Co., 13 O. L.R. 656 (D.C.).

—Use of streets—Payment for—Percentage of receipts—Traffic beyond city.]—By agreement between the City of Hamilton and the Hamilton Street Ry. Co. the latter was authorized to construct its railway on certain named streets and agreed to pay to the city, inter alia certain percentages on their gross receipts:—Held, following Montreal Street Ry. Co. v. City of Montreal, [1906] A.C. 100, that such payment applies in respect to all traffic in the city including that originating or terminating in the adjoining Township of Barton. Held, also, that as, when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic and not on the portion within the city only. Held, further, that the power of the company to construct its railway was not derived wholly from its charter, but was subject to the permission of the city corporation; the city had, therefore, a right to stipulate for payment of such percentages and the agreement therefor was intra vires. The judgment of the Court of Appeal, 10 Ont. L.R. 575, affirming that of Meredith, J., at the trial, 8 Ont. L.R. 455, was affirmed.

The Hamilton Street Railway Company v. City of Hamilton, 38 Can. S.C.R. 106.

—Injury to passenger alighting from car —Crossing behind car—Collision with car on parallel track.]—The plaintiff was a passenger on a car of the defendants, and stepped from it while it was in motion, as it reached a street crossing; the motorman had been signalled to stop, but failed to do so. The plaintiff alighted safely, but found himself in front of a horse and cab driven swiftly towards him. In order to avoid a collision with the horse, and also in order to cross to the west side of the street, the plaintiff turned behind the car he had just left and passed on towards the other track; as he reached it, he became aware of a car coming towards him at a rapid rate, and to avoid being run down he flung himself on the fender, thus saving his life, but he was seriously injured. In an action to recover damages for his injuries he was a witness at the trial, and said that it was imposible to get out of the way of the car; he did not hear the gong sound, although if it had been rung he would have heard it. By one of the regulations forming part of the agreement between the city corporation and the defendants, validated by 57 Vict. c. 76 (O.), under which the defendants operated their cars on the city's highways it was provided that each car was to be supplied with a gong, to be sounded by the driver when the car approached to within 50 feet of each crossing. This was not brought to the attention of the Judge at the trial. The plaintiff, however, was aware that it was the usual practice to sound the gong at crossings, and he expected it to be done when a car was approaching a crossing:—Held, that even if the regulation had not the force of a statutory requirement, the proof of failure to comply with a precaution which the defendants had recognized as important for the safety of persons using the crossing on streets occupied by the railway, was evidence for the jury of negligence in the conduct of the car; and the question whether the gong was sounded was for the jury. Semble, per Moss, C.J.O., that the term "crossing" in the agreement, is intended to indicate any place on or along the streets occupied by the railway where there is a walk laid for the purpose of enabling foot pasengers to cross from one side of the street to another, and where the cars would stop to take up or let down passengers; and is not confined to the crossing of an intersecting street. The Court declined to interfere with the discretion of the Court below in withholding costs from the plaintiff, in setting aside a nonsuit and granting a new trial.

Wallingford v. Ottawa Electric R.W. Co., 14 O.L.R. 383, 6 Can. Ry Cas. 454.

—Negligence—Verdict.]—In an action for damages against the appellant for loss of life occasioned by the negligent management of their street car by their motorman, the jury found that the motorman was guilty of negligence in causing the accident and that the deceased was not guilty of contributory negligence and judgment was accordingly entered for plaintiffs. The Court of Appeal for Ontario set aside the judgment and ordered a new trial:—Held, that the Court of Appeal erred in so doing, there having been evidence on both issues properly submitted to the jury. It is not valid ground for ordering a new trial that the Judges differ from the conclusion at which the jury have arrived or consider that the findings show that the defendants had not had a fair and unprejudiced trial.

Toronto Ry. Co. v. King, [1908] A.C. 260, 7 Can. Ry. Cas. 408.

—By-law of municipality—Passenger fares —School children—Reduced rates.]—Under a municipal by-law governing a street railway, it was provided that the ordinary cash fare should be 5 cents, children under five years of age, not occupying a seat and accompanied by its parent, to be carried free; and for every child under twelve years of age, except as aforesaid, the fare should not exceed 3 cents. Tickets were to be issued and sold at the following rates: Ordinary tickets, six for 25 cents, each ticket to be taken for an ordinary 5 cent cash fare; children's and school children's tickets, ten for 25 cents, each ticket to be taken for a 3 cent fare, as above provided; workingmen's special tickets, eight for 25 cents, to be taken for a 5 cent fare:—Held, reversing the order of the Ontario Railway and Municipal Board, that the children entitled to school children's tickets were those under the age of twelve years, and not those under twenty-one, even though the latter were actually attending school.

In re Township of Sandwich East and Windsor and Tecumseh Electric R.W. Co., 16 O.L.R. 641.

— Electric railway—Construction along highway with consent of municipality—By-laws—Location of the line and change thereof—Filing of further plans and profiles dispensed with.]—On an application by a land owner for an order rescinding an order of the Board allowing an electric railway company to change the location of its line from the centre to the west side of a public highway on the ground that such deviation would injuriously affect his property:—Held, 1. Refusing the application, that the Board having already sufficient material before it, could authorize such deviation without the filing of further plans and profiles. 2. That the railway in question was one "to be operated as a street railway or tramway" within the meaning of s. 235 of the Railway Act and that the Board must either authorize the placing of the railway upon the street in

accordance with the terms of the consent of the municipality (that it should be on the west side of the highway), or refuse the authority entirely.

Robertson v. Chatham, Wallaceburg and Lake Erie Ry. Co., 7 Can. Ry. Cas. 96.

—**Accident—Negligence—Evidence—Leaning over to expectorate.**]—The plaintiff, as a passenger, was, about midnight, standing on the back platform of one of the defendants' cars, smoking a cigar and leaning upon the railway gate or grating at the side, over which he leaned, from time to time, a distance from five to seven inches, and expectorated. Apparently, while doing so, he was struck by something and received the injuries complained of. The plaintiff alleged, in his statement of claim, that he was struck by a post belonging to the defendants, and used by them for their trolley wire, but gave no evidence as to this. As a matter of fact, there were trolley poles along the line of the defendant railway on the side where the plaintiff was struck, but there was no evidence given by the plaintiff of their position, and the evidence for the defendants placed them about two feet from the overhang of the car:—Held (reversing the judgment of the Divisional Court), that the plaintiff's action should be dismissed, as there was no evidence of what caused the injury.

Simpson v. Toronto and York Radial R.W. Co., 16 O.L.R. 31 (C.A.).

—**Accident — Negligence — Contributory negligence.**]—The deceased, in attempting to cross over one of the streets of a city on which there were street car lines, passed behind one of the cars, and was just stepping on to the track on which cars coming in the opposite direction ran, when she fell and was struck by an approaching car and killed. In an action brought to recover damages therefor, the jury, while finding that there was negligence on the defendants' part in running at too high a rate of speed, and that there was contributory negligence on the plaintiff's part in not taking proper precautions before attempting to cross, also found that the defendants could have avoided the accident had the car been running at a reasonable rate of speed. Upon their answers judgment was entered for the plaintiff:—Held, that on these findings, the judgment could not be supported, and a new trial was directed.

Hinsley v. London Street Railway Company, 16 O.L.R. 350, 7 Can. Ry. Cas. 419.

—**Removal of snowfalls—Electric sweeper—Construction of agreement.**]—The agreement with the plaintiffs under which the defendant's railway is operated provides that the track allowances shall be kept free from snow at the expense of the defendants, so that the cars may be in use continuously; and that if the fall of snow is less than six inches at any one time, the defendants must remove the same from the tracks, and shall, if the city engineer so directs, evenly spread it on the adjoining portions of the roadway, but should the quantity of snow at any time exceed six inches in depth, the whole space occupied as track allowances shall be at once cleared of snow, and the snow removed and deposited at such points on or off the street as may be ordered by the city engineer. 55 Vict. c. 99, s. 25 (O.), passed to construe the above, enacts that the defendants shall not deposit snow on any street, square, highway or other public place in the city of Toronto without having first obtained the permission of the city engineer:—Held, that there was nothing in the above to prevent the defendants from sweeping the small snowfalls or the large to the sides of the road by means of an electric sweeper, and the purpose of the application being to prevent the use of the sweeper altogether, the appeal should be dismissed.

City of Toronto v. Toronto Railway, 16 O.L.R. 205.

—**Tramway—Protection of passengers.**]—The conductor of a street car who, after stopping the car to permit a passenger to alight, gives the signal to start again before satisfying himself that the passenger has safely departed is guilty of negligence and his employers are liable for any injury that results therefrom.

Dupuis v. Montreal Street Railway Co., Q.R. 16 K.B. 286.

—**Rules—Contributory negligence—Motorman.**]—Rule 212 of the rules of the London Street Ry. Co. provides that "when the power leaves the line the controller must be shut off, the overhead switch thrown and the car brought to a stop . . ." A car on which the lights had been weak and intermittent for some little time passed a point on the line at which there was a circuit breaker when the power ceased to operate. The motorman shut off the controller but, instead of applying the brakes, allowed the car to proceed by the momentum it had acquired and it collided with a stationary car on the line ahead of it. In an action by the motorman claiming damages for injuries received through such collision:—Held, that the accident was due to the motorman's disregard of the above rule and he could not recover.

Harris v. London Street Railway Company, 39 Can. S.C.R. 398.

—**Injury to person crossing in front of car—Omission to stop at usual stopping place, when signalled.**]—The plaintiff intending to take a street car going westerly, on arriving, shortly after midnight, at the south-

erly side of the street on which the particular car line was, saw a car coming westerly very rapidly, being then about 300 feet off. He saw two persons standing at the corner signal the car to stop, and believing that it would do so, it being the usual and customary practice to stop at the corner, when persons wished to get on or off the car, he, without again looking to see where the car was, attempted to cross in front of it so as to get on it, when, instead of stopping, it ran past the corner, knocked down the plaintiff and injured him:—Held, that it could not be said that there was inexcusable negligence on the plaintiff's part in attempting to cross the street in front of the car, for he might reasonably assume that the car would stop at the corner in pursuance of the signal to do so, and that the case therefore could not have been withdrawn from the jury; and was properly submitted to them. Judgment of the Divisional Court (1907), 15 O.L.R. 438, reversed.

Tinsley v. Toronto Railway Co., 17 O.L.R. 74.

—Rules of company—Contributory negligence.]—A rule of the Toronto Ry. Co. provides that "when approaching crossings and crowded places where there is a possibility of accidents the speed must be reduced and the car kept carefully under control. Go very slowly over all curves, switches and intersections; never faster than three miles an hour . . ." A girl on the south side of Queen Street wished to cross to University Avenue which reaches but does not cross Queen. She saw a car coming along the latter street from the east and thought she had time to cross, but was struck and severely injured. On the trial of an action for damages the Judge in his charge said: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." The jury found that defendants were not guilty of negligence; that plaintiff by the exercise of reasonable care could have avoided the injury; and that she failed to exercise such care by not taking proper precautions before crossing. The action was dismissed at the trial; a Divisional Court ordered a new trial on the ground that the Judge had misdirected the jury in withdrawing from their consideration the rules of the company; the Court of Appeal restored the judgment at the trial:—Held, affirming the judgment of the Court of Appeal, 15 Ont. L.R. 195, which set aside the order of the Divisional Court for a new trial, 13 Ont. L.R. 423, that the action was properly dismissed.

Brenner v. Toronto Railway Company, 40 Can. S.C.R. 540.

—Assumption of ownership by municipality—Award of arbitrators.]—Arbitrators were appointed under the Street Railway Act, R.S.O. 1897, c. 208, to determine the value of the appellants' railway and all real and personal property in connection with the working thereof, the ownership of which had been assumed, under the provisions of s. 41 (1) of the Act, by a town corporation, part of the railway being laid within the town. The arbitrators in their award fixed on a certain sum as "the actual present value of the railway and of the real and personal property in connection with the working thereof," and stated that in arriving at that value they had "valued the railway as being a railway in use and capable of being used and operated as a street railway," and that they had "not allowed anything for the value of any privilege or franchise whatsoever," in either of the municipalities in which the railway was laid. They further stated that they had not been able to assent to the contention of the company that the proper mode of valuation should be to capitalize the amount of the permanent net earning power of the railway, and that they had not reached their valuation in any way on that basis, but had "considered only the actual present value":—Held, that the arbitrators had erred in their method of valuation, and that in the case of a railway producing, as the appellants' railway did, a considerable permanent profit, the proper method of valuation was to take its net permanent revenue and capitalize that, the result representing its real value.

Re Berlin and Waterloo Street R.W. Co. and Town of Berlin, 19 O.L.R. 57.

—Pecuniary loss—Quantum of damage.]—The plaintiff, though not originally trained as a mining engineer, had by long experience become an expert examiner of gold mining locations; was 37 years of age, physically strong and healthy, and of excellent character. He was in receipt of a salary of $6,000 a year from employers interested in gold properties, who spoke very highly of his capabilities and prospects. He was permanently disabled by injury sustained on one of the defendants' cars through their negligence. A jury awarded him $30,000:—Held, on appeal, that the amount was not so excessive as to entitle the defendants to a new trial. Held, also, that by a reference in the charge to the jury to $25,000 as a sum which would not appear large to a man earning $6,000 a year, and by a mention of the sum claimed as $50,000 the jury were not, reading the charge as a whole, left under the impression that they were directed as to the amount they were to fix. Held, also, that counsel for the plaintiff, in opening to the jury, mentioning the sum claimed in the statement of claim, was not so objectionable as to be a ground for granting a new trial.

Bradenburg v. Ottawa Electric R.W. Co., 19 O.L.R. 34.

—Contract with municipal corporation—Construction.]—Upon appeal from a decision or order of the Ontario Railway and Municipal Board upon the hearing of an application to it involving the same question as that dealt with by the Judicial Committee of the Privy Council in City of Toronto v. Toronto R.W. Co., [1907] A.C. 315:—Held, that, inasmuch as it could not be said that it manifestly appeared that the decision of the Judicial Committee was founded solely upon the effect of the provisions of the Act 55 Viet. c. 99 (O.), and not, to some extent at least, upon the language of the agreement validated and confirmed by that Act, the only course open was to affirm the order of the Railway and Municipal Board, notwithstanding s. 1 of the Act 8 Edw. VII. c. 112 (O.).

Re Toronto R.W. Co. and City of Toronto, 19 O.L.R. 396.

—Ontario Railway and Municipal Board—Jurisdiction—Agreement between municipalities—Enforcement—Possession of railway.]—Under an agreement made between two municipalities and confirmed by the statute 8 Edw. VII. c. 80 (O.), one of the municipalities was, on payment of the amount of an award, to become the owner of a part of an electric railway which theretofore had been owned by the other, although operated in both municipalities and the whole road was to be operated and managed by a board of commissioners constituted in the manner provided for in the statute and agreement. The amount awarded having been paid, and the appellants, a board of commissioners who had been operating the railway for the municipality which owned it, retaining control, management, and possession of the railway, and refusing to permit compliance with the provisions of the agreement and enactment in regard to its operation and management, the Ontario Railway and Municipal Board was applied to, and such compliance was enforced by its order:—Held, that the Board did not thereby exceed the powers conferred upon it by the Ontario Railway and Municipal Board Act, 1906.

Re Fort Arthur Electric Street Railway, 18 O.L.R. 376.

—Entrance of passengers by rear of car—Injury to passenger in attempting to enter by front door.]—In compliance with an order made by the Ontario and Municipal Board, the front vestibule doors of the defendants' cars were enclosed by a swing door, fastened by a spring lock on the inside, capable of being opened by the motorman to permit the exit of passengers. The plaintiff, not being aware of this order, attempted to get on a car so equipped at the front, and while so doing, the car started and she was thrown to the ground and injured. She asserted that the motorman saw her standing on the step, and notwithstanding started the car. There was no notice on the door notifying the public of the non-admission by that door. On a charge to the jury that they might find on one or all of the following grounds of negligence, namely, (1) the omission of a non-admittance notice, (2) starting the car while the plaintiff was on the step, and (3) in not opening the door and letting the plaintiff in, they found that the defendants' negligence consisted in the omission to have a non-admittance notice on the door, and did not make any finding as to the other alleged grounds of negligence. The Divisional Court, on appeal to it, while holding that the ground of negligence found by the jury was not tenable, in that the company were merely obeying the Board's order, which did not require any such notice, directed a new trial on the other alleged grounds of negligence. The Court of Appeal, while affirming the judgment of the Divisional Court as to the ground on which the jury found not constituting negligence, reversed the judgment granting a new trial, holding that the finding of the jury was tantamount to a finding negativing negligence on the other alleged grounds.

McGraw v. Toronto R.W. Co., 18 O.L.R 154.

—Negligence—Injury—Impairment of prospects of marriage.]—In an action of negligence, impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, may be taken into consideration by the jury in estimating the damages. In such a case of accident to a young woman of about 21 years of age, living with her father, but earning $6 a week as a stenographer, which accident resulted in the amputation of her left leg at the knee, paresis in a hand and arm, of which there might never be complete recovery, injury to her back, and a very serious shock to her nervous system:—Held, that a verdict of $5,500 damages was not so excessive as to necessitate a new trial.

Morin v. Ottawa Electric R.W. Co., 18 O.L.R. 209.

—Power line—Protection of the public and owners of other lines.]—The Windsor, Essex & Lake Shore Rapid Railway Company incorporated by provincial statute to construct an electric railway through the town of Essex built its line on Talbot Street under the authority of a municipal by-law which provided that its poles and wires should not interfere with any then existing poles or wires of any other person or company. The railway works were declared to be for the general advantage of Canada.

The company's wires and poles when constructed interfered with existing telegraph, telephone and electric light poles and wires (the latter belonging to one Naylor, erected under an agreement with the town) and created danger by the escape of electrical current therefrom:—Held, that if the railway and power line were constructed before the passing of the Dominion Act no order was necessary to authorize their subsequent maintenance and use, but if not, then leave was required under secs. 235 and 237. Quære, if part only of the work was done before the Act and part afterward. Assuming that the work was lawfully done before the passing of the Dominion Act the Dominion Railway Board has power under s. 238 to require the company to execute such works or take such measures as appeared to the Board best adapted to remove or diminish the danger. An agreement having been made with the approval of the Board for the use by Naylor of the company's poles for carrying his wires, order accordingly, the company being ordered to pay the costs of the proceedings.

Naylor v. Windsor, Essex & Lake Shore Rapid Ry. Co., 8 Can. Ry. Cas. 14.

—Telephone wires crossing electric railway —Protective works.]—The Railway Board has no jurisdiction under secs. 237 and 238 of the Railway Act to order the junior company at a crossing, where the wires of a telephone company are carried over an electric railway, to bear the cost of certain changes in the construction of the lines of the senior company and of certain protective appliances rendered necessary by reason of the construction and operation of the railway of the junior company, where such alterations were made by the senior company without having previously obtained an order from the Board for the making of the same.

Bell Telephone Co. v. Windsor, Essex & Lake Shore Rapid Ry. Co., 8 Can. Ry. Cas. 20.

—Crossing in front of approaching car—Negligence.] — The plaintiff was driving easterly in his carriage and pair of horses, at a moderate pace, along one of the streets of a city, and on arriving within thirty feet of a cross street, on which there was a street car line, he saw a car coming from the north, where there was a down grade, approaching at a rapid rate, the car being then about 300 feet distant. He consulted with his coachman, and, both being of the opinion the speed of the car was not so great as to prevent their crossing in safety, he attempted to do so, when the carriage was struck by the car, and damaged, and he, himself, injured. No attempt was made by the motorman to slow down the car. On questions submitted to the jury, they found that the accident was caused through the defendants' negligence, such negligence consisting in the car not being under proper control, and that there was no contributory negligence on the plaintiff's part:—Held, that it could not be said, in all the circumstances, the plaintiff acted so recklessly as to preclude the submission to the jury of the question whether or not he acted with reasonable care; and a finding by the jury in the plaintiff's favour was upheld.

Milligan v. Toronto Railway, 17 O.L.R. 530 (Appeal from this decision quashed: Toronto Ry. v. Milligan, 42 Can. S.C.R. 238.)

Quebec.

—Injunction—Malice—Irreparable damage.]—The plaintiff had obtained the right to operate a line of electric railway in certain streets within the limits of the municipality defendant, under a by-law of the town council and under a contract passed between plaintiff and defendant. The defendant, by the contract, reserved the right to take possession of the streets used by the plaintiff, for the purpose of changing the level and the performance of other necessary work. It was acting under these powers when the work was stopped by a temporary injunction order:—Held (affirming the judgment of the Superior Court, Archibald, J.): (1) Where one of two parties to a contract is doing a thing which, by the terms of the contract, he has specially reserved the right to do, the other party to the contract is not entitled to an injunction to restrain the doing of the thing, on the ground that the work is proceeding in a way which inflicts more damage than would be caused if another method, more expensive, had been adopted. So, in the present case, the municipality defendant, which had granted certain powers to the plaintiff, but had reserved the right to take possession of the streets when necessary for road operations, was not bound to adopt a more lengthy and expensive though less injurious method of performing the work. (2) In order to obtain an injunction in such circumstances, where there has been no invasion of a legal or equitable right, it must be established that irreparable injury will be caused if an injunction is not granted. (3) A temporary interruption of traffic and injurious method of removing the rails, causing a damage in the nature of a pecuniary loss, do not constitute an irreparable injury. (4) Although difficulties had existed between the parties, and defendant may have derived satisfaction from the thought that the exercise of its rights would cause the plaintiff damage, yet malice alone does not open any right of action, where, as here, there was a real intention to accomplish the work, and defendant was acting within its right.

The Montreal Park and Island Railway Co. v. Town of St. Louis, 17 Que. S.C. 545.

—Accident to pedestrian—Undue speed of car—Negligence—Damages.]—

Poisson v. Sherbrooke Street Railway Co., 5 E.L.R. 388 (Que.).

— Negligence — Precautions — Excuse — Notice of action.]—An electric tramway company should avoid everything which, not being absolutely necessary for the service, is a source of danger to the public, and if it does not do so it is guilty of imprudence for which it is responsible. The fact that a cause of danger could only be avoided by increased labour and expense is no excuse for allowing it to remain. The provision in the charter of the Montreal Street Railway Co., compelling any one desiring to bring an action against the company for damages to give 30 days' notice does not make such notice a condition precedent to the right of action; it is merely one of the prejudicial requirements the non-observance of which should be invoked by a dilatory exception.

Mattice v. Montreal Street Railway Co., 20 Que. S.C. 222 (Sup. Ct.).

— Nuisance — Power house machinery — Vibrations, smoke and noise—Injury to adjoining property—Evidence—Assessment of damages—Reversal on questions of fact.] —Notwithstanding the privileges conferred by its Act of incorporation, upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city the company is responsible in damages to the owners of property adjoining its power-house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and value thereby occasioned. Drysdale v. Dugas (26 S.C.R. 20) followed. In an action by the owner of adjoining property for damages thus caused the evidence was contradictory and the Courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality:—Held, Taschereau, J., dissenting, that notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible in evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations. In reversing the judgment appealed from, the Supreme Court, in the interest of both parties, assessed damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise, the record was ordered to be transmitted to the trial Court to have the amount of damages determined.

Gareau v. Montreal Street Railway Co., 31 Can. S.C.R. 463.

—Right to clear ice and snow into the streets — Electric sweeper.] — The City Council of Montreal being bound as the road authority to remove the ice and snow on the streets from curb to curb, including the snow thrown or falling thereon from the roofs of houses and removed thereto from the sidewalks:—Held, that the respondent street railway company, having contracted with the city to keep their track free from ice and snow, did not, having regard to the surrounding circumstances, and in the absence of words expressly or impliedly forbidding it, commit a nuisance by sweeping their snow into the street. Ogston v. Aberdeen District Tramways Co., [1897] A.C. 111, distinguished. Held, also, that the city having granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets in the manner successfully in use elsewhere, the latter could not be prevented from using the electric sweepers.

City of Montreal v. Montreal Street Railway Company, [1903] A.C. 482, affirming 11 Que. K.B. 458.

—Negligence—Fright—Nervous shock.]—

—Fright or nervous shock, producing physical injury, may be ground for an action against the person by whose fault it occurred. Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222, discussed.

Montreal Street Railway v. Walker, Q.R. 13 Q.B. 324.

—Recovery of fine under by-law—Meaning of "outside municipalities" in covenant to extend a railway.]—(1) The Recorder's Court for the city of Montreal has jurisdiction to try an action for the recovery of a fine imposed for a breach of the conditions in a by-law to grant a street railway company certain privileges. The fact that a contract is entered into by the city and the company, to carry out the by-law, does not alter the nature of the duties prescribed by the latter, so as to convert them into contractual obligations. (2) When a municipal by-law has a proviso to be carried out upon an order to be given by the council, the adoption by the latter of a report of one of its committees empowered to deal with the matter, recommending performance and that instructions be given for the purpose, amounts to a substantive order, as required by the by-law. (3) A clause in a by-law imposing a penalty, that its enforcement shall devolve upon an officer named, makes it his duty to initiate and carry on proceedings, but does not mean that he must do so in his own name. (4) A covenant in a contract between a city

and a street railway company, that the latter, in case of annexation by the former "of any of the outside municipalities, shall extend its system" thereto, is binding only as to the outside municipalities that were, at the time of the contract, contiguous to and adjoining the city. (5) A company cannot be compelled to execute a covenant into which it has no power to enter under its charter. (6) When a contract between a city and a street railway company, to build and operate a railway, designates the streets in which this is to be done, and a covenant is added that in case of the annexation of neighbouring territory, the company shall extend its railway to it, when ordered to do so, the order to be effective, must designate the streets in the new territory to which it is meant to apply. (7) A covenant to extend a railway into "outside municipalities" thereafter to be annexed, does not apply to "parts of outside municipalities" which are annexed. (8) Nor can the company be compelled to carry it out, until the city has complied with subsequent legislative enactments of a public nature, for the protection of interested parties.

Montreal Street Railway Co. v. Recorder's Court, 37 Que. S.C. 311 (Davidson, J.).

—Agreement for removal of snow.]—A covenant or agreement in a contract between a city municipality and a tramcar company, pursuant to a by-law granting the privilege to operate tramcars on certain conditions, that the company shall pay the city one-half the cost of the removal of snow from the entire street surface, in the streets where the tramcars pass, is not an agreement of a commercial nature, within the meaning of Art. 421 C.P. Hence, a trial by jury cannot be had in an action brought under the agreement by the city against the company, to recover the cost of removal of snow.

Montreal Terminal Railway Co. v. City of Montreal, 19 Que. K.B. 216.

— Negligence — Operation of tramway — Carriage of passengers — Crossing cars — Undue speed—Sounding gong—Findings of jury.]—Appeal from the judgment of the Court of King's Bench, appeal side (Q.R. 14 K.B. 355), affirming the judgment of the Superior Court, District of Montreal, entered upon the verdict of a jury, in favour of the plaintiff. The plaintiff was a passenger on a tramcar operated by the company, and, on approaching a crossing, signalled the conductor to stop the car and, when it slowed down, but before it reached the crossing, stepped off the car and attempted to cross to the other side of the street by passing in rear of the car on which he had been travelling. He was struck and injured by a car coming at a considerable speed from the opposite direction without, it was alleged, giving notice according to running regulations, by sounding the gong as it was meeting and passing the other car. The jury found generally for the plaintiff, without specifying any particular act of negligence, but that the plaintiff was also negligent and assessed the damages at $3,500, for which judgment was entered at the trial. By the judgment appealed from it was held that, upon the contradictory evidence, there was sufficient ground to support the verdict. On the appeal to the Supreme Court the company contended that there was misdirection, irregularity in the verdict and that the verdict was against the weight of evidence. After hearing counsel on behalf of the appellants and without calling upon the respondent's counsel for any argument, the Supreme Court of Canada dismissed the appeal with costs.

Montreal Street Railway Co. v. Deslongchamps, 37 Can. S.C.R. 685.

—Percentage contract—"Whole operation of its railway"—Limits to whole operation —Civil Code of Lower Canada, Art. 1018.] —By Art. 1018 of the Civil Code of Lower Canada, "all the clauses of a contract are interpreted the one by the other, giving each the meaning derived from the entire Act." The appellant company having contracted with the respondent city to pay annually certain specified percentages on the total amount of their gross earnings arising from the whole operation of their railway, and it appearing from the rest of the contract that the city considered territories of outside municipalities were not included within its scope, and that it could only deal with streets within its jurisdiction, and that the company had to make separate arrangements with outside municipalities in respect of the operation of the railway within their limits:—Held, that by the true construction of the contract the city was only entitled to percentage on the gross earnings arising from the whole operation of the lines within its own limits.

Montreal Street Railway Company v. City of Montreal, [1906] A.C. 100, 15 Que. K.B. 174, 5 Can. Ry. Cas. 287, reversing 34 Can. S.C.R. 459.

—Maintenance of roadway.]—A corporation obliged to maintain a public road which enters into a contract authorizing a company to construct and operate a tramway on said road on condition of maintaining it and keeping it in repair does not acquire a privilege on the tramway for the cost of repairs which it was obliged to make owing to the insolvency of the company.

Morse v. Levis County Ry. Co., Q.R. 30 S.C. 353 (Sup. Ct.).

—Employees engaged in manual labour—Lien for wages.]—Motormen and conductors on electric tramways and teamsters who haul the materials, remove the snow, etc., for these tramways are "employees of

railways engaged in manual labour'' within the meaning of paragraph 9 of article 2009 C.C. These employees have a lien on the tramway and its appurtenances for three full months' wages without regard to the date of seizure or of the sale that may be made of it.

Paquet v. New York Trust Co., Q.R. 15 K.B. 179, reversing 28 S.C. 178.

—**Negligence.**]—In an action against a street railway company in which the plaintiff claimed that he had been obliged to shoot his horse injured by a car the action was properly dismissed at the trial on two grounds, one, that it was established by the witnesses called and the circumstances proved that at the moment when the collision took place plaintiff was driving his horse at a very fast gait in a place of danger, and the other, that he had failed to prove any negligence on the part of the company or its employees.

Montreuil v. Quebec Railway, Light and Power Co., Q.R. 30 S.C. 6 (Ct. Rev.).

—**Usufruct—Expropriation for railway.**]—The abandonment of the usufruct from land need not be made in any particular form. It may result from circumstances such as the conduct of the usufructuary, his failure to exercise his rights, etc., from which the Court may determine it. Expropriation for the purposes of an electric railway (Art. 5164 St. Seq. R.S.O.) does not affect the right of the owner expropriated to damages for injury to the land which is left by the substitution of a steam for an electric railway. Therefore, this right is independent of the enhanced value, if any, that is given to the land by the railway and the arbitrators' award fixing the indemnity, is not a bar to recovery of a claim, resulting from the expropriation. Such claim, moreover, is in no way based on the special provisions above referred to, but is founded on the common law liability stated in Art. 1053 C.C. Therefore it only applies to the damages actually suffered, to be revived in case of fresh damage afterwards and cannot be determined by a gross amount covering past and future damages.

Lapointe v. Chateauguay and Nor. Ry. Co., Q.R. 38 S.C. 139 (Sup. Ct.).

—**Sale of securities—Right of way claims—Legal expenses incurred in settlement.**]—The plaintiffs sold the defendants stock and bonds of the P. & I. Ry. Co. with an agreement in writing which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000 in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. & I. Ry. Co. except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows:—''After two years from the date hereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made.'' The vendees exercised the option and paid the $30,000 to the vendors who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement was, subsequently, settled by the vendors within the two years. The question arose as to whether or not this claim, then known to exist, and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000 was to be contributed only in respect of right of way claims arising after the date of the agreement:—Held, affirming the judgment appealed from, 15 Que. K.B. 77, that the agreement must be construed as being controlled by the provisions of the last clause thereof; that said last clause was not inconsistent with the previous clauses of the agreement, and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5,000 mentioned in the last clause.

Montreal Street Railway Company v. Montreal Construction Company, 38 Can. S.C.R. 422.

—**Tramway—Protection of passengers.**]—The conductor of a street car who, after stopping the car to permit a passenger to alight, gives the signal to start again before satisfying himself that the passenger has safely departed is guilty of negligence and his employers are liable for any injury that results therefrom.

Dupuis v. Montreal Street Railway Co., Q.R. 16 K.B. 286.

—**Negligence—Notice of action under statute—Default—Effect of.**]—See NOTICE.

Montreal Street Ry. v. Patenande, 16 Que. K.B. 541.

—**Sale of tramway by sheriff as ''going concern''—Unpaid vendor—Lien for price of cars.**]—A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the

principal and interest of an issue of its debenture-bonds hypothecated its real property, tramway, cars, etc., used in connection therewith, to trustees for the debentureholders, and transferred the movable property of the company and its present and future revenues to the trustees. By a provincial statute, 3 Edw. VII. c. 91, s. 1 (Que.), the deed was validated and ratified. On the sale, in execution, of the tramway, as a going concern:—Held, that whether, at the time of such sale, the cars in question were movable or immovable in character the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, that unpaid vendors thereof were not entitled, under Art. 2,000 of the Civil Code of Lower Canada, to priority of payment by privilege upon the distribution of the moneys realized on the sale in execution. In the result, the judgment appealed from, Q.R. 18 K.B. 82, was affirmed.

Ahearn & Soper v. New York Trust Co., 42 Can. S.C.R. 267.

— Contributory negligence by injured child.]—A boy of eleven years of age and of sufficient intelligence, in the estimation of the Court, to understand the probable consequence of his actions, is liable for contributory negligence in the case of an accident, while attempting to board a tramway car as a trespasser and in disobedience to orders of the school-masters in charge of him.

Normand v. Hull Electric Co., 35 Que. S.C. 329.

—Negligence—Damages.]—A street railway company is liable, in addition to actual damage suffered, for the diminution in value of an immovable situate at the foot of, and adjoining, a steep hill down which the cars run where they are frequently derailed and precipitated on the immovable to the great peril of any persons who may be on the spot.

Amyot v. Quebec Railway, Light & Power Co., Q.R. 36 S.C. 141.

—Specification of tortious acts and negligence—Evidence of acts not alleged—Changing nature of demand.]—(1) When a plaintiff in an action of damages specifically charges the tortious act or negligence that caused the injury, he is estopped from proving any other at the trial, and the admission of such evidence by the Judge is a sufficient ground to quash a verdict in his favour. (2) Leave to amend a declaration "so as to agree with the facts proved," will not be granted if the amendment changes the nature of the demand, or is such as to lead the defendant into error as to the facts intended to be proved. In an action of damages caused by a collision with a tramcar, in which it is alleged that "the car which struck the plaintiff was crossing another car moving on the same street, in the opposite direction," the plaintiff cannot, after trial, amend his declaration to make it set forth that the second car was stationary and not moving. Leave granted him to do so by the trial Judge is a sufficient ground to quash a verdict in his favour.

Lemieux v. Montreal Street Railway Co., 38 Que. S.C. 400.

—Use of streets—By-law—Penalty for breach of conditions—Repeal of by-law—Contractual obligation.]—The city enacted a by-law granting the company permission to use its streets for the construction and operation of a tramway, and, in conformity with the provisions and conditions of the by-law, the city and the company executed a deed of agreement respecting the same. A provision of the by-law was that "the cars shall follow each other at intervals of not more than five minutes, except from eight o'clock at night to midnight, during which space of time they shall follow each other at intervals of not more than ten minutes. The council may, by resolution, alter the time fixed for the circulation of the cars in the different sections." For neglect or contravention of any condition or obligation imposed by the by-law, a penalty of $40 was imposed to be paid by the company for each day on which such default occurred, recoverable before the Recorder's Court, "like other fines and penalties." An amendment to the by-law, by a subsequent by-law, provided that "the present disposition shall be applicable only in such portion of the city where such increased circulation is required by the demands of the public:"—Held, that default to conform to the conditions and obligations so imposed on the company was an offence against the provisions of the by-law, and that, under the statute, 29 & 30 Vict. c. 57, s. 50 (Can.), the exclusive jurisdiction to hear and decide in the matter of such offence was in the Recorder's Court of the city of Quebec.

Quebec Railway, Light and Power Co. v. Quebec City, 41 Can. S.C.R. 145, affirming Quebec Ry. v. Recorder's Court, 17 Que. K.B. 256, 32 Que. S.C. 489.

—Collision—Contributory negligence.]—A street railway company is liable for the consequences of a collision caused by its curves being too sharp for the length of the cars. Passengers using the cars are not obliged to be on the lookout for accidents and the fact that a person injured was absorbed in reading a newspaper when the accident occurred was not evidence of contributory negligence.

Jago v. Montreal Street Railway Co., Q.R. 35 S.C. 109 (Ct. Rev.).

Eastern Provinces

—Street railway—Care of streets—Agreement with city—Removal of snow—Nonfeasance.]—The Saint John Railway Company acquired the Saint John Street Railway in 1894, subject to the obligations of keeping in repair the streets in which the railway ran, as provided by s. 10 of 50 Vict. c. 33, and also the obligation of removing the snow and ice as provided by s. 10 of 55 Vict. c. 29. In 1895 the Act 58 Vict. c. 72, was passed, s. 6 of which authorized the company to agree with the city of Saint John to pay the said city an annual sum to be agreed upon as a consideration for taking care, etc., of the streets and the removal of the snow thereon, relieving the company from all liability for the same during the continuance of the agreement. Acting under the authority of this section, the company and the city entered into a contract by which the city undertook to do what, by the section, it is authorized to do:—Held (per Tuck, C.J., Hanington, Barker and McLeod, JJ.), in an action for damages caused by the defendants' negligence in not removing the snow in a street through which the railway ran, that s. 6, and the agreement made thereunder, imposes upon the city no greater liability in respect to the care of the streets than otherwise attaches to them as a municipal corporation, and neglect to remove the snow was a mere non-feasance for which they were not liable at the suit of a private individual, and a nonsuit should be entered. Per Gregory, J.:—That there was a statutory obligation on the railway company to level the snow and keep safe in that respect for public travel the streets where the railway runs. That while the Act 58 Vict. c. 72, does not impose a duty on the city, it authorizes it in this instance to become a contractor for the performance of the work, and to stand in the place of the company in respect to all its liabilities in regard to the removal of snow, and the city is liable to a private individual for damages caused by its failure to do so.

McCrea v. City of Saint John, 36 N.B.R. 144.

—Collision at crossing—Rate of speed—Contributory negligence — Proximate cause.]—A waggon in which plaintiff was proceeding from Sydney to Glace Bay was struck by an electric tram car owned and operated by the defendant company, while attempting to cross the defendant's track, at a place known as Grand Lake Crossing, and plaintiff was injured. The evidence showed that near the crossing there was a down grade for a distance of about 3,000 feet, and then an up grade for 1,000 feet, terminating at a siding near which the crossing at which the accident occurred was situated. On the down grade it was usual to run cars at a speed of from 20 to 25 miles an hour, but when half way down the power was shut off and the speed on reaching the siding was 10 miles an hour. When plaintiff's team was first seen it was at a distance of from 35 to 40 feet from the crossing, and the car was distant from 50 to 75 feet. The motorman in charge of the car acted promptly in applying the brakes and reversing the current, but was unable to avert the collision. The whistle had been blown when 300 yards distant from the crossing, and the car was provided with suitable appliances for stopping it within a reasonable time. The rate of speed at which the car was proceeding was reasonable considering the time and place. Plaintiff heard a whistle blown which he supposed to be that of a Sydney and Louisburg train but did not see the car until his horse's head was distant about 20 feet from the crossing. There was also evidence to show that he failed to exercise proper care in approaching the crossing as the reins were lying loose, and one witness called for plaintiff testified that, at the time, the horse was being whipped and was galloping. Held, affirming the judgment of the trial judge and dismissing the action, that the proximate cause of the accident was negligence on the part of the plaintiff. Held, that a point not raised by the statement of claim, or at the trial where evidence might have been given to displace the contention, should not be raised on appeal.

Livingstone v. Sidney & Glace Bay Ry. Co., 37 N.S.R. 336.

—Liability for negligence in operating cars—Excessive speed—Nuisance caused by depositing snow on street.]—The defendant company removed from their tracks snow which accumulated there during a heavy snow storm, and deposited it upon the highway in such a way as to make it impassable to waggons, which were forced, in consequence, to make use of the company's track, of which the company had notice. Plaintiff's horse and waggon, while proceeding along the track, was overtaken by one of defendant's cars, and, before it could escape, was run into and the horse, waggon and harness, and the contents of the waggon injured. The evidence showed that the car, at the time, was being driven at an excessive rate of speed, and that the driver of the waggon made repeated efforts to attract the attention of the motorman, but failed to do so although there was sufficient light and there was an unobstructed view of the place where the waggon was at the time of the accident for a distance of four hundred yards. Held, in an action claiming damages for negligence, the plaintiffs were entitled to recover. Held, that the blocking of the highway by defendant constituted in fact as well as in law a nuisance, and, the common law having been infringed, there was no burden

cast upon plaintiff to show a requirement by the local authorities to level the snow to a certain depth over a certain area, and that such requirement had not been complied with. Held, also, that if contributory negligence was relied on, the case was one in which defendants must not only prove such negligence, but, also, that it was of such a character that they could not by the exercise of ordinary care and diligence have averted the mischief which happened. Held, also, that the restrictions in the company's charter in relation to the levelling of snow placed upon the highway, amounted to a condition.

Bell v. Cape Breton Electric Co., 37 N.S.R. 298.

—Dangerous condition of car steps during storm—Duty of passenger to exercise more than ordinary caution.]—The steps of an electric car, owned and operated by the defendant company, were in a slippery condition in consequence of exposure, while in use, to snow followed by rain, sleet and cold. The evidence showed that the car had been thoroughly cleaned in the morning, before being sent out, and that it would not have been practicable to operate it in such weather as that which prevailed at the time and to send it back constantly to the barn to have the snow and ice removed. Held, that passengers boarding and leaving the car at such a time were bound to exercise more than ordinary caution, and that it would not be reasonable to hold the company accountable for injuries sustained by plaintiff, a passenger on one of their cars who, in getting off the car, slipped and fell.

McCormack v. Sydney & Glace Bay Railway Co., 37 N.S.R. 254.

--Negligence in operating—Injury to foot passenger — Excessive speed — Burden of showing means of escape.]—Plaintiff was proceeding along the track of the defendant company, on a public street in the City of Sydney, when he was overtaken, struck, and severely injured by an electric car, which was being driven at an excessive and dangerous rate of speed. At the time of the accident, plaintiff was prevented from escaping by a car of another line, which was obstructing the crossing in front of him, and by banks of snow, which had been thrown up by defendant's plow, at the side of the track upon which he was standing. Held, setting aside the judgment for defendant, and ordering a new trial, that the burden of showing that plaintiff had means of escape, was upon the defendant company. Also, that plaintiff having the right to be where he was, and the whole event, from the moment he discovered his danger to the time he was struck, having happened in the course of a few seconds, he was not to be held to the obligation of selecting the best possible means of escape.

Ricketts v. Sydney and Glace Bay Ry. 37 N.S.R. 270.

—Destination of car—Sign-boards indicating—Unusual circumstances—Duty of passenger to inquire.]—The defendant company had placed a number of special or extra cars on a portion of their line for the purpose of carrying a large number of persons who had assembled for the purpose of viewing a regatta. It was arranged that the cars in question should run from a point in the suburbs, near which the regatta was held, to a point in the centre of the city, and discharge their passengers there and return for others, those passengers who desired it being given transfers which entitled them to be carried on other cars to their destinations in other parts of the city. The point at which the special cars were stationed was passed at stated intervals by other cars carrying on a regular service to and from Quinpool Road. Plaintiff who had been attending the regatta, entered a car known as a "trailer," attached to another car which bore a sign at each end with the words "Quinpool Road," expecting to be carried to a point on the line near his residence, but was informed on reaching the central point that the car in which he was went no further, and that he would have to transfer. There was evidence that an agent of the company stationed at the point of departure announced, as passengers entered, that the car in question was for the city, but this was not heard by plaintiff:—Held, affirming the judgment for defendant, that, outside of the cars performing the regular service, there was no obligation on the part of the company to carry plaintiff through to his destination in any one particular car; that the only contract on the part of the company was to carry passengers in accordance with the usual modes and methods of running its trams; and that, under the circumstances existing at the time, it was plaintiff's duty to have protected himself by making inquiry as to the destination of the car he entered.

O'Connor v. Halifax Electric Tramway Co. 38 N.S.R. 212, affirmed, 37 Can. S.C.R. 523.

— Nuisance — Removal of snow and ice from track to adjacent portions of street.] —Defendant company, operating a tramway line in H., was empowered by its act of incorporation and the rules made thereunder to remove snow and ice from its tracks, to enable it to operate its cars, "provided" that, in case of such removal, it should be the duty of the company to level the snow and ice so removed to a uniform depth to be determined by the city engineer, and to such distance on either side of the track as the engineer should direct, or to remove from the street all snow and ice disturbed, ploughed or thrown out, etc

within 48 hours of the fall or disturbance, etc., if the city engineer should so direct, In exercise of the power conferred upon it the defendant company swept snow from its tracks and piled it up on either side of the road in such a way as to form a ridge or bank which caused a sleigh driven by plaintiff to slew, throwing him out and severely injuring him:—Held, that the removal by the company, under the powers conferred upon it, of snow and ice, and placing it upon other portions of the street, was not to be treated as a nuisance for which the company would be responsible in damages. Semble, that, irrespective of any directions given by the engineer, it was the duty of the company, in removing snow and ice from its track and throwing it upon adjacent parts of the street, to do so in a reasonably careful manner, and with a just regard to the rights and interests of the public, and that if the question had been left to the jury in this way a verdict for the plaintiff based upon sufficient evidence could not have been disturbed. Also, that the company would be responsible for the consequences of failure on their part to carry out the directions and determination of the city engineer, but, in the absence of such directions and determination, they were only bound to act in a reasonably careful manner, and the adequacy of their performance of the duty cast upon them was to be determined by the circumstances of the case.

Mader v. Halifax Electric Tramway Co, 37 N.S.R. 546.

(See next case.)

—Negligence—Finding of jury—Exercise of statutory privilege.]—Where on the trial of an action based on negligence questions are submitted to the jury they should be asked specifically to find what was the negligence of the defendants which caused the injury, general findings of negligence will not support a verdict unless the same is shown to be the direct cause of the injury. Where a street car company has by its charter privileges in regard to the removal of snow from its tracks and the city engineer is given power to determine the condition in which the highway shall be left after a snow storm a duty is cast upon the company to exercise its privilege in the first instance in a reasonable and proper way and without negligence.

Mader v. Halifax Electric Tramway Co., 37 Can. S.C.R. 94.

—Injury to infant—Failure of motorman to take proper precautions.]—In an action brought in the name of an infant, claiming damages for injuries occasioned through the alleged negligence of the defendant company in the operation of their electric tramway, the evidence showed that the infant, a child aged one year and eleven months, was seen approaching the track upon which one of defendant's cars was moving slowly The whistle was sounded and the child stopped for a moment and then moved quickly towards the car and was struck, and received the injuries for which the action was brought. Upon seeing the child stop when the whistle was blown, the motorman immediately applied speed without waiting to see whether the child was going to retreat or making any effort to remove it from its dangerous position:—Held, that this was a clear case of reckless conduct, for which defendant was responsible. Also, that the failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time table and preventing delay to passengers. Also, that the failure of defendant company to provide its car with a fender was clear evidence of negligence.

Lott v. Sydney & Glace Bay Ry. Co., 41 N.S.R. 153, affirmed; Sydney & G. B. Ry. v. Lott, 42 Can. S.C.R. 220.

Western Provinces.

—Grading street—Damage to land adjoining—Support.]—A street railway company in grading a street in Vancouver in accordance with an agreement entered into with the corporation pursuant to the Vancouver Incorporation Act and Amendment of 1895, is not liable for damages for loss of support caused to lands adjoining the street.

Macdonell v. British Columbia Electric Railway Company, 9 B.C.R. 542.

—Excessive speed—Duty of driver to have his car under control.]—Where plaintiff alighted from one of the defendant's cars at night time, at a point where the street was torn up for purposes of repair, and the bell on a car immediately behind that from which he alighted, was clanging; and going between the two cars, and looking up and down a parallel track before crossing, but seeing no car approaching, was nevertheless struck and injured by an approaching car, running at an excessive speed on such parallel track:—Held, that he was entitled to recover, as it was the duty of the driver to have his car under control.

Morton v. British Columbia Electric Railway Co., 15 B.C.R. 187.

—Excessive or punitive damages—Permanent injury.]—Plaintiff was injured in a collision between two cars of the defendant company, the collision having occurred admittedly through the company's negligence. No evidence was offered by the company at the trial. Plaintiff's hip was dislocated and permanently injured, rendering him unable to follow certain branches of his trade, that of tinsmith. There was some medical evidence that an operation might improve his condition so as to reduce the disability.

He was, at the time of the accident, 24 years of age, and earned $4 per day when working. His medical and other expenses in connection with the accident amounted, roughly, to $500. Added to this should be loss of work on account of the accident. In an action for damages, the jury awarded him $11,500:—Held, on appeal, that the damages were excessive, and there should be a new trial.

Farquharson v. British Columbia Electric Railway Co., 15 B.C.F. 280.

—Removal of trees on highway—Rights of owner of adjoining land—Injunction.]—The right of property in shade trees on highways and to fence them in conferred upon the owners of the land adjacent to the highways by s. 688 of The Municipal Act, R.S.M. 1902, c. 116, is not taken away by an Act incorporating a railway company with power to construct a line of railway along the public highway with the consent of the municipality and according to plans to be approved by the council of the municipality, even although such consent has been given and such plans approved. Douglas v. Fox (1880), 31 U.C. C.P. 140, and Re Cuno (1888), 45 Ch. D. 12, followed. The defendants' Act of incorporation provided that the several clauses of the Manitoba Railway Act, R.S.M. 1902, c. 145, should be incorporated with and deemed part of it. And the Railway Act provides that the several clauses of The Manitoba Expropriation Act, R.S.M. 1902, c. 61, with respect to the expropriation of land and the compensation to be paid therefor shall be deemed to be incorporated mutatis mutandis with the Railway Act:—Held, that the defendants had no right to cut down the trees on the highway or to lower the grade in front of the plaintiffs' land, although such action was necessary in carrying out the approved plans without taking the proper steps, under the Railway Act and the Expropriation Act, either to ascertain and pay the damage suffered by the plaintiffs to their land injuriously affected by the intended construction, or to procure an order from a Judge, under s. 25 of the Railway Act, giving them the right to take possession upon giving security for payment of the compensation to be awarded; and that the interim injunction secured by the plaintiffs should be continued until the trial unless the defendants should furnish security that they would proceed forthwith to settle the amount of such compensation.

Bannatyne v. The Suburban Rapid Transit Co., 15 Man. R. 7 (Perdue, J.).

—Injury to and consequent death of servant travelling on pass—Inference as to cause of collision.]—A man employed by the defendants as a painter was travelling to the place where he worked, upon a car of the defendants, into which a freight car of the defendants which had got loose from the motor which drew it, ran, and in consequence the man was killed. The man was travelling on a pass issued by the defendants to him, and upon the back of the pass was printed a condition relieving the defendants from liability in case of accident. The deceased had not signed his name on the back of the pass, as required by the condition. In an action, under the Fatal Accidents' Act, to recover damages for the death of the man, the jury found that he was travelling on the pass, but was not aware of the condition, and assessed damages to the plaintiff, but were not asked to make and did not make any other findings:—Held, that the relation of master and servant existed between the deceased and the defendants at the time he was killed. Quære, whether the rule res ipsa loquitur applied. But held, that the proper inference from the evidence was that the coupling between the freight car and the motor broke; and, no proof being adduced that the coupling was a proper one and in good repair, or that the defendants had in force a proper method of inspection and competent men to inspect, the defendants were liable at common law. Held, also, that there was evidence to sustain the finding of the jury as to the pass. Judgment for the plaintiff for the damages assessed.

Farmer v. British Columbia Electric R. W. Co., 15 W.L.R. 136 (B.C.).

—Injury to passenger in alighting from car—Direction of conductor—Dangerous place—Failure to give warning.]—A car of the defendants, upon which the plaintiff was a passenger, upon a dark and foggy night, stopped upon a bridge and remained there some time. The plaintiff stepped off, fell through the bridge, and was injured. The plaintiff's evidence, in an action for damages for her injuries, was that the conductor told her to transfer to a car ahead, but gave her no warning of the character of the place where she was about to alight, and the fog and darkness prevented her seeing for herself. There was no evidence to show the extent or limits of the conductor's authority. The trial Judge did not give the jury any direction upon the question of the conductor's authority. The jury gave a general verdict for the plaintiff. No objection was taken to the Judge's charge:—Held, that there was evidence of negligence proper to be submitted to the jury, and therefore a nonsuit was properly refused; and the Court should not order a new trial on the ground of non-direction. Per Macdonald, C.J.A.:—There was no miscarriage by reason of the non-direction (if any), nor was it shown that the jury proceeded upon a wrong principle. Prima facie the conductor had authority to do all things reasonably necessary to carry

the plaintiff to her destination. There was no necessity for obtaining a special finding that the conductor acted within the scope of his authority. The onus was on the defendants to show that he acted outside the scope of his authority. Beard v. London General Omnibus Co., [1900] 2 Q.B. 530, followed. Per Irving, J.A.:—The action arose from the contractual relations of the plaintiff and defendants. The jury would require no oral evidence to warrant them in concluding that a conductor was a person in authority; and evidence was not necessary to show his authority to tell the plaintiff to transfer to the car ahead. Per Martin, J.A.:—There was no definite evidence of the existence of any orders to the conductor, and the case could not have been withdrawn from the jury. As to non-direction, no objection was taken at the trial, and the effect of what was done was that the issues submitted were accepted on both sides as the only issues on which the jury was asked to pass, and, non-direction complained of not having produced a verdict against the evidence, there should not be a new trial.

Schnell v. British Columbia Electric R. W. Co., 14 W.L.R. 586 (B.C.).

—General verdict—Answers to questions—Doubt as to meaning of jury—New trial.]—In an action for damages for injury to a child who was run over by a car of the defendants, in which negligence was alleged, several questions were submitted to the jury by the trial Judge, but he also told them that they might, if they chose, find a general verdict. When the jury returned into Court, the foreman announced, "We award the plaintiff $300 damages." On being asked by the trial Judge whether they had answered the questions, they said they had answered 3, as follows: "1. Q. Was the company guilty of negligence? A. Yes. 2. Q. If so, in what did such negligence consist? A. Over-speed. 3. Q. Was the plaintiff guilty of contributory negligence? A. Yes." On this the trial Judge dismissed the action:—Held, that there should be a new trial; it was probable that the verdict was intended to be a general one, but the matter was not free from doubt; and the jury should have been asked to make the matter plain before being discharged. Among the questions that were not answered by the jury, was the following: "Could the motorman, after it became apparent to him that the boy was going to cross the track, by the exercise of reasonable care and skill have prevented the accident, if he had been running at a reasonable rate of speed." In leaving this question, the trial Judge said: "I want you to consider that last element, because it is not, 'Could he have prevented the accident if running at an unreasonable rate of speed?'" Held, that this question was not properly framed, and the jury were not properly directed. The unreasonable rate of speed was the original negligence, and the question which the jury had to consider, after finding such negligence, was whether, notwithstanding that unreasonable rate of speed, the motorman, after seeing the child committing or about to commit a negligent act, could, by the exercise of reasonable care, have avoided the consequences of it. Held, that the defendants should pay the costs of the plaintiff's appeal from the judgment dismissing the action (Martin, J.A., dissenting as to this); and that the costs below should abide the result of the new trial.

Rayfield v. British Columbia Electric R. W. Co., 14 W.L.R. 414 (B.C.).

—Injury to passenger after alighting from car—Contributory negligence.]—The plaintiff was a passenger on a crowded car of the defendants going westward along Portage Avenue, in the City of Winnipeg. Being near the front end of the car when it stopped at the street where he wished to alight, he made his way past a number of people in the passage and in the front vestibule to the steps at that end, on which another man was standing, and stepped off the car in the direction of the parallel track of the railway. Almost instantaneously upon alighting, he was struck by another car of the defendants proceeding eastwards on the other track, knocked down and very seriously injured. The distances between the sides of two cars, when passing one another on the two tracks, was 44 inches, and the height of the lowest step of the car from the ground was 15½ inches There was no rule of the Company prohibiting passengers from alighting at the front entrance of cars, but a rule of the Company required motormen, when approaching another car on that Avenue, to slacken speed and ring the gong continuously until the car had been passed. It was the custom of the company to permit passengers to alight at the front entrance. The trial Judge found as facts that the motorman on the eastbound car did not sensibly slacken his speed or ring his gong as he approached the other car. The plaintiff was not aware of the approaching car until it struck him:—Held, (1) That the motorman on the car by which the plaintiff was struck was guilty of negligence, rendering the defendants liable in damages for the injury done to plaintiff. (2) The plaintiff had not been guilty of such contributory negligence as to prevent his recovery of damages, as he had a right to expect that, as far as the acts of the defendants' servants were concerned, he might alight in safety and would have a reasonable time after alighting to look

about so as to guard himself against injury from other cars of the defendants, but was not given that time. Oldright v. G. T. Ry. Co. (1895), 22 A.R. 286, and Chicago, M. & St. P. Ry. Co. v. Lowell (1894), 151 U.S.R. 209, followed. (3) There is no binding authority for the proposition that, from the moment a passenger's foot touches the ground, a street railway's liability for injuries to him by their other car ceases.

Bell v. Winnipeg Electric Street Railway Co., 15 Man. R. 338, affirmed, 37 Can. S.C.R. 515.

—Street car conductor—Transfer of passenger at dangerous place.]—Owing to fog disarranging the schedule time of defendant company's cars, they were not running on time. That which the plaintiff was riding in stopped on a bridge. There was another car immediately ahead which, in due course, would take plaintiff to her destination before that in which plaintiff was. The conductor asked or told her and another passenger to transfer to that car, and in doing so, she was injured by falling on the bridge in the darkness:—Held, that, in the absence of evidence to the contrary, it must be assumed that the conductor had authority to use his judgment in the circumstances to forward the passengers to their destination. The question of the scope of the conductor's authority having been twice brought to the notice of the Judge during the trial, yet he did not direct the jury on that point, and the case having been allowed to go to them without direction, and no objection taken to the charge on that account:—Held, that this brought the case within Scott v. Fernie (1904), 11 B. C. R. 91, and therefore the effect of what was done was that the issues submitted were accepted on both sides as the only issues on which the jury was asked to pass.

Schnell v. British Columbia Electric Railway Co., 15 B.C.R. 378.

—Verdict—Doubt as to intention of jury—Misdirection — Contributory negligence — Ultimate negligence.]—In submitting the case to the jury in an action for damages arising out of injury to a child by one of the defendant company's cars, five questions were submitted by the Judge, who also instructed the jury that they might if they chose, bring in a general verdict. The jury returned a verdict for the plaintiff in $300 damages. On the Judge asking whether they had answered the questions, the foreman replied that they had answered three: "(1) Was the company guilty of negligence? Yes. (2) If so, in what did such negligence consist? Overspeed. (3) Was the plaintiff guilty of contributory negligence? Yes." The trial Judge, on this, dismissed the action:—Held, that while it was probable that the jury intended to return a general verdict, yet the matter was not free from doubt, and should have been cleared up before the jury was discharged. There should, therefore, be a new trial. One of the questions not answered was "Could the motorman, after it became apparent to him that the boy was going to cross the track, by the exercise of reasonable care and skill, have prevented the accident if he had been running at a reasonable rate of speed?" The Judge said, in submitting this question: "I want you to consider that last element, because it is not: 'Could he have prevented the accident if running at an unreasonable rate of speed?'" Held, that this question was improperly framed, and the jury were not properly directed; that the original rate of speed was the original negligence, and after finding such negligence the jury had to consider whether, notwithstanding the unreasonable rate of speed, the motorman, after seeing the boy commit or about to commit a negligent act, could, by the exercise of reasonable care, have avoided the consequences of it. New trial ordered, costs of appeal to appellant, and costs of trial below to abide the event of the new trial.

Rayfield v. British Columbia Electric Railway Co., 15 B.C.R. 361.

—Riding on platform — Platform part of car.]—Plaintiff's husband was a passenger on one of the defendant company's cars, riding on the front platform, where it was customary for passengers to ride. The doors were open and there was no protecting bar across the opening, or other measures of safety taken. On the car approaching a switch, at a speed of three or four miles an hour, he was jolted off the car and, falling under the wheels, was killed. A jury gave a verdict of $3,500, but the trial Judge entered judgment for the defendant company on the ground that there was no evidence of negligence on their part:—Held, on appeal, that there was evidence of negligence and that the verdict should stand.

Dynes v. British Columbia Electric Railway Co., 15 B.C.R. 429.

—Collision of motor-car with tram-car — Absence of air-brakes.]—

Winter v. British Columbia Electric Ry. Co., 9 W.L.R. 117 (B.C.).

—Accident resulting from contact of electric wires.]—Per Dubuc, C.J.: A street railway company is not guilty of negligence in failing to take steps to prevent telephone wires crossing above its trolley wire from coming in contact, if broken, with the trolley wire, unless it be at some place known to be especially dangerous. Per Mathers, J. Such failure by a street railway company is evidence of negligence to go to the jury. The escape of electricity from wires suspended over streets through any other wires that may come in contact with them must be prevented so

far as it can be done by the exercise of reasonable care and diligence, and the defendants should have put up guards such as were shown to be in use very generally in the United States and England to prevent such accidents. The Court being equally divided the appeal from the County Court jury's verdict in favour of the plaintiff was dismissed.

Hinman v. Winnipeg Electric Street Railway Co., 16 Man. R. 16.

—Agreement between municipal corporation and electric railway company—Conditions in agreement repugnant to statute.]—By an agreement dated the 20th of November, 1888, made between certain persons (predecessors of defendant company) and the plaintiff corporation, authority was given to establish a system of street railways in the city of Victoria; but clause 25 of said agreement provided that the cars to be used should be exclusively for the carriage of passengers. In 1894 the Legislature passed an Act, c. 63, consequent upon a petition reciting an agreement, the incorporation of the persons named therein as a company, and the passage of an Act, c. 52 of 1890, giving the company power to build and operate tramways through the districts adjoining Victoria, and to take, transport and carry passengers and freight thereon. The petition further prayed for an Act consolidating and amending the Acts and franchises of the company then in force, and declaring, defining and confirming the rights, powers and privileges of the company. S. 16 of said c. 63, provides that "in addition to the powers conferred by the agreement the said Company are hereby authorized and empowered . . . to take, transport and carry passengers, freight, express and mail matter upon and over the said lines of railway . . . subject to the approval and supervision of the city engineer, or other officer appointed for that purpose by the said corporation as to location of all poles, tracks and other works of the said company":—Held, that, the passage in the agreement being repugnant to the provision in the statute, the latter should prevail.

City of Victoria v. British Columbia Electric Railway Co., 15 B.C.R. 43, 13 W.L.R. 336.

—Negligence—Highway—Use of by street car company—Collision—Motor car struck by tramcar—Negligence of driver of tramcar.]—Plaintiff's motor car, proceeding along the highway, got partly between the rails of the defendant company, but owing to the condition of the road, was unable to get out of the way of an approaching tramcar. On seeing his difficulty, the driver signalled to the motorman of the tramcar to stop, which he endeavoured to do, but was unable to avoid a collision, in which the motor car was damaged. The trial Judge gave judgment for plaintiff on the ground of negligence on the part of the defendant company in not having a car of the size which caused the collision equipped with air brakes, which would, he held, have enabled the motorman to have stopped in time to prevent the collision:—Held, on appeal, on the evidence, that there was no negligence on the part of the motorman. Per Martin, J.A., that there was no evidence to support the finding of negligence in the company's not having the car equipped with an air brake.

Winter v. British Columbia Electric Railway, 15 B.C.R. 81, 13 W.L.R. 352.

—Limitations of actions—Contract for supply of electric light—Neligence.]—The appellant company, having acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company, under the provisions of "The Consolidated Railway Company's Act, 1896" (59 Vict. c. 55 [B.C.]), is entitled to the benefit of the limitation of actions provided by s. 60 of that statute. The limitation so provided applies to the case of a minor injured, while residing in his mother's house, by contact with an electric wire in use there under a contract between the company and his mother. Judgment appealed from, 14 B.C. Rep. 224, 1909, C.A. Dig. 116, reversed.

British Columbia Electric Railway Co. v. Crompton, 43 Can. S.C.R. 1.

—Liability for injury to person risking his life to save that of another.]—A statement of claim alleging, in effect, that a child about two years of age had fallen on the track of the defendants' street railway on a public street in the city; that one of the defendants' cars was approaching the child at a high rate of speed, and that, owing to the negligence of the motorman in charge of the car in not stopping it, the child's life was endangered without negligence on her part; that the plaintiff, observing this, necessarily rushed in front of the car in an attempt to save the child, and that, owing to the motorman's negligence in not stopping the car or reducing its speed, he was struck and injured by the car, discloses a good cause of action.

Seymour v. Winnipeg Electric Railway Co., 19 Man. R. 412, 13 W.L.R. 566.

—Duty of company to put on wheel guards.]—(1) It is negligence in a company operating electric cars on the streets of a city not to have such guards for the front wheels as will prevent persons falling on the track from being run over, and the company will be liable in damages to any person injured in consequence of such negligence, unless there is sufficient contributory negligence on the part of such persons to constitute a defence. (2) No such contributory negligence could be attributed to a child under six years old. (3) A verdict for $8,000 damages in such a case, where one of the child's legs was cut

off, is not so excessive as to warrant the Court in ordering a new trial.

Wald v. Winnipeg Electric Railway, 18 Man. R. 134.

—Statutory limitation of actions.]—The statutory exemption as to limitation of actions provided by s. 60 of the Consolidated Railway Company's Act, 1896, does not enure to the benefit of the British Columbia Electric Railway Company's operations as carried on in the city of Victoria. The doctrine that private legislation must be strictly construed against the company or corporation obtaining the same, applied.

Crompton v. British Columbia Electric Railway Co., 14 B.C.R. 224.

EMPLOYER AND EMPLOYEE.

Generally.]—See MASTER AND SERVANT.

—Of railway.]—See RAILWAY.

ENCROACHMENT.

See BOUNDARY.

EQUITABLE ASSIGNMENT.

Power of attorney—Authority to receive surplus proceeds of mortgage sale—Revocation.]—Pending a suit for the foreclosure of a mortgage and sale of the mortgaged premises the mortgagor executed and delivered a writing in favour of a creditor authorizing him to collect, recover and receive, and apply on account of his debt, any surplus from the sale, and declaring that the power might be exercised in the name of the grantor's heirs, executors and administrators, and should not be revoked by his death. The sale resulted in a surplus. Before the sale the mortgagor died:—Held, that the writing was not an equitable assignment, but a power of attorney revocable by the grantor's death.

Ex parte Welch, Chapman v. Gilfillan, 2 N.B. Eq. 129.

—Of chose in action.]—See that title.

EQUITY OF REDEMPTION.

See MORTGAGE.

EQUITABLE EXECUTION.

See EXECUTION; RECEIVER.

EMBLEMENTS.

Sale of growing hay to be severed by purchaser — Interest in land or chattels — Breach of implied warranty of title—Damages.]—

Fredkin v. Glines, 8 W.L.R. 587 (Man.).

ESTOPPEL.

By record.]—A confession of judgment for a portion of the claim unless withdrawn constitutes complete proof of the right of action against the party making it.

Citizens Light and Power Co. v. St. Louis, 34 Can. S.C.R. 495, reversing 13 Que. K.B. 19.

Work and labour—Claim for price of—Application on purchase money of land—Mortgage for purchase money.]—

Reading v. Coe, 6 W.L.R. 279 (N.W.T.).

—Charge on land — Lien memorandum — Representation as to ownership.]—

Abell Co. v. Hornby, 1 W.L.R. 3 (Man.).

—Sale of goods on credit—Representation by purchaser.]—

North American Transportation and Trading Co. v. Olsen, 1 W.L.R. 518 (Y.T.).

—Forgery—Promissory note—Discount—Duty to notify holder.]—E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co., for $2,000, would fall due at that bank on a date named, and asking them to provide for it. The name of E. & Co. had been forged to said note, which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees:—Held, affirming the judgment of the Court of Appeal, 7 O.L.R. 90 (Sedgewick and Nesbitt, JJ., dissenting), that on receipt of said notice E. & Co. were under a legal duty to inform the bank promptly that they had not made the note, and not doing so, they were afterwards estopped from denying their signature thereto.

Ewing v. Dominion Bank, 35 Can. S.C.R. 133.

Leave to appeal refused. Ewing v. Dominion Bank, [1904] A.C. 806

—Judgment in former action—Bar to subsequent suit.]—To an action for work done, labour performed, etc., defendant pleaded a previous action by plaintiff in the County Court for the same cause of action, in which, the cause coming on for trial and no one appearing for plaintiff, it was ordered that he take nothing by his

action and that the same be dismissed with costs. Held, that the judgment entered was a complete defence to the action and that the judge of the County Court was in error in treating the plea as a preliminary objection merely, and in going on and hearing evidence on the merits. Semble, that while the judgment in the first action, until set aside, operated as an estoppel, the proper course for plaintiff to have adopted, as pointed out in Vint v. Hudspeth, 29 Ch. D. 322, was to have applied to the judge who heard the cause to set aside the judgment and for a re-hearing. Held, that the writ of summons in the previous action, being specially indorsed, was proper evidence for the Court that the previous judgment embraced the same claim as that now sued for.

Mumford v. Acadia Powder Co. 37 N.S.R. 375.

—Life insurance—Fraud.] — See INSURANCE (LIFE).

—Forgery—Ratification.]—See BILLS AND NOTES.

Merchants Bank v. Lucas, (1890) 1 S.C. Cas. 275.

—Pleading—Facts constituting estoppel to be detailed.]—See BANKRUPTCY.

Davies v. McMillan, (1893) 1 S.C. Cas. 506.

—Estoppel by representation—Lien on land—Consideration.]—Action to recover balance due for a threshing outfit sold and delivered by the plaintiff company to defendants, Charles Hornby and his wife, Ellen Hornby, under a written agreement signed by defendants which provided that promissory notes were to be given on approved security for the amounts payable at the dates mentioned. When the machinery had been delivered at the defendants' farm, the plaintiffs' agent called there to take settlement for it. Defendants then signed the notes asked for and the agent demanded a lien on the farm as security for the notes and, relying on the representations of both defendants then made that the wife owned the land, accepted a lien on the land for the amount, signed by Mrs. Hornby in the presence of her husband, and did not insist, as he might have done, that the husband should also sign it. It appeared that the title to the land was then actually in the husband, and had remained so ever since. Renewal notes had been given by the defendants and the original periods of credit considerably extended, and during this time the husband wrote several letters in which the wife was spoken of as the actual owner. The chief contention at the trial was as to whether the plaintiffs were entitled to a lien on the land for the debt as against the defendant Charles Hornby:—Held, 1. There was ample consideration for the giving of the lien, as the plaintiff might have removed the machinery and refused to carry out the transaction if it had been refused. 2. The defendant Charles Hornby was estopped by the representations he had made, and subsequently repeated, from denying that the land in question was his wife's property and from claiming it as his own as against the plaintiffs. 3. Defendant Hornby was also thereby estopped from claiming it to be exempt as land occupied by him from proceedings under a registered judgment. Judgment declaring that the lien claimed forms a valid charge on the land referred to for the amount of the plaintiff's claim and costs of suit.

Abell Co. v. Hornby, 14 Man. R. 450, (Perdue, J.).

—Voidable contract—Infancy.]—

See INFANT.

Meyers v. Blackburn, 38 N.S.R. 50.

—Settlement of controversy—Imperfectly drawn document.]—The ancestors of plaintiff and defendant received a joint grant of land from the Crown and used and occupied different parts of the land included in the grant as tenants in common. N., being in debt, in order to save his property from his creditors, gave a deed to his brother A. of his right and title in the whole grant but remained in possession, use and enjoyment of the land occupied by him as before. Subsequently he demanded a reconveyance from A. and his heirs and a controversy which arose was settled by the heirs of A. conveying to N. one portion of the land and N. executing to the heirs of A. what was intended as a release and quit claim of all his interest in the other portion of the land, including that in question:—Held, that although the release was badly drawn and failed to express in clear and distinct terms the nature of the transaction between the parties, as this was the clear inference to be drawn from the documentary evidence and the surrounding circumstances, the Court would give effect to it.

McQueen v. McQueen, 42 N.S.R. 253.

EVIDENCE.

I. ADMISSIBILITY AND ONUS.
II. UNDER COMMISSION.
III. IN CRIMINAL CASES.
IV. EXAMINATION FOR DISCOVERY.
V. PRODUCTION OF DOCUMENTS.

I. ADMISSIBILITY AND ONUS.

Jury trial—Proof—Private regulations of a company.]—It is illegal to admit and allow to be placed before the jury the private regulations and instructions of a company for the guidance of its employees.

Kleinbrod v. Montreal Street Railway Co., 11 Que. P.R. 301.

Confidential report made to tramway company as to accident—Action by person injured—Privilege.]—
Snell v. British Columbia Electric Ry. Co., 11 W.L.R. 198 (B.C.).

—Parol evidence to vary—Statute of Frauds—Written agreement to build house—Contemporaneous oral agreement to accept conveyance of land as part of price.]—
Eaton v. Crook, 12 W.L.R. 658 (Alta.).

—Examination of defendant — Refusal to answer—Privilege.]—Section 5 of the Canada Evidence Act does not apply to a witness under examination in the Superior Court upon a proceeding to quash a saisie conservatoire issued in virtue of the provisions of the Code of Civil Procedure. Said witness may refuse to answer questions tending to incriminate him.
Robinson v. Casey, 12 Que. P.R. 95.

—Telephone conversation between parties—Testimony of person hearing words of one party.]—It appeared in evidence that there were communications by telephone, on a given day, at a given time, between one of the plaintiffs and one of the defendants in regard to the matters in question in the action; but what was said by one was denied by the other. It was sought to elucidate what was said by the defendant by calling witnesses who heard his words as spoken into the telephone receiver, though the witnesses could not affirm to whom he spoke or that he was in fact speaking to any person:—Held, that the evidence of the proposed witnesses was relevant, and therefore admissible, though the value of it might be little or nothing. McCarthy v. Peach (1904), 186 Mass. 67, approved. Judgment of Sutherland, J., 2 O.W.N. 222, set aside; and a new trial ordered.
Warren v. Forst, 22 O.L.R. 441 (D.C.).

—Cross-examination on affidavit used in answer to interlocutory motion—Original document — Compelling witness to produce.]—
Wilson v. Rannie, 1 W.L.R. 397 (Y.T.).

—Secondary evidence — Ejectment — Mesne profits.]—Section 27 of the Evidence Act of Nova Scotia (R.S.N.S. (1900) c. 163) provides that "a copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any Court in place of the original, and shall have the same force and effect as the original would have if produced and proved." And by the first two sub-sections of s. 22 it is provided that:—"The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the Court may, upon due cause shown upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition and the correctness of the prepared copy. (2) This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in Courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills":—Held, that a copy of a will executed before two notaries in the Province of Quebec under the provisions of article 834 C.C. certified by one of said notaries to be a true copy of the original in his possession, is admissible in evidence on the trial of an action of ejectment in Nova Scotia, as provided in s. 27.
Musgrave v. Angle, 43 Can. S.C.R. 484.

Juror at first trial witness at second—Proving physical condition of exhibit at time of first trial.]—The evidence of a juryman upon a former trial at which the jury disagreed is admissible to prove the physical condition of an exhibit when it was put in evidence at the former trial.
The King v. Roso, 15 W.L.R. 17.

—Findings of Judge on conflicting evidence—Denial of signature—Comparison of handwritings.]—The plaintiff sued the defendant for $2,000 said to have been lent, and produced two promissory notes for $1,000 each, said to have been written by the plaintiff and signed by the defendant. The notes were signed "Alec. Keiser," but the defendant's name was "John Keiser." The defendant denied the signatures, and swore that he never saw the plaintiff till the plaintiff endeavored to collect the money. The trial Judge—there was no jury—believed the plaintiff's evidence, which was corroborated to some slight extent, and was of opinion, from a comparison made by himself of the signatures to the notes with a signature made by the defendant in the witness-box, that the former were written by the defendant. He therefore gave judgment for the plaintiff:—Held, that the Court could not, in these circumstances, reverse the judgment of the trial Judge, nor grant a new trial.
Kalmet v. Keiser, 13 W.L.R. 94.

—Action to revoke a judgment—Subsequent discovery of evidence not available at the trial.]—New evidence alleged, in an action

to revoke a judgment, to have been discovered subsequently to the trial, must be material, that is, of such a kind and nature, that if it had been adduced thereat, the judgment impugned might have been different.

American Asbestos Co. v. Johnson Co., 38 Que. S.C. 32, affirming 34 Que. S.C. 185.

—Signature by mark—Denial under oath.] —When a signature to a receipt, by affixing his mark in the presence of a witness, is denied under oath, as provided in Art. 208 C.P., by the party alleged to have subscribed it, the onus of proving the payment it refers to, is cast on the party who sets it up, and, if the sum exceeds fifty dollars, parol testimony, including that of the attesting witness to the receipt, is inadmissible for the purpose.

Légaré v. Barbe, 38 Que. S.C. 27 (C.R.).

—Proof of handwriting.]—Proof by comparison of writings of a signature denied under oath is permissible even when the writing containing the signature has all the essential characteristics of a promissory note.

Paquin v. Turcotte, Q.R. 37 S.C. 118 (Ct. Rev.), affirming 35 S.C. 269.

—Parol testimony—Contracts by traders and in commercial matters.]—A farmer who carries on the business of contracting for the shifting or removal of buildings, is a trader, and a contract made by him for such purpose is a commercial matter. Hence, parol testimony is admissible to prove it.

Besner v. Poirier, 37 Que. S.C. 264.

—Cross-examination at trial—Disallowance of irrelevant questions.]—The Judge presiding at the trial of a cause has a necessary discretion for the protection of witnesses under cross-examination and, where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence, an appellate Court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a question being disallowed which did not, at the time it was put to the witness, have relevancy to the issues.

Brownell v. Brownell, 42 Can. S.C.R. 368.

—Interrogatories—Exceptions to answer.]—Answers to interrogatories must be made substantially and fully, and not with a view to avoid giving information, but they need not be in strict or technical language.

Pick v. Edwards, 4 N.B. Eq. 151.

—Loss of document—Secondary evidence.]—The party who brings an action founded upon a document sous seing prive is bound to produce it upon the trial. He will not be allowed to give secondary evidence of it by merely alleging that it has been lost. To obtain the benefit of par. 6 of Art. 1233 C.C. he must prove, not only that the document had existed, but the unforeseen event which caused its loss. When the defendant without denying the existence of the contract set up by the plaintiff, claims that the proceedings taken in the cause (saisie-revendication) are not justified by it proof of it becomes necessary to enable the Court to decide the issue. The plaintiff cannot rely on Art. 111 C.P.Q. as the express denial of the right to such remedy is a denial of the contract set up by him.

Mason & Risch Piano Co. v. Fournier, Q.R. 38 S.C. 242 (Ct. Rev.).

—Presumptions—Acts of party.]—Presumptions from personal acts to amount to proof must be weighty, precise, consistent, unequivocal and certain. Their efficacy is to be determined by the Court. Where property is purchased on terms of payment by instalments and the purchaser renounces the benefit of the term in consideration of a reduction in the rate of interest and advances money to the vendor in excess of what is due, the claim for repayment of such excess is not answered by presumptions raised from the new terms of payment of the purchase money subsequently settled by the parties and by the long delay of the purchaser in claiming such repayment.

Meunier v. Foraud, Q.R. 37 S.C. 209 (Ct. Rev.).

—Weight of evidence.]—See APPEAL, V.

—Depositions of deceased plaintiff on examination for discovery.]—See BROKER.

Johnson v. Birkett, 21 O.L.R. 319.

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

East v. O'Connor, 19 Ont. Pr. 301.

—Defamation—Previous libel—Subsequent libel—Admissibility.]—In an action for libel evidence of a previous provocatory

libel on the plaintiff's part is admissible in mitigation of damages; but (Rose, J., diss.) evidence of a subsequent libel by the plaintiff is not admissible. Nor can the defendant be permitted to show that the plaintiff has attacked the character and reputation of others. It having been elicited in cross examination of the plaintiff that the defendant had recovered damages for previous and subsequent libels before mentioned in an action against the proprietor of the newspaper of which the plaintiff was editor, the trial judge told the jury to take that fact into consideration:—Held, not misdirection.

Downey v. Stirton, 1 O.L.R. 186.

—Defamation—Previous libel—Subsequent libel—Admissibility.]—In an action for libel evidence may be given of a previous publication by the plaintiff connected with the libel complained of, but not of a publication subsequent to the libel, at any rate, where it makes no reference to the defendant. Stirton v. Gummer, 31 O.R. 277, and Downey v. Stirton, 1 O.L.R. 186, followed.

Downey v. Armstrong, 1 O.L.R. 237.

—Conflict between Provincial and Dominion law—Exchequer Court.]—In a proceeding in the Exchequer Court if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail.

The Queen ex rel. Attorney-General of Canada v. O'Bryan, 7 Can. Exch. R. 19.

—Negligence—Horse at large on highway—Right of action—Evidence of by-law.]—The defendant knew that the fences of his field in which he let his horses loose were not in proper condition; and owing to such defect the horses escaped on to the public streets of a city, and being startled into running by mischievous conduct of a third person, knocked the female plaintiff down and injured her:—Held, that she was entitled to damages. Cox v. Burbidge (1863), 13 C.B. N.S. 430, discussed. In such a case evidence of a by-law of the municipality against running at large is admissible in aid of the plaintiff.

Patterson v. Fanning, 1 O.L.R. 412.

—Bank Act, s. 46—Inspection of customer's account—Company—Manager—Private liabilities.]—Section 46 of the Bank Act, 1890, 53 Vict., c. 31 (D), providing that "no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank," does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shows good cause for requiring the information he seeks. The company had an account with the bank (claimant), and the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator showed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim:—Held, that the liquidator, in examining the agent of the bank for the purpose of showing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party to the proceeding; more especially as the bank had set up certain transfers of cash from one account to the other as justifying them in charging the company's account with the manager's liabilities. Held, also, that there was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no farther. Held, also, that periodical acknowledgments given by the manager to the bank of the correctness of the company's account could not be set up as a bar to an inquiry into the account, where specific errors in it were charged, to the knowledge of the bank.

Re Chatham Banner Co.; Bank of Montreal's Claim, 2 O.L.R. 672 (D.C.).

— Technical breach of trust — Opinion — "Honestly and reasonably"—Liability of trustees.]—The provisions of 62 Vict. (2) c. 15, s. 1 (O.) relieving trustees from the consequences of technical breaches of trust who have acted "honestly and reasonably" do not render competent as evidence the opinion of bankers or other financial men as to whether the trustee has so acted in the course he has taken or omitted to take in respect to collecting a debt due the estate. The general rule of evidence still applies that mere personal belief or opinion is not evidence, and the test of reasonableness is that exhibited by the ordinary business man or the man of ordinary sense, knowledge and prudence in the conduct of his own affairs. Semble, such kind of opinion evidence may be given where the opinion is shown to have

been prevalent in the neighbourhood, and to be concurrent with the transaction.

Smith v. Mason, 1 O.L.R. 594.

—**Negligence.**]—In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death. Where, therefore, a man employed on the defendant's tug was drowned, and it was shown that wood had been piled upon the tug's deck in such a way as to make it dangerous to pass along the deck, but it was also shown that there was a safe passage-way on a scow lashed to the tug, and there was no evidence whatever as to the cause of the accident, the action was dismissed.

Young v. Owen Sound Dredge Company, 27 O.A. 649.

—**Parol evidence varying written contract.**]—Plaintiff sold to S. a property known as the Mill Farm, containing a quantity of woodland, for the sum of $8,500, under an agreement in writing by which S. agreed to pay a portion of the purchase money on the execution of the agreement, and the balance in yearly instalments, with interest, subject to the condition that if S. failed to pay any of the instalments, with interest, as agreed, the payments made would be forfeited and plaintiff would be at liberty to resume possession; and subject to the further condition that S. would not cut more than a specified quantity of lumber in any one year. In an action of replevin brought by plaintiff against the defendant sheriff, who had levied upon a quantity of lumber on the premises, under executions issued at the suit of creditors of S., plaintiff tendered evidence to show that all lumber cut by S. was to be sold and the proceeds, after deducting certain disbursements, paid to plaintiff on account of the purchase money, and that the title to the land and lumber was to remain in plaintiff until the payments agreed to be made by S. were completed:—Held, that the evidence was not admissible, the effect of it being to vary the written contract.

Blaikie v. McLennan, 33 N.S.R. 558.

—**Evidence to vary written contract—Promissory note — Indorsement — Contemporaneous parol agreement.**]—Parol evidence will not be received to show that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable on the indorsemnt, as that would be contradicting the contract which such indorsement by sub-s. 2 of s. 55 of the Bills of Exchange Act, 1890, imports. Abrey v. Crux (1869), L.R. 5 C.P. 37; Henry v. Smith (1895), 39 Sol. J. 559, and New London Credit Syndicate v. Neale, [1898] 2 Q.B. 487, followed. Pike v. Street (1828), Moo. & M. 226, dissented from.

Smith v. Squires, 13 Man. R. 360.

—**Judgment—Statements contained therein—Contradiction by verbal evidence—Inscription en faux.**]—A judgment of the Superior Court is an authentic document which makes full proof of the statements contained therein, and their veracity cannot be impeached by parol evidence, except upon inscription en faux.

Beaubien Produce and Milling Co. v. Corbeil, 18 Que. S.C. 484.

—**Transfer absolute in form—Mortgage.**]—An instrument absolute on its face may yet be shown to be a conditional conveyance, and parol evidence will be received to show what was the intention of the parties; and all the circumstances in connection with the instrument will be looked at in determining this. Parol evidence will be received, not that the instrument may thereby be contradicted, but for the purpose of raising an equity paramount to its terms.

Blunt v. Marsh, 1 Terr. L.R. 126.

—**Written agreement—Parol evidence to supplement as to method of payment.**]—Where a written order is given for the supply of goods at a fixed price without further specification of the mode of payment, it is not inconsistent with the written agreement to prove that payment was to be made in some other way than by cash, and oral evidence is admissible to complete what had not been fully expressed.

Wilson v. Windsor Foundry Co., 31 Can. S.C.R. 381, affirming 33 N.S.R. 21.

—**Collateral contract—Parol evidence.**]—The plaintiff sued on a promissory note, and tendered with his action a certificate of shares which he said the defendant had transferred to him as collateral security for the loan represented by the note. The defendant pleaded that the note was made in connection with a contract by which the defendant sold to the plaintiff eleven shares of Kensington Land Company stock subject to the right of redemption within six months on certain conditions, and that the note was only collateral to the contract, and made at plaintiff's request to enable him to obtain the money by discount. The note and contract were produced:—Held, that taking the note and contract together, and also seeing the admission in the declaration that the two documents were connected with the same transaction, parol evidence was admissible in explanation of the contract as between the parties thereto.

Walker v. Brown, 19 Que. S.C. 23.

—Trade custom—Art. 1016 C.C.]—A party to an action on a contract may rely on a custom of trade not only when the terms of the contract are ambiguous, but also when it does not plainly appear from the circumstances of the transaction what was the intention of the parties.

Prior v. Atkinson, 19 Que. S.C. 210.

—Slander—Finding of trial judge on question of fact.]—In an action claiming damages for certain slanderous words, alleged to have been spoken by the defendant, of and concerning plaintiff, during the progress of a trial before a justice of the peace, six witnesses called by the plaintiff, testified to the use of the words complained of, while four called on the other side, including the justice, testified that they had not heard the words used, and the defendant denied having uttered them. The learned County Court Judge treated the evidence for defendant as a contradiction of that for plaintiff and gave judgment in defendant's favour:—Held, that he erred in doing so, and that there must be a new trial. Per Weatherbe, J., (Henry, J., concurring). Held, that weight should not be attached to the finding of the trial Judge on a question of fact where the reasons given disclosed erroneous judgment in weighing the testimony.

Zwicker v. Zwicker, 33 N.S.R. 284.

—Entry in merchant's books.]—An entry in a merchant's books, showing that the defendant is indebted in a certain amount, with proof that plaintiffs did sell goods to him and that the books were regularly kept, is not sufficient, per se, to put the defendant, who, by his plea, denied his indebtedness, upon proof of the incorrectness of such entry.

Garth v. The Montreal Park and Island Railway Company, 18 Que. S.C. 463 (Archibald, J.).

—Authentic and private writings—Art. 1221 C.C.]—(1) A writing, non-authentic owing to certain defects depriving it of its authenticity, will avail as a private writing, if signed by all the parties whose signatures to it was necessary, if made as a private writing, there being practically no distinction between Art. 1221 of Civil Code and Art. 1213 of Code Napoleon. (2) Proof of the amount payable under a private writing, signed in blank (other than promissory note or bill of exchange) will require to be supported by a commencement de preuve par écrit; and the signature of obligor would not be a commencement de preuve par écrit as to the amount.

Gauthier v. Rioux, 19 Que. S.C.R. 82 (White, J.), affirmed in review, 19 Que. S.C. 473.

—Chinese Immigration Act, 63 & 64 Vict. c. 32—Prostitute—Affidavits of Chinamen in English language.]—Evidence of the general reputation of a house in which a Chinese immigrant has lived is admissible in habeas corpus proceedings directed against the Collector of Customs who is detaining such immigrant for deportation to China on the ground that she is a prostitute. An affidavit drawn up in a language not understood by the deponent may be read in Court if it appears from the jurat that it was first read over and interpreted to deponent. In re Ah Gway (1893), 2 B.C. 343, not followed.

In re Fong Yuk and The Chinese Immigration Act, 8 B.C.R. 118.

—Parol lease—Commencement de preuve par écrit.]—An annual lease with a rental of more than $50 cannot be proved by oral testimony, even against a third party, without a commencement of proof in writing, which will not be found in the allegation, by the third party, of a monthly lease. A confession of judgment by the lessee, in an action by his lessor, is no evidence of a parol lease against a third person who has been made a party (mis en cause).

Laliberté v. Langelier, 9 Que. Q.B. 398.

—Presumption—Defendant present at trial but not called.]—When a defendant who is in Court does not give evidence to support his case, the Judge is entitled to make every reasonable presumption against him. Barker v. Furlong [1891] 2 Ch. 172, per Romer, J., at page 184, approved.

Miller v. McCuaig, 13 Man. R. 220 (Dubuc, J.).

—Divorce suit—Evidence of witness at former trial—Admissibility—Proof of.]—In divorce proceedings in British Columbia, the evidence of a witness who cannot be found, given at a former trial and proving misconduct, may be read over to the petitioner and verified by her as a correct note of the evidence given by such witness in her presence, and when so verified is admissible.

Cunliffe v. Cunliffe, 8 B.C.R. 18 (Drake, J.).

—Examination of ex-officer of corporation for discovery—Reading depositions at trial—Jury allowed to retire.]—If an appointment is taken out for the examination for discovery of an ex-officer of a corporation, and the corporation's solicitor does not attend, and gives notice that he will object to the deposition being received at the trial:—Held, following Osler, J., in Leitch v. Grand Trunk Railway Company (1890), 13 P.R. 369, that it should not be received. On a trial by jury after the plaintiff's case has commenced, the Judge may, in his discretion, permit the jury to retire while proof is being given of facts with which the Judge alone is concerned

Bank of B. C. v. Oppenheimer, 7 B.C.R. 48.

—Witness' reputation for veracity.]—On the trial, evidence having been given of the individual opinions of plaintiff's neighbours as to his general reputation for veracity, defendant's counsel proposed to ask the question, "Whose opinion do you know?" The evidence having been excluded:—Held, that the learned trial Judge erred in doing so, and that the question should not have been disallowed. Held, notwithstanding, that as, assuming plaintiff's testimony to be perfectly true, no case was made out against the defendant, there was no necessity for sending the case back for a new trial for rejection of evidence, there having been no substantial wrong or miscarriage within O. 37, r. 6.

Messenger v. Town of Bridgetown, 33 N.S.R. 291.

—Right to contradict one's own witness—Facts material to the issue.]—Where a witness (whether party to the action or not) is called to prove a case and his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit the former, but to contradict him on facts material to the issue; and the right to contradict by such other evidence exists without leave of the Judge at the trial.

The Stanley Piano Co. v. Thomson, 32 O.R. 341.

—Incompetent witness—Examination on the voir dire—Religious belief.]—In the Court of Divorce and Matrimonial Causes the amount of credence to be given to the witnesses is entirely for the Judge who hears the case. Therefore on the trial of a libel filed by the wife for a divorce a vinculo matrimonii on the ground of the adultery of the husband, when the presiding Judge accepted the evidence of a single witness to prove the adultery, as to which fact she was not corroborated, though on other matters she was, and entirely rejected the uncontradicted statements of several witnesses called to prove immoral conduct on the part of the wife, it was held that he had a right so to do, and the Court on appeal would not on that account disturb the decree. A person offered as a witness upon being examined on the voir dire, stated that he believed in God but did not believe in a future state of rewards and punishments dependent upon his conduct while on earth, whereupon he was rejected as incompetent:—Held, that he was properly so rejected.

Bell v. Bell, 34 N.B.R. 615.

New evidence on appeal.]—

See APPEAL.

—Evidence of death—Certified copy of will.]—An action was brought by plaintiffs, trustees under the last will of D. to recover possession of a lot of land bought by plaintiffs at sheriff's sale under execution on a judgment recovered by D. against M. The objection was taken that at the trial plaintiffs failed to give evidence of the death of D.:—Held, that the objection was one which under O. 21 r. 5, must be specifically taken. Held, also, that the reception in evidence, without objection, of a certified copy of the will of D. was an implied admission of his death.

Doull v. O'Keefe, 34 N.S.R. 15.

—Cross-examination on affidavit.]—Held, per Rouleau, J., that where a party has been cross-examined on an affidavit made by him, the opposite party can use such examination at the trial as evidence in rebuttal of the evidence de bene esse of the same party.

Livingstone v. Colpitts, 4 Terr. L.R. 441.

—Commercial matters—Bills and notes—Parol evidence.]—Bills of exchange, notes and cheques are of a commercial nature in themselves and as to all persons and all agreements or transactions relating thereto are commercial matters. Hence, one who alleges that he remitted a cheque to a third party as a guarantee of the obligation he had assumed against the holder of said cheque to try and collect the amount of a deposit by the latter in a bank in liquidation, may prove his allegation by witnesses.

Town of Maisonneuve v. Chartier, 20 Que. S.C. 518 (Sup. Ct.).

—Examination of officer of corporation—Cross-examination on depositions—Reading depositions at trial.]—On an examination for discovery of the plaintiffs' manager the plaintiffs took no part:—Held, that the deposition was admissible at the trial.

Royal Bank of Canada v. Harris, 8 B.C.R. 368 (Irving, J.).

—Parol testimony — Commencement of proof in writing—Admissions—Arts. 1233, 1243 C.C.—60 Vict. c. 50, s. 20 (Que.).]—Where a contract is admitted to have been entered into, by the party against whom it is set up, no commencement of proof in writing is necessary in order to permit of the adduction of evidence by parol as to the amount of the consideration or as to the conditions of the contract. In such a case, the rule that admissions cannot be divided against the party making them does not apply.

Robert P. Campbell v. Young, 32 Can. S.C.R. 547, reversing the Court of King's Bench, appeal side, Province of Quebec.

—Lost notarial minute—"Unforseen accident"—Art. 1233 C.C., par. 6.]—Where the

original of a notarial minute has disappeared without the fault of the parties, by some inexplicable circumstance, the case comes within Art. 1233, par. 6, of the Civil Code, which provides that proof may be made by testimony "in cases in which the proof in writing has been lost by unforeseen accident."

Filiatrault v. Feeny, 20 Que. S.C. 11.

—Wife joined in action pertaining to the community—Art. 314, C.C.P., par. 4.]—Where, in an action pertaining to the community, the wife is joined with her husband, the wife has no more right to testify in the cause than if the action had been instituted by the husband alone.

Dunfy v. Kelly, 20 Que. S.C. 231 (Curran, J.).

—Subject to just objections.]

See MINES.

Leckie v. Stuart, 34 N.S.R. 140.

—Payment of premium—Life insurance.]

See INSURANCE.

Mutual Life v. Giguère, 22 Can. S.C.R 348.

—Slander—Verdict for defendant notwithstanding proof of defamatory words—New trial—Aggravation of damages—Pleading.]—In an action for slander a jury is not bound to return a verdict for the plaintiff even though the defamatory words be proved, and a new trial will not be granted because in such a case they have returned a verdict for the defendant. New trial refused notwithstanding rejection of evidence tendered in aggravation of damages where the plaintiffs' pleading contained no allegations entitling him to give such evidence.

Milligan v. Jamieson, 4 O.L.R. 650 (Div. Ct.).

—Enquete—Motion to re-open—Art. 505 C. C.P.]—On application for discharge of the deliberé in order to prove an allegation in the declaration will not be granted unless it is made to appear that the facts of which proof is desired only came to the cognizance of the plaintiff since the enquête was closed.

Canadian Breweries v. Ailard, 4 Que. P.R. 365 (Sup. Ct.).

—Corroboration — Sufficiency of — Registered mortgage—Promissory note—R.S.O. 1897, c. 73, s. 10.]—In an action on a promissory note against the personal representatives of the maker, tried by a Judge without a jury, a duplicate registered mortgage purporting to be executed by the maker of the note, with the registrar's certificate of registration upon it, was produced in evidence to prove by comparison the signature to the note:—Held, that the Judge was entitled to compare the signatures, and to act on his own conclusion as to their identity, and having found them identical, the corroboration was sufficient to satisfy R.S.O. 1897, c. 73, s. 10.

Thompson v. Thompson, 4 O.L.R. 442.

—Corroborative evidence — Advance of money—Claim of interest.]—The plaintiff sued the surviving member of a firm, together with the representatives of a deceased member, for money loaned by him in the lifetime of the deceased, to the firm for the purposes of the firm. He also claimed interest, as having been stipulated for at the time:—Held, that inasmuch as there was corroboration as to the main fact, namely, the borrowing of the principal, this was sufficient to entitle the plaintiff to recover the interest claimed. When a promissory note is taken from a borrower as collateral security for money loaned to him, and not in payment, action can be brought for the money lent, notwithstanding that owing to the form of the note it may not be maintainable thereon.

Secor v. Gray, 3 O.L.R. 34.

—Corroboration—"Some other material evidence"—Interest—Cestui que trust—R.S.O. 1897, c. 73, s. 10.]—A person interested as cestui que trust in a claim in question in a proceeding by or against the executors of a deceased person, is not debarred by reason of such interest from giving the material corroborative evidence required by R.S.O. 1897, c. 73, s. 10.

Batzold v. Upper, 4 O.L.R. 116 (Div. Ct.).

—Capacity of testator—Onus—Evidence of interested parties—Corroboration.]—

See WILLS.

—Evidence taken in one case to serve in another—Motion to such effect—Art. 292 C.C.P.]—The provision in Art. 292 C.C.P.: "The Judge may order . . . that the evidence in one action . . . be used in another," must be construed as applying to evidence which has not yet been received but is to be given, the parties being aware, at the time the order is made, that it will serve in the other case.

Boutin v. The Traders Advertising Co., 5 Que. P.R. 350.

—Admission of party — Divisibility — 39 Vict. (Q.), c. 50, s. 20.]—In answer to an action brought by architects, claiming fees for the preparation of sketches or designs for the defendant, the latter, when examined as a witness, admitted that the sketches had been prepared for him by the plaintiffs, but stated that there was an understanding that they were not to be paid for unless used by him, and that they had not been used. It appeared that the defendant, at the time the plans were in-

vited, had not yet purchased the land for the proposed buildings, and that he had asked for plans from several architects:—Held, that the admission of the defendant could not be divided, for the purpose of obtaining a commencement of proof, there being no improbability in his statement, or indication of bad faith, or other circumstance, to bring the case within the exceptions of 60 Vict. (Q.), c. 50, s. 20.

Cox v. Pacaud, 23 Que. S.C. 9 (Archibald, J.).

—Proof of age—Life insurance—Onus—Bona fides of representation.]—A defence to an action on a policy of life insurance was that the insured in his application, made in 1891, stated he was forty-one, whereas in fact he was forty-four:—Held, that evidence of statements made by the insured many years before the application tending to show his belief that he was born in 1850, for the purpose of showing bona fides, was improperly rejected. The jury found that the statement in the application that the insured was born in 1850 was untrue and was material, and although there was no evidence to that effect, that it was made in good faith. Held, that on these answers judgment should have been entered for the defendants, the onus being on the persons seeking to uphold the contract to prove the bona fides of the answers. New trial ordered to permit plaintiff to adduce evidence of good faith which had been rejected.

Dillon v. Mutual Reserve Fund Life Association, 5 O.L.R. 434 (C.A.).

—Relevancy—Evidence to contradict.]—In an action to set aside a bill of sale of a mineral claim on the ground that it was a forgery by one of the defendants, evidence was given by plaintiff and his witnesses as to matters which, whether material or not, were intended to make the Judge give a readier credit to the plaintiff's case. For the defence, witnesses were allowed to give evidence showing that the plaintiff and his witnesses in respect to the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury and conspiracy and tending to show that a like fradulent scheme was being attempted in this case, and the result was that the Judge was so influenced by this evidence that he gave judgment for the defendants:—Held, by the full Court, that the said evidence on behalf of defendants was properly admitted.

D'Avignon v. Jones, 9 B.C.R. 359.

—Executors and administrators—Corroboration—R.S.O. 1897, c. 73, s. 10.]—Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not show on their face whether they had been given on account of rent or in respect of advances.

Re Jelly, Union Trust Co. v. Gamon, 39 Can. Law Jour. 787 (Ont.)

—Claim against estate of person deceased.]—The class of evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove a donatio mortis causa, viz., any evidence which is believed and is corroborated as required by the statute.

Re Reid, 6 O.L.R. 420 (Street, J.).

—Executors and administrators—Matters occurring before death of deceased—Corroboration.]—The executor of the estate of H. was also the executor of the estate of M., in which H. was beneficially interested. In passing his accounts as executor of another estate after H.'s death, the executor credited himself with having received for H. on account of her share in such last named estate a specified sum of money. On subsequently proving his accounts in the H. estate, and being charged with this sum, as having been received by him for the deceased, he claimed that he had not then received it, but had in fact paid it out in small sums to H. during her lifetime:—Held, that this was not a matter occurring before the death of H., and therefore the evidence of the executor did not require to be corroborated under s. 10 of the Evidence Act, R.S.O. 1897, c. 73.

McClenaghan v. Perkins, 5 O.L.R. 129 (C.A.).

—Breach of promise of marriage.]—

See PROMISE.

Cockerill v. Harrison, 14 Man. R. 366.

—Rogatory commission—Motion referred to the trial Judge.]—The Judge to whom an application is made for a commission rogatoire may refer the same to the trial Judge, who will, in his discretion, after having heard the evidence, grant or refuse the motion, and, in the former case, postpone the trial in order to permit the execution of the commission.

Armstrong v. Gillies, 5 Que. P.R. 423.

—Trial—Application for commission—Discretion of Judge to refuse not interfered with—Estoppel.]—During the progress of the trial, and after a number of witnesses on behalf of plaintiffs had been examined, defendants' counsel applied for a commission for the examination of a witness who was absent in British Columbia, and for a postponement of the trial. The witness in question was a son of one of the defend-

ants, who was aware of his absence, but the fact was not brought to the attention of defendants' counsel until the day on which the trial was commenced. The learned trial Judge having refused both the commission and the postponement:—Held, that there was no reason for interfering with his discretion on these points. After the commission applied for had been refused, plaintiffs' counsel offered to agree to an adjournment for a reasonable time, to be fixed by the Court, to enable defendants to produce the witness, should they desire to do so, and the case was adjourned from the 8th of January to the 17th of February On the latter day, the case being called, defendants' counsel stated that he had no further evidence to offer, and judgment was given for plaintiffs. Held, that defendants, having accepted the offer made on behalf of plaintiffs, and obtained an adjournment of the case, were not in a position to revert back to their original rights, and claim a review of the judgment.

Stephen v. Thompson, 35 N.S.R. 390.

—Interrogatories — Failure to answer.]—The Court has a discretion to admit interrogatories upon default in answer thereto, but is not obliged to take them pro confesso.

Caron v. Gaudet, 6 Que. P.R. 105 (Doherty, J.).

—Payment of debt—Onus of proof.]—Payment of a debt must be proven by the debtor beyond reasonable doubt.

True v. Burt, 2 N.B. Eq. 497.

—Merchant's entries in books—Judicial admission.]—Entries made by a merchant in his books should be accepted as presumably representing the facts truly and correctly, and unless error be established by legal proof to the contrary, they are evidence against him (Acts 1226-7 C.C.). Oral testimony of the merchant himself cannot destroy such proof, and, as to him, is not legal evidence to the contrary. A notarial deed can be contradicted and its terms changed by the Judicial admission of the party against whom such admission is invoked.

Restlier v. Malte, Q.R. 13, K.B. 198.

—Acknowledgment of debt—Husband and wife.]—An acknowledgment of indebtedness on a sale of goods for more than $50, by a trader to a non-commercial purchaser cannot be proved by oral testimony if it has not been established that the whole or a part of the goods were delivered. In the absence of special authority a man is only liable for purchases made by his wife of things necessary for his family such as provisions and clothing. Even in the case of goods bought by the wife for the necessities of the family, the husband is not bound by an acknowledgment of his wife of the indebtedness therefor unless the same was made in the course of the sale.

Pichette v. Morissette, Q.R. 25 S.C. 46 (Ct. Rev.).

—Sale of goods—Oral proof.]—Although the terms or conditions of a civil contract for a sum exceeding $50 (Art. 1235 C.C.) is not the subject of oral testimony, the acceptance of the contract and delivery of the thing sold can be proved orally by witnesses.

Wack v. Clancey, Q.R. 25 S.C. 199 (Ct. Rev.).

—Civil action for criminal assault—Hearsay evidence—Complaints by wife to husband—Admissibility.]—In an action for damages by a husband and wife for assaults alleged to have been committed on the wife under circumstances which made them the criminal offence of an attempt to commit rape or an indecent assault:—Held, that evidence of statements and complaints made by the wife to the husband on his return from work some hours after the alleged assaults had taken place was properly received.

Hopkinson v. Perdue, 8 O.L.R. 228, 8 Can. Cr. Cas. 286.

—Documentary evidence—Refusal to produce—Inference from.]—On the trial of an action involving disputed accounts it is not a ground for a new trial that the Judge told the jury they might draw inferences favourable or unfavourable to the plaintiff's case from the fact that he refused to produce, under notice, documentary evidence in his possession, which, it was admitted, contained some account of the transaction in dispute.

Hale v. Leighton, 36 N.B.R. 256.

— Personal injury — Negligence — Statements of person injured—Res Gestae.]—In action brought by the father and mother of a young girl to recover damages in respect of her death which resulted, as was alleged, from a fall on a stone in a highway under the control of the defendants, it was proved that the stone in question had been allowed to remain for a long time in a part of the highway used by foot passengers; that several persons had tripped over it; that the deceased had left a house on a certain evening to go to her own house, the direct route to which would be by the highway in question; that a few minutes later she came to the house of a friend near the place where the stone was, apparently suffering great pain, and stated that she had tripped on the stone and hurt herself; that about the time she would in the ordinary course have been passing the stone in question a witness saw a young girl whose description answered to that of the deceased lying

beside the stone, who stated to him that she had fallen on the stone and hurt herself; and that the girl died from peritonitis resulting, in the opinion of the doctor who attended her, from an injury such as would have been the result of a fall upon a stone—Held, affirming the judgment of MacMahon, J., that the statement of the deceased to her friends at the house to which she came, and, assuming that the identity had been proved, her statement while lying near the stone, were not admissible in evidence as part of the res gestae, these being at most statements made in reference to the accident after it had happened, and after the deceased had had time for consideration, distinguishable therefore from those involuntary and contemporaneous exclamations made without time for reflection, which alone are properly admissible as part of the res gestae. Regina v. MacMahon (1889), 18 O.R. 502, applied. Held, however, reversing the judgment of MacMahon, J., that the identity of the deceased with the person seen by the witness lying near the stone was established; that excluding her statements, there was ample evidence to justify the conclusion that the deceased had received injuries by falling on the stone; and that as the highway was by reason of the presence of the stone in a dangerous condition and out of repair the defendants were liable.

Garner v. Township of Stamford, 7 O.L.R. 50.

—Parol—Commencement of proof in writing—Objections to testimony.]—A notary public, in the Province of Quebec, has not any actual or ostensible authority to receive moneys invested for his clients under instruments executed before him and remaining in his custody as a member of the notarial profession of that province. Admissions made to the effect that a notary had invested moneys and collected interest on loans for the plaintiff do not constitute evidence of agency on the part of the notary, nor could they amount to a commencement of proof in writing as required by Art. 1233 of the Civil Code, read in connection with Art. 316 of the Code of Civil Procedure, to permit the abduction of parol testimony as to the authorization of the notary to receive payment of the capital so invested or as to the repayment thereof alleged to have been made to him as the mandatory of the creditor. The prohibition of parol testimony, in certain cases, by the Civil Code, is not a rule of public order which must be judicially noticed, and, where such evidence has been improperly admitted at the trial without objection, the adverse party cannot take objection to the irregularity on appeal.

Gervais v. McCarthy, 35 Can. S.C.R. 14.

—Certificate of baptism as evidence.]—The certificate of baptism attests only the filiation of the party mentioned therein, but not that the parents of the said party were man and wife, which fact can only be proved by the marriage settlement or other similar documents.

Connolly v. Consumers' Cordage Co., 6 Que. P.R. 150.

—Corroboration—Action against executor—B.C. Evidence Act Amendment Act, 1900, cap. 9, s. 4.]—The corroboration required by section 50 of the Evidence Act (B.C. Stat. 1900. Cap. 9, c. 4) must refer specifically to the contract on which action is based, and not to some part of it, so as to leave the effect of the whole unascertained.

Blacquiere v. Corr. B.C.R. 448 (Irving, J.).

— Action by executors — Corroboration — R.S.O. [1897] c. 37, s. 10.]—In an action by executors to recover money due from C. to the testator it was proved that the latter when ill in a hospital had sold a farm to C. and $1,000 of the purchase money was deposited in the bank to testator's credit; that subsequently C. withdrew this money on an order from testator who died some weeks after when none was found on his person nor any record of its having been received by him. C. admitted having drawn out the money but swore that he had paid it over to testator but no other evidence of any kind was given of such payment:—Held, reversing the judgment of the Ontario Court of Appeal, that a prima facie case having been made out against C. and his evidence not having been corroborated as required by R.S.O. [1897] c. 73, s. 10, the executors were entitled to judgment.

Thompson v. Coulter, 34 Can. S.C.R. 261.

—Burden of proof—Rule as to adoption of positive against negative evidence.]—In an action against the defendant R. D. T., as indorser of certain promissory notes, the defence to which was non-presentation for payment and failure to give notice of dishonour, the defence was admitted, but plaintiff relied upon an admission of liability alleged to have been made by defendant in a conversation respecting the affairs of R. T., the maker of the notes. The trial Judge found in favor of defendant's contention that the conversation related to the affairs of R. T., and not to defendant's personal liability. Held, that the case was one in which the burden of proof rested upon plaintiff, and there was no reason for disturbing the finding of the trial Judge. Also, per Townsend, J., Graham, E.J., concurring, that the case was not one to which the rule in relation to the adoption of the positive evidence of one witness against the negation of another could be properly applied.

Hart v. Taylor, 37 N.S.R. 155.

—Affidavit verifying mortgage amount—Right to cross-examine.]—Con. Rule 490 whereby a person who has made an affidavit to be used in any action or proceeding other than on production of documents, may be cross-examined thereon, has no application to proceedings in the Master's office; and therefore there is no right under that rule to cross-examine on an affidavit verifying a mortgage amount on a reference.

Plenderleith v. Parsons, 10 O.L.R. 436, Boyd, C.

— Admissibility — Harmless error — New trial.]—The Supreme Court of Canada reversed the judgment of the Supreme Court of Nova Scotia, 37 N.S.R. 361. and restored the verdict at the trial holding that the books were received on the taking of evidence under commission by the express consent of both parties, and their reception could not afterwards be objected to on the general ground that they were irrelevant and immaterial to the issue.

Carstens v. Muggah, 36 Can. S.C.R. 612.

—Improper admission of—Uncorroborated testimony of plaintiff—Contradictory evidence.]—The plaintiff claimed to recover from the defendant the price of certain goods delivered to the defendant's brother, alleging that defendant verbally agreed that notes at three months should be given in payment of the goods by the brother, and when they matured the defendant would give his own promissory notes at four months. The defendant denied that he ever made any such agreement, and said that any notes given by him were to help his brother in his business and were not made payable to the defendant. The trial Judge admitted evidence of the plaintiff of a statement alleged to have been made to him by the defendant's brother when bringing a note made by the defendant in favour of his brother to take up the latter's note. The jury gave a verdict for the plaintiff, and a new trial was refused by the court below. Held, the Chief Justice and Taschereau, J., dissenting, that the plaintiff's dealings with the defendant's brother were inconsistent with the plaintiff's statement of the transaction, and that there should be a new trial. Held, per Fournier, Henry and Gwynne, JJ., that the plaintiff was not entitled to give in evidence a statement made by the defendant's brother as to what the defendant had instructed him to say to the plaintiff when substituting the defendant's note for his own.

Fraser v. Stephenson, (1886) 1 S.C. Cas. 214.

—Parol evidence varying written document—Reformation of agreement.]—In an action, by plaintiff, to recover certain personal property which, it was alleged, defendant unlawfully detained, defendant relied upon an agreement, entered into between plaintiff and defendant, whereby plaintiff, in consideration that defendant would provide him with sufficient and comfortable maintenance during his lifetime, agreed to convey to defendant his real and personal property. The document put in evidence in support of the defence set up contained no reference to personal property. Held, affirming the judgment below, that parol evidence could not be introduced to vary the terms of the written document and that plaintiff was entitled to judgment. Held, nevertheless, that, as the amount awarded as damages was excessive, the order for judgment should be amended in that respect, and that, if the parties were unable to agree upon the amount to be recovered for the detention of the goods, the matter must be referred back for that purpose, to the Judge of the county court. Per Townshend, J., that if, through fraud or mistake, the personal property was omitted from the written agreement, defendant had his remedy in a proper action to have the agreement amended.

Guion v. Thibeau, 36 N.S.R., 542.

— Cross-examination of defendant — Disposal of property.]—In cross-examination of a defendant it is admissible to question him as to what disposition he has made of his property since the suit was begun or in anticipation of it, and a defendant so disposing of his property does an act which will be viewed with suspicion.

Camsusa v. Coigdarripe, 11 B.C.R. 177.

—Title to lands—Description in grant—Plan of survey—Certified copy.]—The provisions of section 20 of "The Evidence Act," R.S.N.S. (1900) c. 160, do not permit the reception of a certified copy of a copy of a plan of survey deposited in the Crown Lands Office to make proof of the original annexed to the grant of the lands from the Crown.

Nova Scotia Steel Company v. Bartlett, 35 Can. S.C.R. 527.

—Lost document—Writing in duplicate.]—When a writing is drawn up in duplicate anything in one copy not found in the other is of no effect as against the holder of the latter.—To enable a party to give secondary evidence of a document he is not required to prove that it has been lost through no fault of his and by an unforeseen cause; it is sufficient for him to establish to the satisfaction of the Court that he cannot possibly find it and has not been the voluntary cause of its disappearance.—A creditor can claim damages from his debtor for non-performance of an obligation only if he has put the debtor en demeure to perform it or if the latter was placed en demeure by operation of law.

Lafrance v. Larochelle, Q.R. 27 S.C. 152 (Ct. Rev.).

—Hearsay evidence—Crown Land Office—Documents on file.]—On the trial of an action claiming damages for trespass to land witnesses were permitted, notwithstanding the objection of the plaintiff's counsel, to give evidence of what they had been told or understood, and of declarations of deceased persons, in relation to lines and boundaries in dispute. Also a certified copy of a plan found in the Crown Land Office, and supposed to relate to the property in dispute, was received in evidence. Held, that the evidence was wrongly received, and that the verdict for defendant, entered upon the findings of the jury, must be set aside with costs Held, further, that the statute, (Witnesses and Evidence Act, R.S. 1900, c. 163, s. 20), making admissible in evidence plans on file in the Crown Land Office, was one that must be strictly construed.

Bartlett v. Nova Scotia Steel Co., 37 N.S.R. 259.

— Depositions in former action — Opportunity to cross-examine.]—Under Rule 263 (Yukon Terr.) it is provided that "an order to read evidence taken in another cause or matter shall not be necessary; that such evidence may, saving all just exceptions be read by leave of the Court or Judge." The evidence offered under this Rule was evidence taken in another action in which Chretien—the man hired by Frank, the defendant—sued both Frank and plaintiff for his wages In that action the evidence of two other witnesses was taken,—the men employed by Graham, the present plaintiff. Graham defended that action. Frank allowed judgment to go by default and did not appear either in Court or at the hearing. Held, that the evidence would have been admissible had he defended and been present with full opportunity to cross-examine. In this case there was neither the right to cross-examine nor the opportunity, because, having allowed the judgment to go by default, Frank had no right to appear in the action and cross-examine witnesses. He had not the opportunity, not being present; and there was no necessity for his presence. Depositions held inadmissible.

Graham v. Frank, 1 W.L.R. 510 (Craig, J.).

—Foreign law—Conflict of expert testimony—Determination by Court.]—The expert evidence as to the foreign law being conflicting, the Court examined the authorities upon which the experts respectively relied, and reading these with the aid of the explanatory, critical, and argumentative testimony adduced, and discharging functions analogous to those of a special jury, determine the question of legitimacy.

Hunt v. Trusts and Guarantee Co., 10 O.L.R. 147, affirmed. 18 O.L.R. 351.

—Commencement of proof.]—In an action to recover $95 balance of a note for $125 indorsed by plaintiff to defendant and who, plaintiff alleged, had agreed to reimburse him the amount thereof, and affidavit by defendant in another proceeding that the note had been so indorsed joined to the latter's admission that plaintiff had received no consideration therefor, constitutes a commencement of proof in writing of such alleged promise sufficient to permit oral evidence thereof to be given.

Jewell v. Latimore, Q.R. 26 S.C. 450.

— Written contract—Contemporaneous oral contract.]—In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiff's agent that two other named persons had each subscribed $10,000 of shares upon the condition that subscriptions for $50,000 were obtained by a certain date; that the defendant's subscription was required to make up the $50,000; and that his subscription would not be binding unless the $50 000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for $10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscription, and that $50,000 was not subscribed on or before the date named. The defendant's testimony was not contradicted, the plaintiff's agent having died some years before the commencement of the action; and the trial Judge credited the testimony: —Held, that it was sufficient without direct corroboration, and, in the absence of facts or circumstances of countervailing weight should be accepted. Held, also, that the plaintiffs were bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares whether those representations were made in good faith and with a belief in their fulfilment or not. Where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement. Wallis v. Littell (1861), 11 C.B.N.S. 369, applied and followed.

Ontario Ladies' College v. Kendry, 10 O.L.R. 324, C.A.

— Improper reception of — "Harmless error"—Admission.]—In an action for goods sold and delivered, to which the defence set up was that the goods in question were only delivered to defendant as manager of plaintiffs' business and not other-

wise, books of account kept by plaintiffs were received in evidence against defendant:—Held, that the evidence in question was improperly received, and, the Court being unable to say with certainty that the evidence did not enter into the materials that produced upon the mind of the trial Judge the conviction expressed in his judgment in favour of plaintiffs, and the Court being unable to say with certainty what the judgment of the trial Judge excluding the evidence improperly received would have been, Held, that there must be a new trial It was argued for plaintiffs that the reception of the books of account was "harmless error," inasmuch as they could only have been received to fix the value of the goods sold and delivered, and such value was fixed independently of the books by the admission of defendant. The whole question in dispute being whether defendant was a purchaser or not, and there being evidence that defendant was not aware that plaintiffs were making a claim against him until shortly before the action was brought, the admission relied upon being vague in its character, and the amount of goods sold being only capable of being ascertained from plaintiffs' books. Held, that the admission was not of the nature or effect which such an argument required. Semble, if it were conceded that defendant was a purchaser of the goods sent, the evidence as to his admissions on this point would probably suffice to fix the amount.

Carstens v. Muggah, 37 N.S.R. 361.

— Ex parte motion — Examination of witness—Con. Rule 491.]—Con. Rule 491 applies to an ex parte motion and therefore a witness may be examined in support of such a motion.

Dunlop v. Dunlop, 9 O.L.R. 372, Meredith, J

—Of character of witness.]—See WITNESS.

—Agreement collateral to promissory note.]—See BILLS AND NOTES.

— Corroboration — Recovery of chattels — Action against administrator.]—In the absence of a statute requiring corroboration, it was held not necessary that the plaintiff's own evidence that she was the owner of money and chattels found on the person of a man whose estate was represented by the defendant as administrator ad litem, should be corroborated, and her testimony being believed, judgment was given in her favour.

Bakewell v. Mackenzie, 1 W.L.R. 68.

—Agreement by parol—Reduction into writing—Conditions precedent—Formation of contract—Onus of proof.]—Where it has been understood between the parties that an agreement by parol shall be reduced into writing, there is a presumption that the execution of the deed should be a condition precedent to the formation of the contract; the onus of proof is upon the party relying upon the contract.

Dorion v. Bedard, Q.R. 27 S.C. 193 (Sup Ct.).

—Promissory note—Conditional possession —Examination of holder.]—A party to an action may be examined as a witness to explain how he came into possession of certain promissory notes and on what conditions they were accepted.

Sauve v. Charlebois, 7 Que. P.R. 442.

—Contract—Proof of making—Telegraph—Original message—Destruction—Secondary evidence.]—The plaintiffs, who were dealers in canned fruits in Ontario, wrote to the defendants in British Columbia a letter quoting prices of various canned goods. Proof of the loss of this letter was given, and secondary evidence of its contents received. It concluded with a request to the defendants to order by telegraph at the expense of the plaintiffs. The defendants telegraphed an order for specified quantities of goods. The message as received by the plaintiffs specified "three-fifty Lombard plums," and the plaintiffs shipped 350 cases of plums, and the other goods specified, with the exception of 250 gallons of pears, which they proposed to send later. The defendants refused to accept the goods shipped, because they said they had ordered only "fifty Lombard plums" and because the pears were not sent. The defendants alleged that the telegraph company had made a mistake in the transmission of the message, but the original message as delivered by the defendants to the company at Vancouver was not proved:—Held, that, assuming the mistake to be proved by proper evidence, the defendants were not responsible for it, for, even if the telegraph company were the defendants' agents, the authority of the agents was limited to the transmission of the message in the terms in which the defendants delivered it; and the document handed to the company for transmission was the original order which must be proved to establish the contract. Henkel v. Pape (1870), L.R. 6 Ex. 7, and Kinghorne v. Montreal Telegraph Co. (1859), 18 U.C.R. 60, followed. The fact of the destruction of the message delivered by the defendants to the telegraph company was not shown, and, although secondary evidence of the contents was given by the defendants, it was inadmissible, and there was therefore no evidence that the transcript delivered to the plaintiffs was incorrect. But the burden of proving the contract was upon the plaintiffs, and the admission of the transcript in evidence without objection did not render its terms binding upon the defendants. It was not evidence of the order given by the defendants; it was relevant and admissible primary evi-

dence to prove that the order had in fact been transmitted and delivered to the plaintiffs; but its admission in evidence did not excuse the plaintiffs from making proof of the order by production of the original or by proof of its destruction or loss and secondary evidence of its contents. Moreover, although secondary evidence was given of a portion of the contents of the plaintiff's letter quoting prices, the plaintiffs had omitted to prove what were the prices quoted, and this material element of a contract was lacking. Held, also, that the non-delivery of the pears ordered would have justified the defendants' rejection of the other goods sent.

Flynn v. Kelly, 12 O.L.R. 440.

—**Account stated—Admission of liability—Promise to pay—Collateral agreement—Parol evidence.**]—On the dissolution of a partnership, the parties signed a statement showing a certain amount as due to the plaintiff for his share and declaring that "for the sake of peace and quiet and to avoid friction and bother," the plaintiff waived examination of the firm's books and agreed that the amount so stated should be deemed to be the amount payable by the defendants to the plaintiff:—Held, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability. In an action for the amount of the balance, the defendants alleged that the plaintiff had verbally agreed that he would not sue upon the account as stated, and that the document should be treated as merely showing what would be payable to him upon the collection of outstanding debts owing to the firm:—Held, that as the effect of the alleged collateral agreements was to vary and annul the terms of the written instrument they could not be proved by oral testimony

Jackson v. Drake, Jackson and Helmcken, 37 Can. S.C.R. 315.

—**Proof of relationship of heirs-at-law—Possession of status.**]—(1) Relationship of heirs-at-law, as brothers and sisters of the de cujus, is proved by the acts of birth in the registers of civil status, describing the parties as born of the same father and mother as he was. It is not necessary to produce the certificate of marriage of the parents; it is enough to show that they were in possession of the status of husband and wife.

O'Meara v. Ouellet, 23 Que. S.C. 418.

—**Sale—Commencement of proof in writing—Admissions—Arts. 1233, 1235, C.C.**]—The writing required in the case of paragraph 4 of Art. 1235 C.C. need not mention the full details of the contract of sale; it is sufficient when the essential conditions are stated and reference made to another writing containing the particulars. (2) The admission of the party may supply the place of the writing, but such admission must state all conditions and be complete in itself; further, as Art. 1235 C.C. provides an exception to Art. 1233 C.C., the case does not involve the question of commencement of proof in writing. (3) A writing signed by the person sued which conforms to the requirements of Art. 1235 C.C., although the party thereby contends that he is not liable, is nevertheless sufficient to admit proof of the contract of sale by parol testimony.

Molleur v. Mitchell, Q.R. 14 K.B. 74.

—**Oral testimony—Pleading—Commencement of proof in writing.**]—The allegation by a party in his pleadings that a deed in the form of a sale is in fact a pledge, gives the opposite party the right of showing by parol testimony that the deed was of a different nature, as, for instances, a deposit.

Whitney v. Joyce, Q.R. 14 K.B. 406.

—**Parol testimony—Validity of proof—Notary—Mandate.**]—The provisions of Art. 1233 C.C. excluding parol testimony is a matter of public policy, and the Court should disregard such evidence in cases where the principal sum demanded exceeds $50, even when objection thereto has not been taken by the interested party. (2) Under the impression that this exclusion of parol testimony was not of public policy, the neglect of the party against whom it is admitted to invoke the prohibition cannot allow it to be admitted except expressly and that the facts are incompatible with an intention to object and leave no doubt as to the consent of the party affected. (3) The authority of a notary to collect capital sums due to a client cannot be presumed from his having drawn the deeds for their investment nor because he had authority to collect the interest, nor because he acted generally as manager of the client's business.

Gervais v. McCarthy, Q.R. 14 K.B. 420, judgment affirmed, 35 Can. S.C.R. 14.

—**Improbation — Authentic document — False representations.**]—Recourse by improbation is not open to a party simply attacking the truth of declarations made in an authentic document when it appears that the notary entered them as instructed. Evidence in such a case may and should be given in the usual manner.

Anderson v. Prévost, Q.R. 28 S.C. 434 (Sup. Ct.).

—**Evidence of marriage.**]—

See LORD CAMPBELL'S ACT.

(Daye v. McNeill, 6 Terr. L.R. 23.).

—**Expert witness—Obligation to testify.**]—See WITNESS.

(Butler v. Toronto Mutoscope Co., 11 O. L.R. 12.)

—Agreement in writing with false terms to deceive others—Proof of true oral contract.]—See SHIPPING.
(Smith v. Haughn, 38 N.S.R. 153.)

—Of pedigree—Declarations.]—
See PEDIGREE.
(Johnson v. Hazen, 3 N.B. Eq. 147.).

—Testimony at former trial—Absence of witness at subsequent trial—Search for witness—Reception of evidence.]—Where it is sought to give in evidence at the trial of an action oral testimony taken under oath in another judicial proceeding, in which the adverse party had the power to cross-examine, on the ground that the witness cannot be called as being beyond the jurisdiction of the Court or otherwise, it is sufficient to show that after diligent search the witness cannot be found. Answers to inquiries made as to his where abouts are admissible to prove an unsuccessful search for a witness and are not for that purpose to be treated as hearsay. Monro v. Toronto Railway Co. (1904), 9 O.L.R. 299, at p. 312, distinguished.
Cuff v. Frazee Storage and Cartage Co., 14 O.L.R. 263 (D.C.).

—Declaration against interest.]—A statement of a person through whom plaintiff claims, made to a stranger before the transfer to the plaintiff, but not in his presence, that he, the predecessor in title, was not the owner of the property in question is evidence as a declaration against interest.
Lloyd v. Adams, 37 N.B.R. 590

—Commencement of proof in writing—Loan of money—Indorsement of cheque.]—The indorsement of a cheque under the signature of the payee does not constitute commencement of proof in writing of the fact, as alleged, that the amount of the cheque had been loaned by the payee to the person who made the subsequent indorsement.
Pouliot v. Lavigne, Q.R. 29 S.C. 539 (Ct. Rev.).

—Experts—Writing—Comparison.] — The evidence of experts in writing, like all expert evidence, requires great care with respect to the credit to be attached to it and should only be accepted after close examination and for what it is worth having regard to the other elements of proof in the cause. Proof by comparison of writing will not establish the authenticity of a signature denied under oath by the party alleged to have written it.
Deschênes v. Langlois, Q.R 15 K.B. 389.

— Depositions of witnesses — Authentication.]—If depositions taken down at length without a stenographer are not signed by the witnesses who make them they are null and the cause will be remitted to the Court of first instance to enable the parties to remedy such irregularity either by a fresh examination of the witnesses or by perfecting the depositions taken.
Lamarre v. Villecourt, 8 Que. P.R. 154 (Ct. Rev.).

—Waiver of benefit of admission in pleadings by adducing evidence—Evidence—Entries in regular course of business—Original memoranda destroyed.]—Where a reference is directed to the clerk of the Court, and the plaintiff adduces evidence, he will not be allowed to rely on admissions in the statement of defence. Entries in a ledger, sworn to have been made in the usual course of business, from memoranda regularly made, which memoranda had been accidentally destroyed by fire, are not evidence. On a reference the clerk refused to receive further material evidence tendered by the plaintiff after the close of the defendants' case:—Held, that the matter was in the discretion of the clerk, that in this case he had exercised such discretion reasonably, and that the case would not be referred back by a judge on appeal.
Cummings v. Gourlay, 1 Alta. R. 86.

—Judicial notice of provincial laws—Federal Court.]—
See MASTER AND SERVANT II.
(Logan v. Lee, 39 Can. S.C.R. 311.)

—Error and fraud—Oral testimony—Non-pertinent facts.]—Oral testimony is always admissible for the purpose of establishing error or fraud. The Judge seized of the case should not exclude evidence to prove facts alleged in the pleadings the pertinence of which has not been attacked by inscription en droit. He should admit subject to his appreciation of its effect on deciding the merits.
Mancotel v. Tétrault, Q.R. 32 S.C. 506 (Ct. Rev.), reversing 28 S.C. 251.

—Oral testimony — Contract — Trader and non-trader.]—Contracts, for purposes of admission of evidence, are civil, commercial or mixed, that is, a contract may be civil for one of the parties and commercial as to the other. As to mixed contracts, in cases where the amount claimed exceeds fifty dollars, oral evidence may be admitted against the trader but not in his favour. Therefore, a hotel-keeper cannot prove by witnesses a contract with a non-trader under which he claims more than $50.
Pellerin v. Vincent, Q.R. 33 S.C. 51 (Ct. Rev.).

— Commercial transaction — Oral testimony.]—Proof of authority (mandat) in a commercial transaction, where the amount claimed exceeds fifty dollars, may be made by oral testimony. Therefore, the plaintiff

who sues for the settlement of an account rendered by him as a commission merchant, the defence set up being that he was purchaser of the merchandise, will be allowed to prove by witnesses the contract giving him authority to accept delivery.

Desrosiers v. Brown, Q.R. 17 K.B. 55.

—Partial payments of debt.]—Evidence is not admissible to prove payment of a debt exceeding $50, by payments on account of less than $50 each. The appropriation made by a landlord of a payment to a certain gale of rent raises the presumption that the earlier gales had been paid.

Deslières v. Deslières, Q.R. 35 S.C. 528.

—Comparison of handwriting.]—In a writing signed by two persons to embody the terms of several reciprocal engagements the promise by one to pay on demand to the order of the other a stated amount is not a promissory note and Arts. 2340 and 2341 C.C., have no application thereto. Hence, if the signature is denied it may be proved by comparison of handwriting. Evidence is admissible of an extra-judicial admission by the party of the signature she has denied even when the sum demanded exceeds fifty dollars.

Paquin v. Turcotte, Q.R. 35 S.C. 266.

—Weight of evidence.]—See APPEAL.

II. UNDER COMMISSION.

—Deposition taken de bene esse—Evidence as to absence.]—Where the evidence of a witness taken de bene esse is tendered upon the trial, and the trial Judge, on being satisfied from the evidence before him that the witness is absent from the province, receives it, the fact that it is subsequently made to appear that the witness was at the time within the province, in the absence of any fraud practised upon the Court, is not ground for setting aside the verdict and ordering a new trial. The rules providing for taking the evidence of a witness about to leave the province, make the admission or use of the evidence so taken to depend not upon the absence in fact of the witness at the time the evidence is offered, but upon the trial Judge being satisfied as to his absence. O. 35, R. 17.

Rogers v. Troop, 43 N.S.R. 279.

Commission to examine witnesses — Enlargement of time for return—Winding-up Act.]—

Re Port Hood Coal Co., 5 E.L.R. 377 (N. S.).

—Foreign commission — Time for return.]—The time for the return of a foreign commission is the date on or before which it must be executed and despatched by the commissioner—not the date at which it must reach the central office. An application to suppress the depositions taken upon a foreign commission, upon the ground that a partner of the commissioner appeared before him on the taking of the evidence as solicitor for one of the parties, was refused, without prejudice to objection at the trial.

Jackson v. Hughes, 1 O.W.N. 478.

—Witnesses — Credibility — Finding of fact.]—A trial tribunal has not the right, simply because it disbelieves a witness or set of witnesses, to find as proved the opposite of what is sworn to. Rex v. Van Norman, 19 O.L.R. 447, distinguished.

Gilbert v. Brown, 1 O.W.N. 652 (D.C.).

—Foreign commission — Examination of defendant and witness abroad.]—

Stearns v. Kimmell, 1 W.L.R. 290 (Y.T.).

—Foreign commission — Application for — Affidavit in support—Purpose of evidence sought.]—

Spencer v. Drysdale, 1 W.L.R. 7 (B.C.).

—Foreign commission — Application for — Nature of evidence.]—

Barrett v. Canadian Bank of Commerce, 6 W.L.R. 714 (Y.T.).

—Application for commission — Expense—Convenience.]—

Carbonneau v. Letourneau, 3 W.L.R. 219 (Y.T.).

—Depositions taken on foreign commission —Refusal of witness to answer questions.]—

Allan v. Inter-Ocean Pressed Brick Co., 11 W.L.R. 393 (Sask.).

—Foreign commission — Examination of plaintiff on his own behalf — Bona fides—Discretion.]—

Cleveland v. Assam, 8 W.L.R. 970 (Y.T.).

—Foreign commission — Second commission —Postponement of trial—Terms.]—

Canadian Bank of Commerce v. Matheson, 8 W.L.R. 972 (Y.T.).

—Foreign Court—Order for attendance of person within jurisdiction—Cross-examination upon affidavit.]—(1) Section 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by s. 1 of c. 11 of 4 and 5 Edw. VII., does not empower the Court to make an order commanding the attendance of a person making an affidavit in a suit or proceeding pending in a Court outside the Province of Manitoba for the purpose of being cross-examined upon it within the province. (2) If an order is made without jurisdiction, the right to move for its rescission is not lost by laches or acquiescence. (3) An order for attendance of witnesses for examination for the purposes of a suit in a foreign Court made under the section of the Evidence Act above quoted is only an interlocutory order and may be

founded on affidavits sworn merely on information and belief. (4) Such an order, if otherwise properly made, may require the witnesses to produce any relevant documents on their examination, although the order of the foreign Court upon which it is founded makes no mention of any documents; and such production should not be confined to documents relevant to the affidavits on which it is desired to cross-examine the witness or to those in their possession, but may include all documents relevant to the issue between the parties and either in the possession or under the control of the affiants. (5) If a party complies with an order or delays for an unreasonable time in moving against it, he will be precluded thereby from objecting to it on the ground of irregularities merely.

Bank of Nova Scotia v. Booth, 19 Man. R. 394.

—Examination of witnesses abroad—Discretion.]—It is discretionary with the Judge to grant or refuse an order for examination of witnesses abroad. Where it appeared that the veracity and honesty of the proposed witnesses would be attacked, order was refused, on the ground that it was practically impossible to instruct foreign counsel with such particularity as to enable him to cross-examine in such a way as to avoid the application of the rule laid down by the Supreme Court in Peters v. Perras, 42 S.C.R. 244.

Union Investment Co. v. Perras, 2 Alta. R. 357.

Commission to take evidence—Arts 373, 380 C.P.Q.]—Under the provisions of Art. 373 C.P.Q. a commissioner to take evidence whose appointment is asked for must reside in the Province of Quebec, and the witnesses to be examined should also reside within the limits of the Province. If they reside elsewhere the party requiring their evidence should proceed under Arts. 380 et seq.

Patterson v. Crépeau, 19 Que. S.C. 147 (S.C.).

—Commission to take evidence of witnesses abroad—Examination of party himself.]—Under a general commission to examine witnesses abroad on behalf of both parties, the witnesses intended to be examined not being named in the order or the commission, it is not permissible for the plaintiff to give his evidence before the commissioner, and, where the commission is opened at the trial, the plaintiff's depositions on being tendered in evidence will be rejected.

Wright v. Shattuck, 4 Terr. L.R. 317, 5 Terr. L.R. 264.

—Commission rogatoire — Delay — Extension.]—When a judicial commission (commission rogatoire) is not issued within the delay granted for its return, the order permitting it to issue becomes void and the court cannot extend the delay for examination of witnesses thereunder or for its return.

Girard v. City of Montreal, 18 Que. S.C. 315 (S.C.).

—Evidence on commission or order—Special examiner—Appointment in person or as office-holder—Successor in office—Authority to take depositions.]—An order appointed "E. K. A. of Neihart, Montana, U.S.A., a Justice of the Peace," a special examiner to take depositions of certain witnesses; the depositions were in fact taken by one G. P. M., a Justice of the Peace, it appearing that E. K. A. had ceased to hold office, and that G. P. M. was his successor in office. An agent for each party appeared on the taking of the depositions, and it did not appear that any objection was made to G. P. M. taking the depositions:—Held, that the depositions were taken by G. P. M. without authority, and, therefore, could not be used in evidence. Held, also, that the depositions being taken without authority and being not merely irregular, a substantive motion to suppress was not necessary, and that the objection could be taken upon their being tendered in evidence.

Claverie v. Gory; Pagnac v. Claverie, 4 Terr. L.R. 470.

—Examination of witness de bene esse—Rule 368 (B.C.]—A witness who lives in a remote part of the province is examinable under B.C.R. 368, while temporarily in Victoria.

Hyland v. Canadian Development Co., 9 B.C.R. 32, Drake, J.

—Order of foreign Court for examination of witnesses in Manitoba — Relevancy of documents — No power to command attendance for cross-examination on affidavits.]—Re Bank of Nova Scotia v. Booth, 10 W.L.R. 94 (Man.).

—Foreign commission—Examination abroad of officers of plaintiff company — Production of books of company before commissioner—Convenience.]—

Canadian Ry. Accident Insurance Co. v. Kelly, 8 W.L.R. 838 (Man.).

—Depositions taken under foreign commission — Proof that witnesses beyond jurisdiction—Terms of order for commission.]—

St. John v. Friel, 4 W.L.R. 126 (N. W. T.).

—Under commission—Return] — The execution of a commission for taking evidence, and the report of the commissioner, after the prescribed delays by consent of the parties, do not necessarily make it void especially when no prejudice has been

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caused. If the commissioner omits to put to a witness some of the cross-questions allowed his return will not be received as the proceedings are incomplete; but such omission will not involve the nullity of the proceedings and the Court may order the record to be returned to the commissioner with instructions to put the cross-questions omitted and thus complete his report.

Thibault v. Poulin, Q.R. 22 S.C. 371 (Sup. Ct.), 5 Que. P.R. 189.

—Application for commission to examine witness abroad—Material.] — Application was made for a commission to examine a witness resident in the United States, the application being based on an affidavit of the partner of defendant's solicitor, on information obtained by him from M., defendant's agent. There was no affidavit from M., personally, and nothing to show that the evidence of the witness could not have been obtained before he left the jurisdiction, or that the facts said to be in the knowledge of the witness could not be supplied by other persons:—Held, that the application was properly dismissed.

McPherson v. The Riter-Conley Manufacturing Co., 35 N.S.R. 429.

—Rogatory commission—Motion referred to the trial judge.]—The judge to whom an application is made for a commission rogatoire may refer the same to the trial Judge, who will, in his discretion, after having heard the evidence, grant or refuse the motion, and, in the former case, postpone the trial in order to permit the execution of the commission.

Armstrong v. Gillies, 5 Que. P.R. 423.

—Trial—Application for commission—Discretion of judge to refuse not interfered with—Estoppel.]—During the progress of the trial, and after a number of witnesses on behalf of plaintiffs had been examined, defendants' counsel applied for a commission for the examination of a witness who was absent in British Columbia, and for a postponement of the trial. The witness in question was a son of one of the defendant's, who was aware of his absence, but the fact was not brought to the attention of defendants' counsel until the day on which the trial was commenced. The learned trial Judge having refused both the commission and the postponement:—Held, that there was no reason for interfering with his discretion on these points. After the commission applied for had been refused, plaintiffs' counsel offered to agree to an adjournment for a reasonable time, to be fixed by the Court, to enable defendants to produce the witness, should they desire to do so, and the case was adjourned from the 8th of January to the 17th of February. On the latter day, the case being called, defendants' counsel stated that he had no further evidence to offer, and judgment was given for plaintiffs. Held, that defendants, having accepted the offer made on behalf of plaintiffs, and obtained an adjournment of the case, were not in a position to revert back to their original rights, and claim a review of the judgment.

Stephen v. Thompson, 35 N.S.R. 390.

—B.C. county courts—When commission will be granted.]—In a County Court action on a promissory note for $65.40, the defendant pleaded that the note was obtained from him under duress, and the plaintiffs, who lived in Ontario, applied for a commission to take their evidence there:—Held, that as the probable expenses of the commission would not exceed a quarter of the expenses of the plaintiff's attending the trial, and the application was made bona fide, it should be granted.

Thompson v. Henderson, 9 B.C.R. 540.

— Circuit court — Deposition taken by stenographer.]—The cost of a deposition taken with consent of parties by stenography before the trial, cannot be taxed in the Circuit Court, although the proceeding saved the expense of a commission.

Lewis v. Hudson's Bay Company, 6 Que. P.R. 97.

—Order of foreign court—Refusal to attend—Order compelling attendance—R.S.C., 1886, c. 140.]—R.S.C., 1886, c. 140 extends to parties as well as witnesses; and a former manager of a company (while the matters in dispute in the action were alleged to have taken place) as such officer is a quasi party and stands for the person to be examined for discovery for the corporation defendant. An order to compel him to attend and be examined in pursuance of an order of a Manitoba Court, which he had refused to do, was made as on an ex parte application.

Re Kirchoffer v. The Imperial Loan and Investment Company, 7 O.L.R. 295, Boyd, C.

—Interrogatories.]—A defendant against whom interrogatories upon articulated facts have been declared pro confessis, and who has left the country cannot obtain a rogatory commission for his examination abroad.

Bernard v. Carbonneau, 6 Que. P.R. 350.

—Names of witnesses.]—When a commission is issued to examine witnesses, the interrogatories may be settled, although the examining party is unable to procure the names of all the witnesses to be examined.

Mulliken v. Laurentide Pulp Co., 6 Que. P.R. 134 (Davidson, J.).

—Foreign commission—Interrogatories.]—There is no power at the instance of the opposite party to strike out or modify in-

terrogatories prepared by the party who has obtained an order for a foreign commission. He may frame them as he pleases, taking the risk of the evidence being rejected in whole or in part by the Judge at the trial.

Toronto Industrial Exhibition Association v. Houston, 9 O.L.R. 527, M.C.

—Reference—Examination on commission—Right of cross-examination.]—On reference to take accounts a party is entitled ex dibito justitiæ to a commission to cross-examine the opposite party upon affidavits filed in proof of accounts. Townend v. Hunter (1883), 3 C.L.T. 310, followed; Plenderleith v. Parsons (1905), 10 O.L.R. 436, distinguished.

Horlick v. Eschweiler, 11 O.L.R. 140.

—Absence of witness—Enlarging case—Commission to take evidence.]—A defendant appearing to have a good defence and depending upon the presence of his principal witness at the trial, such witness residing abroad, may, even after the expiration of the time limited, obtain a commission for the examination of the witness, unless there has been want of diligence on his part. A judgment refusing such commission was reversed by the Court of Review.

Nash v. Baie des Chaleurs Ry. Co., 7 Que. P.R. 381 (Ct. Rev.).

—Evidence under commission—Use of by jury.]—On the trial of an action on a promissory note, the evidence of a witness taken under a commission was, subject to the objection of counsel, given to the jury, and by them taken to the jury room when they retired to consider as to their verdict:—Held, by the majority of the Court, that the practice was not usual, and was not to be commended, but as the incident could not have had a prejudicial effect it was not a ground for a new trial.

Royal Bank of Canada v. Hale, 37 N.B.R. 47.

— Foreign commission — Examination of defendants as witnesses on their own behalf—Terms.]—The defendants, a solicitor practising his profession in Ontario, and his wife, were still in Ontario when two actions were brought, one against both of them by a former client of the husband and the other against the husband alone. Shortly afterwards they removed to the North-West Territories to take up their permanent residence there. The actions were respectively for an account of moneys intrusted to the solicitor for investment, and to set aside assignments of life insurance policies:—Held, reversing the decisions of a Divisional Court and of a Judge and the Master in Chambers, that, in the circumstances shown by affidavits, the defendants should be allowed to have their evidence taken on commission in the Territories, as witnesses on their own behalf, for use at the trial of the actions, but upon terms advantageous to the plaintiff as to the expense of executing the commission.

Ferguson v. Millican, 11 O.L.R. 35 (C.A.).

--Vacation—Commission.]—An action to recover moneys paid does not fall within the provisions of article 15 C.C.P. and a commission to take evidence therein will not be granted during the long vacation.

Royal Trust Co. v. Robert, 8 Que. P.R. 391 (Loranger, J.).

—On commission—Reading at trial.]—Whether all the evidence taken upon commission shall be read at length or read in part and stated in part or stated by counsel at the trial is a matter in the discretion of the trial Judge.

Marks v. Marks, 13 B.C.R. 161.

—Commission to take evidence of plaintiff abroad.]—A plaintiff suing in a foreign forum should not ordinarily be excused from appearing there and giving his evidence, and the proof that the interests of justice require the issue of a commission to take his evidence abroad should be of the clearest kind and best nature that can be got, affidavits sworn to on information and belief only being insufficient. The issue of such a commission should be the exception and should only be resorted to when the inconvenience or expense caused by requiring the plaintiff's personal attendance at the trial would pretty nearly thwart the ends of justice. These principles applied upon an application by the plaintiffs, a company whose head office was in Ottawa, Ontario, for the issue of a commission to take the evidence of a number of the company's officers at Ottawa, in spite of affidavits tending to show that the books of the company at the head office, which would have to be put in evidence, were in constant use there and could not be brought to Winnipeg without great inconvenience and loss, also that it would be practically impossible to carry on the business of the company if all the officers whose evidence would be necessary at the trial had to be absent from the head office for the time necessary to attend the trial at Winnipeg. The Court was of opinion that the material was not sufficient to show that all the books must be kept at the head office all the time and that, if the evidence were taken on commission at Ottawa, the defendant would probably have to go there himself in order to instruct counsel on cross-examination of the witnesses as to entries in the books. Order for commission set aside with all costs to the defendant in any event:—Semble, if a proper case were made, an order might go for the examination of some of the officers of the company

at Ottawa on some of the facts which the plaintiffs wished to prove; and that the books, or at all events all those that were not absolutely required all the time at the head office, might be brought to Winnipeg with the other officers to verify them so that the Court might see those books themselves rather than certified copies of portions of them.

Canadian Railway Accident Insurance Co. v. Kelly, 17 Man. R. 645.

—Rogatory commission—Party — Discretion.]—It is a matter entirely in the discretion of the Court to allow a petition asking that a party be examined under a rogatory commission; generally it will not be granted, for it is obviously far better that the party should give his evidence in open Court.

Deslandes v. St. Jacques, 9 Que. P.R. 213.

—Foreign commercial firm not registered—Interrogatories.]—The Court is without power to order that the clerk in charge of the head office in America of a commercial firm described as of New York City but whose head office is, after the issuance of a commission to New York, declared to be in France, be examined on articulated facts in lieu of the personal defendants.

Timosi v. Moos, 9 Que. P.R. 250.

—Parties residing outside the Province.]—A party to a suit in the Superior Court has no right, even though he resides outside the Province or at a distance of more than a hundred miles from the place where the Court is held, to obtain a commission rogatoire to have himself examined as a witness.

Deslandes v. Saint Jacques, 33 Que. S.C 380.

—Option to use at trial.]—A party who has procured evidence to be taken on commission is not bound to put it in at the trial; but if it has been duly returned into Court the opposite party may put it in on his own behalf if he so desires.

Richardson v. McMillan, 18 Man. R. 359

III. In Criminal Cases.

See Criminal Law.

IV. Examination for Discovery.

See Discovery.

V. Production of Documents.

See Discovery.

EVOCATION.

Lessor and lessee — Future rights.]—Though an action asking for resiliation of a lease and, in addition, a sum for rent less than $100, should be brought in the Circuit Court, evocation to the Superior Court will be permitted if the future rights of the parties for a sum exceeding $100 are affected.

Poire v. Lavigne, 11 Que. P.R. 187 (Ct. Rev.).

Remission of cause to court below—Arts. 49, 1130 C.P.Q.]—The Superior Court cannot remit a cause to the Circuit Court for the reason only that the party asking for evocation has not inscribed therefor; the evocation must be ill founded to warrant such order.

Barber's Association of Quebec v. Lizotte, 4 Que. P.R. 70 (S.C.).

—Promissory notes given in part payment —Arts. 49 and 1130 C.P.]—Held, 1. That an action taken in the Circuit Court for promissory notes, may be evoked by the plaintiff to the Superior Court when the defendant pleads that those notes were given in part payment of a thing sold by the plaintiff, for over $100, and that the sale is null, the thing sold being defective and valueless. 2. That par. 3 of Art. 1130 C.P. is not limitative, but simply provides for a special case.

Tufts v. Dalton, 3 Que. P.R. 523.

—Mode of procedure—Art. 1130 C.P.]—A party may proceed for judgment by means of inscription or motion in cases evoked before the Superior Court, but it should always be stated in the inscription or motion that he desires a judgment on the validity of the evocation.

Roach v. Duggan, 5 Que. P.R. 43 (Sup. Ct.).

—Circuit Court to Superior Court—Annual rents—Future rights—Arts. 49, 1130, 1152 C.C.P.]—There is a right to evocation when the Circuit Court has jurisdiction over the action. When it has not there can be no evocation but jurisdiction must be declined (le declinatoire) An action by which plaintiff demands the resiliation of a lease with a total of $99 for damages and rent due, is within the jurisdiction of the Circuit Court. When the lease is one of a grist mill and saw mill, and the rent is half the receipts and profts, and it has three years to run, and it is shown in the action that the half of the revenues belonging to the defendant for the three years represent a value of more than $100, then the defendant has a right of evocation to the Superior Court as his future rights in the matter might be more than $100.

Morneau v. Verret, 20 Que. S.C. 399 (Sup. Ct.).

—Friendly society—Benefits—Future rights —Arts. 49, 1130, C.C.P.]—An action to recover benefits due from a friendly society to one of its members is evocable to the

Superior Court, as the action dealt with the future rights and interests of the plaintiff, and the judgment therein would decide his status for the future as a member of the society.

Gagné v. Society of St. Jean Baptiste of Victoriaville, 4 Que. P.R. 382 (Cir. Ct.).

—Future rights—Aliments—Arts. 49, 1130 C.C.P.]—An action claiming an alimentary support of $2.25 per week for 47 weeks is evocable to the Superior Court as the judgment that would be given therein would affect the future rights of the parties.

Roach v. Duggan, 4 Que. P.R. 289 (Sup. Ct.).

—Tenancy—Denial of possession.]—Evocation cannot take place where the tenant who is sued denies having taken possession of the immovable property leased, without questioning the right of ownership of the landlord.

Shearer v. Marks, 5 Que. P.R. 304.

—Future rights.]—There can be evocation from the Circuit Court to the Superior Court only in the cases mentioned in Art. 49 C.P.Q. When the right of evocation does not appear by the demand the declaration of evocation should allege it and should be accompanied by documents or by a deposition affording primâ facie proof that the action is capable of being evoked. Evocation is allowed only for the future rights which appertain to the party asking for it.

Richmond Aqueduct Co. v. Johnson, Q.R. 22 S.C. 65 (Sup. Ct.).

—Procedure—Future rights.]—Under Art. 55 C.P.Q. there can be no evocation to the Superior Court of the district of the judgment in an action to recover $99 taken in the Circuit Court of the county even though it may affect future rights.

Roy v. Ferland, Q.R. 23 S.C. 1 (Sup. Ct.). 5 Que. P.R. 188.

—Action to recover taxes—Right of evocation and appeal—Town Corporations Act.]—There can be no appeal from a judgment rendered in the Circuit Court in a municipal matter and, in consequence, a person sued for municipal taxes cannot, even on grounds that future rights are affected, evoke the case to the Superior Court.

Mayor and Councillors of the Town of Nicolet v. The Imperial Oil Co., 5 Que. P.R. 205.

— Recorder's court — Notary — Agent for management of real estate.]—A notary against whom action has been taken in respect of his having acted as an agent for the management of real estate cannot, before hearing, ask by way of certiorari, that the case should be evoked from the Recorder's Court of the city of Montreal to the Superior Court, the proof of his agency for the sale of real estate being of a nature within the jurisdiction of the Recorder's Court.

Laliberté v. City of Montreal, 5 Que. P.R. 395.

—Unstated rental value.]—The lessor, to whose action his lessee pleads that the renting value of the leased premises was not stated in the declaration, cannot evoke the cause from the Circuit Court to the Superior Court.

Shearer v. Marks, Q.R. 22 S.C. 472 (Sup. Ct.).

—Time for filing—Arts. 49, 1130 C.C.P.]—A defendant wishing to evoke a suit should file his demand for evocation before filing his plea to the merits.

The Montreal Turnpike Road Commissioners v. Penniston, 5 Que. P.R. 445.

—Lease from wife separate as to property —Future rights—Art. 49 C.P.Q.]—A defendant sued for the sum of $20, to wit, $10 for rent due, and $10 for damages, pleaded that he had leased from the wife of the plaintiff who was separate from him as to property, and that she alone had a right of action against him; he also claimed that there should be evocation of the cause from the Circuit Court to the Superior Court:—Held, that a defendant pleading that he had leased a tenement from the wife, separated as to property, of the plaintiff, without stating how or in virtue of what instrument she was so separate, was, nevertheless, bound to pay the rent to the husband as chief administrator of the community. (2) Such a defence does not involve any danger that future rights may be bound such as would justify the evocation of the action for $20 for rent and damages.

Clarke v. Wilson, 7 Que. P.R. 422 (Pagnuelo, J.).

—Future rights—Arts. 49-1130 C.P.]—When, by a judgment, defendant would be compelled to maintain for all time to come, under a by-law, a road on his property, he has a right to evoke the case to the Superior Court.

St. Martin v. Leblanc, 7 Que. P.R. 367.

—Future rights—Circuit Court.]—Even if future rights be involved in an action taken in the Circuit Court, for an amount under $100, no evocation of the case to the Supreme Court will be allowed, if the action has not been instituted in the Circuit Court at the chief place of the district, because the case is then subject to appeal.

Bickford v. Remington Martin Co., 9 Que. P.R. 354.

— Certiorari — Evocation — Recorder's Court.]—(1) A judgment of the Recorder's

Court of the City of Montreal maintaining an action for salary, though the case has been allowed to be evoked to the Circuit Court, will be set aside on a certiorari. (2) S. 485 of the charter of the city of Montreal which has reference to the Recorder's Court concurrent jurisdiction with the Circuit Court only applies to matters respecting lessors and lessees. (3 A declaration of evocation from the Recorder's Court to the Circuit Court is not premature by being fyled before plea; the provisions of C.P. 1130 to the contrary, only having application to evocations from the Circuit to the Superior Court.

Ouimet v. Fleur, 11 Que. P.R. 41.

—**Real rights—Future rights.**]—When the plaintiff claims by his action less than $100 for work done on a division wall the defendant may evoke the cause to the Superior Court if he claims that the work done related to the line separating two properties and that a judgment in the action would affect the future rights of the parties.

Perrault v. Chopin, 10 Que. P.R. 102.

EXAMINATION.

Of judgment debtor.]—See JUDGMENT.

—**Physical examination.**]—See that title.

See DISCOVERY; EVIDENCE; CRIMINAL LAW.

EXCEPTION.

Status of plaintiff—Exception to form.]—Grounds of defence based on the incapacity or lack of capacity in the plaintiff who brings an action should be invoked by an exception to the form, and when that has not been done or, if done, the exception has been dismissed, the defendant will not be permitted to rely on such grounds in his defence on the merits.

Montreal Rolling Mills Co. v. Sambor, Q.R. 19 K.B. 318.

—**Parties—Liquidator.**]—It is not by an exception to the form but by a dilatory exception that the defendant should object that the liquidator is not a party to an action against an insolvent company. Failure to reply to an exception to the form is not an admission of the facts alleged therein; the party must prove that his exception is well founded.

Royal Bank of Canada v. Canadian Mutual Fire Ins. Co., 11 Que P.R. 265.

—**Exception to form—Demise of Crown.**]—An exception to the form based on the fact that the writ was issued in the name of a sovereign (Edw. VII.) when the latter had died and before his successor was proclaimed, will be dismissed seeing that the defendant is not prejudiced.

Rosenberg v. Millman, 11 Que. P.R. 358.

—**Action for doctor's fees—Service of detailed account—Exception to the form.**]—Held, that the default of serving a detailed account upon the defendant is not a ground for an exception to the form and can have no other effect than to delay the judgment or proceedings until the account is served.

Perrigo v. Arcand, 3 Que. P.R. 350.

—**Declinatory exception—Transmission of record—Security for costs—Tariff of fees.**]—Held, 1. That the fee of the defendant's attorney on a declinatory exception which was maintained, the Court ordering the transmission of the record to another district, is that provided for by Art. 7 of the tariff. 2. That when a motion for security for costs is granted, costs to follow suit, and the record is subsequently transmitted to another district, the costs will follow the final judgment on the case and not the judgment maintaining the declinatory exception and ordering the transmission of the record. 3. That, where, in an action brought at Montreal, where the transmission of the record to Quebec was ordered, the prothonotary, at Montreal, taxed the defendant's bill of costs, the Judges of the district of Montreal are competent to revise such taxation, notwithstanding the judgment ordering the transmission of the record.

The Canadian Mutual Loan and Investment Company v. Tanguay, 3 Que. P.R. 436.

—**Notice of action—Pleading.**]—An electric tramway company should avoid everything which, not being absolutely necessary for the service, is a source of danger to the public, and if it does not do so it is guilty of imprudence for which it is responsible. The fact that a cause of danger could only be avoided by increased labour and expense is no excuse for allowing it to remain. The provision in the charter of the Montreal Street Railway Co. compelling any one desiring to bring an action against the company for damages to give 30 days' notice does not make such notice a condition precedent to the right of action; it is merely one of the pre-judicial requirements the non-observance of which should be invoked by a dilatory exception.

Mattice v. Montreal Street Railway Co., 20 Que. S.C. 222 (Sup. Ct.).

—**Forma pauperis—Incidental demand—Exception to form.**]—Authority to bring an action for a fixed sum in forma pauperis does not extend to a supplementary inci-

dental demand subsequently filed in the same cause. In such case the incidental plaintiff will be ordered to affix the necessary stamp to his demand and obtain permission to proceed thereon in forma pauperis; on failure to comply with this order within the delay fixed thereby his incidental demand will be dismissed on exception to the form.

Vitale v. Canadian Pacific Railway Co., 4 Que. P.R. 355 (Sup. Ct.).

—Beneficiary heir — Dilatory exception — C.P. 177.]—That the beneficiary heir cannot plead a dilatory exception to an action instituted against him in his quality of beneficiary heir, based upon the ground that the term for making inventory and deliberating has not expired.

Standard Drain Pipe Co., Ltd., v. Robertson, 5 Que. P.R. 70.

—Declinatory exception — Conclusion for dismissal—Art. 170 C.C.P.]—When a defendant meets an action by a declinatory exception and a demand purely and simply for its dismissal, he should deposit with his exception the amount claimed, if it is a sum of money, or an abandonment regularly served and verified, if the action, as in this case, is for a writ of prohibition against proceeding on a judgment against the plaintiff.

Garneau v. Gaudet, 21 Que. S.C. 437 (Sup. Ct.).

—Community—Arts. 1234, 1301, C.C.—Art. 174 (3) C.C.P.]—The community between husband and wife sued in damages, though it is a ground of defence au fond, can be pleaded by an exception to the form if it constitutes a good defence.

Shank v. Bourassa, 4 Que. P.R. 287 (Sup. Ct.).

—Dilatory exception—Succession—Art. 665 C.C.—Arts. 1, 177, C.C.P.]—The heirs to a succession may by dilatory exception, stay proceedings in an action pending the delays for making the inventory and considering it.

Drolet v. Lanthier, 4 Que. P.R. 460 (Sup. Ct.).

—Declinatory exception — Deposit—Art. 170 C.C.P.]—When a defendant, by a declinatory exception, asks for the dismissal pure and simple of the action without conforming to the conditions required by Art. 170 C.C.P., that is without depositing the amount claimed, or its equivalent if some thing other than money is claimed, his exception will be considered irregular and dismissed with costs.

Garneau v. Gaudet, 4 Que. P.R. 370 (Sup. Ct.).

—Preliminary exception — Deposit—Art. 165 C.P.]—The requirements of Art. 165 C.P. as regards the deposit to be made with preliminary exception are peremptory, and must be strictly complied with.

Leclère v. Ayer, 5 Que. P.R 253 (Davidson, J.).

—Summary procedure—Time for complaint against summary summons.]—A defendant sued for tort under the statute respecting summary procedure must take proceedings by exception to the form within the time fixed for that purpose, and if he joins issue upon the merits he cannot take exception to defects in matter of form when the case has been inscribed.

Levy v. Strathcona Rubber Co., 5 Que. P.R. 341.

—Judgment by default—Petition in revision—Preliminary exception.]—A defendant who does not reside in Canada and has been summoned by means of advertisement in a newspaper, may, with his petition in revision of a judgment entered by default against him, file preliminary exceptions, and particularly a declinatory exception, if the contract invoked by the plaintiff did not take place in this province and the cause of action did not arise there

Levy v. Arkbulatoff and The National Express Co., 5 Que. P.R. 204.

—Annulment of marriage—Description of female defendant—Divorce in foreign country.]—In an action for annulment of marriage contracted by a woman who had obtained, in the United States of America, a divorce from her first husband, on the ground that such divorce was also null, such question cannot be decided upon issues raised on exception to the form setting out that the summons was illegal and that the woman should have been summoned as the wife of her first husband. However, as there appeared grounds for the fear on the part of the defendant that the omission to invoke the questions raised in limine litis might be construed as acquiescence, the exception was dismissed without costs, the matters therein brought in issue being reserved for adjudication upon the merits of the case.

Stephens v. Miller, and Hopkins, mis en cause, 5 Que. P.R. 397.

—Action on account—Account not served.]—The absence of particulars of account on which an action is founded in the service of summons is not ground for an exception to the form but may give rise to a dilatory exception .

Dubrule v. Leclaire, 5 Que. P.R. 310.

—Substitution of debtor—Dilatory exception—Action of warranty.]—A party bound subject to an unaccomplished condition whereof the obligations have been assumed by a third person accepted by

the plaintiff, cannot, if sued for non-execution of the contract which he has so transferred, call in the third person who has been substituted for him as debtor, as a warrantor.

Veilleux v. Atlantic and Lake Superior Railway Co., 5 Que. P.R. 290

—**Incidental capias—Service of declaration—Application to quash—Deposit.**]—1, An application to quash a writ of capias, which is not founded upon the questions mentioned in Art. 919 C.C.P., but upon reasons in respect to the form of process must be accompanied by a deposit in the same manner as preliminary exceptions. (2) The declaration upon proceedings by incidental capias may be deposited in the office of the Court within three days of the service of the writ.

Radford v. Hickey, 5 Que. P.R. 311.

—**Exception to the form—Notice of deposit C.P. 165.**]—The Court will not hear an exception to the form, when no notice of the deposit made therewith has been given to the opposite party.

The Merchants Bank of Canada v. Republic Consolidated Gold Mining Co., 5 Que. P.R. 202 (Lavergne, J.)

—**Erroneous statement of defendant's domicile—Exception to the form.**]—An exception to the form setting out that the defendant is described as being of the town of St. Louis, when he in fact resides in Montreal where the action has been served upon him will be dismissed with costs.

Brunet v. Tison, 5 Que. P.R. 450.

—**Preliminary exception—Time for filing—Vacation.**]—Although Art. 10 C.C.P. provides: "In reckoning delays for pleading or trial, the first day of September is deemed to be the next day after the thirtieth day of June," it does not follow that each day after the thirtieth of June should be considered as the first of September, and further, the three days fixed by Art. 164 C.C.P. for the service of preliminary exceptions, begin to run, in the case of an action returned during vacation, on the first and not on the second of September.

Barbeau v. Jobin, 5 Que. P.R. 457.

—**Conciliation—Summons.**]—The exception resulting from want of summons in conciliation is not covered by filing a defence au fonds. This law being of public order can be invoked at any time and the Court is obliged to judicially notice its application.

Fortin v. Vaillancourt, 6 Que. P.R. 66 (LaRue, J.).

—**Leave to file preliminary exception after delay.**]—1. The Court has discretionary power to enable the production of preliminary exceptions, and particularly of an exception to the form, after the delays, when sufficient reason for the delay is shown. 2. A judgment allowing a defendant to file an exception to the form after the delays, without adjudicating upon its merits, is not an interlocutory judgment from which leave to appeal can be granted.

Lefebvre v. Everett, 6 Que. P.R. 188.

—**Company in liquidation.**]—An "exception to the form" filed by a company in liquidation will be dismissed unless the filing has been authorized by a Court or Judge under s. 4 of the Winding-up Act.

Desjardines v. Laurie Engine Co., 7 Que. P.R. 228 (Taschereau, J.).

—**Preliminary exceptions—Reply—Plea to merits—Art. 167 C.P.Q.**]—Replying to preliminary exceptions does not prevent the plaintiff from demanding that defendant plead to the merits notwithstanding the exceptions.

Roy v. Quesnel, 7 Que. P.R. 148 (Sup. Ct.).

—**Venue — Exception declinatoire.**]—Where an action is brought in one district against a person domiciled in another the plaintiff should state, in his declaration, all the facts giving jurisdiction to the Court in which it is taken; to set forth these facts in the reply to a declinatory exception is irregular and, on motion therefor, this portion of the reply will be struck out of the record.

McKenzie v. Person, Q.R. 26 S.C. 521 (Sup. Ct.).

—**Exception to form—Service.**]—In serving an exception to the form it is not enough to serve with it a notice that the prothonotary's certificate that the deposit has been made will be filed when the motion is presented but a copy of the certificate itself should be served The defendant will not be given leave to serve such copy of the certificate after the motion is made.

Roberge v. Bélanger, 7 Que. P.R. 80 (Sup. Ct.).

—**Action on account—Declinatory exception.**]—If a declinatory exception is taken to an action on an account the plaintiff cannot, in reply to such exception allege that the defendant has admitted, in the district in which the action was brought, that he owed the amount of the account—The procedure for striking the allegation out of the reply is by motion and not by inscription en droit as the character of the allegation would support the conclusions of the reply.

Theoret v. Brunet, 6 Que. P.R. 441 (Sup. Ct.).

—**Exception to form—Hour of service.**]—An exception to the form, served on the second day after the return, in summary matters, but after five o'clock in the afternoon, will not be received.

Préfontaine v. Wiseman, 7 Que. P.R. 135 (Davidson, J.).

—**Misnomer of plaintiff—Exception to the form—Default to give plaintiff's true name.**]—A defendant who complains, by exception to the form, that the plaintiff does not describe himself under his true name, but without setting forth such true name, will not be allowed to amend his exception, after the delays within which it must be filed, by adding thereto an assertion of the true name of the plaintiff.

Dufour v. Portier, 7 Que. P.R. 162.

—**Declinatory exception — Conclusions — Amount of condemnation.**]—When it may be found necessary to condemn one or the other of the defendants for such a proportion of the sum asked as will exceed $100, and the conclusions are broad enough to justify such a condemnation, the action is properly instituted in the Superior Court.

City of Montreal v. Arnovitch, 7 Que. P.R. 351 (Davidson, J.).

—**Exception to the form—Defendant impleaded personally and ès qualité.**]—Where a defendant sued personally obtains the dismissal of the action upon exception to the form, on subsequent proceedings ès qualité, by an amendment but not personally, the same defendant may plead the same grounds of exception.

Cantlie v. Cantlie, 7 Que. P.R. 308 (Lavergne, J.).

—**Exception to the form—Action by attorney in fact—Want of interest.**]—An action instituted by the attorney in fact of the actual creditor will be dismissed upon exception to the form as the plaintiff has no interest in the action and cannot sue for the rights of another.

Meunier v. Drolet, 7 Que. P.R 426 (Lavergne, J.).

—**Delay expiring on Saturday—Practice—Art. 8 C.P.Q. as amended by 4 Edw. VII. c. 45.**]—Under art. 8 of the Code of Civil Procedure, as amended by the statute 4 Edw. VII. c. 45, when the delay for the service of a preliminary exception expires on a Saturday, such service may be validly made on the following Monday.

Martin v. Drew, 7 Que. P.R. 435.

—**Exception to the form—Notice of action not alleged in declaration—Damages—Details.**]—(1) In the case of suits against public bodies, the want of allegation that the required notice has been given is no ground for the dismissal of the action. (2) The absence of details in an action of damages is matter for a motion for particulars, not for an exception to the form.

Vary v. Bordeaux, 8 Que. P.R. 284.

—**Premature action.**]—The defendant who moves for dismissal of the action as premature can claim, by incidental demand, moneys due him under the contract sued on and is not obliged to establish his rights by a plea en compensation. Even if such incidental demand is an irregular proceeding it is by exception to the form and not by défense endroit that advantage can be taken of such irregularity.

Hendershot v. Locomotive & Machine Co. of Montreal, 8 Que. P.R. 145 (Ct. Rev.).

—**Exception to form—Domicile of defendant.**]—An exception to the form on the ground that the residence of the defendant is not stated or is incorrectly stated should indicate clearly where the residence really is or otherwise it will be dismissed.

Loumaneau Congregation v. Backman, 8 Que. P.R. 108 (Charbonneau, J.).

—**Motion to amend—Contributories.**]—A motion to amend a dilatory exception in order to summon additional contributories in a cession de biens, which motion does not alter the character of the exception will be allowed.

Sleeper Co. v. Jacobs, 8 Que. P.R. 436 (K.B.).

—**Stamp on writ—Deposit—Particulars.**]—A motion for dismissal of an action for want of sufficient stamps on the writ is in the nature of an exception to the form and should be accompanied by the required depcsit. A motion demanding particulars will be refused if such particulars are given in a protest referred to in, and thereby becoming part of, the declaration.

Durand v. Lecours, 8 Que. 418 (Lafontaine, J.).

—**Summary action—Amendment—Costs.**] An action improperly brought as a summary proceeding may be attacked by exception to the form; an amendment will be allowed on plaintiff paying the costs of the motion to amend and the disbursements on the exception.

Coudron v. Gibbons, 8 Que. P.R. 438.

—**Dilatory exception—Option—Joinder of causes of action.**]—If plaintiff asks by his action the annulment of a bill and the dissolution of community and the rendering of an account, a motion to have him optate between those different heads of action will be granted.

Berger v. Clavel, 8 Que. P.R. 274.

—**Personal and real action—Incompatibility.**]—When an action is personal as to a defendant and real as to other defendants, so that the remedies sought are cumu-

lative and incompatible in regard to methods of defence and nature of condemnation, plaintiff will be ordered to optate between these two demands.

McCaskill v. Larivière, 9 Que. P.R. 53.

—**Dilatory exception—Warranty—Agreement by a third party.**]—A plaintiff who has not been a party to an alleged agreement by which a third person undertook to pay him the amount of the notes, upon which he sues, cannot be delayed in his recourse by a dilatory exception by reason thereof, and such exception must be dismissed.

Garand v. Caron, 9 Que. P R. 84.

—**Preliminary exception—Delays.**]—Any procedure adopted in good faith though it has not, strictly, the character of a preliminary exception is a preliminary objection to proceeding with the instance; for example, a demand of particulars which operates as a suspension of the delay for pleading.

Blais v. Aubé, 9 Que. P.R. 390 (Sup. Ct.).

—**Exceptions** to the form.]—A party must plead all of his objections to the form at the same time.

Levy v. Levy, 9 Que. P.R. 271.

—**Dilatory exception—Deposit.**]—A copy of the prothonotary's certificate that the deposit required with the preliminary exception has been duly made or notice of the deposit must be served with the exception or it will be rejected.

Karbage v. Malouf, 9 Que. P.R. 305.

—**Dilatory exception—Incompatible causes of action.**]—Plaintiff cannot by the same action ask for the annulment of a municipal by-law, and for damages caused by the passing of said by-law and for a separate and distinct condemnation for each, especially when it appears by the declaration that the alleged claim for damages was not existent at the time of the institution of the action, but was dependent for its existence on the annulment of said by-law.

Simon v. Village of Knowlton, 9 Que. P R. 343.

—**Dilatory exception—Delays.**]—A dilatory exception served six days after the return of the writ cannot be received; the fact that raises grounds of exception to the form cannot change its nature nor render it receivable as a mere motion demanding particulars.

Whitworth v. Bergeron, 9 Que. P.R. 120 (Sup. Ct.).

—**Preliminary pleading—Proof.**]—If an order is made for proof on a preliminary pleading (in this case an exception to the form) the plaintiff will be allowed to send the articulated facts to the defendant.

Cullen v. Daly, 9 Que. P.R. 268 (Sup. Ct.).

—**Dilatory exception—Service of motion.**]—Service of a motion containing a dilatory exception made within three days after the entry of the cause is sufficient. Filing of the motion within such time is not necessary.

O'Brien v. Heirs of D. Church, 9 Que. P.R. 92 (Sup. Ct.).

EXCHANGE OF LAND.

See SALE OF LAND.

EXECUTION.

Real property—Buildings placed thereon —Property in.]—An execution debtor placed certain buildings on land, the property of the defendant in the issue, for which it appeared a ground rent was paid. These buildings were of wood resting on loose stone foundations to which they were not affixed nor were the foundations let into the earth, but the earth had been levelled to make the foundation level. A cellar had been dug in the earth under one building. A judgment creditor seized these buildings, and the defendant, the owner of the fee simple, claimed them as part of the freehold, and an issue was directed:—Held, that to be a parcel of the freehold a building must be affixed to it or something connected with it, or there must be evidence to show that it was intended that the buildings should be part of the freehold; the buildings in question not being affixed to the freehold, and there being no evidence that they should be a part of it, the buildings were the property of the debtor and liable to seizure.

Hamilton v. Chisholm, 2 Sask. R. 227.

Sheriff's poundage — Railway lands — Equity of redemption — Settlement — Receiver.]—Writs of fi. fa. lands were placed in a sheriff's hands in 1893 to levy the amounts of judgment recovered in actions for interest on first mortgage bonds of a railway company. The sheriff advertised for sale the equity of redemption in the railway lands, and the day of sale wasc adjurned 33 times. The railway extended through parts of three counties. In 1902 the bonds matured, and proceedings were taken to sell the railway. Judgment to that effect was pronounced in March, 1903. On the 14th October, 1902, a receiver was appointed, who was continued through all the subsequent proceedings. In 1906 the Master, upon a reference in the sale proceedings, reported that the mortgage bonds formed a first charge on and covered all the property belonging to the railway

company. Early in 1907 the sheriff was notified to do nothing upon the executions, and the writs were all withdrawn in August, 1907. In September, 1906, a settlement was made by which all the bonds and coupons were bought by R. The executions were kept in the sheriff's hands till a satisfactory arrangement was made with R. The judgments were satisfied by the result of the settlement, and the execution plaintiffs were paid before the writs were withdrawn:—Held, that a settlement was arrived at, pending the executions, which was an equitable satisfaction of the judgments and executions; but as upon a sale nothing could have been realized, because a mere part of the road (that part in the sheriff's bailiwick) could not be sold, and because the equity had no value, there was no basis upon which the Court could say that any sum should be given as representing poundage. Con. Rule 1190 (2) is intended for the benefit of the sheriff when a settlement has been arrived at under pressure of an execution, which, if enforced, would be productive of beneficial results for the execution creditor; the settlement was induced not because of the writs being in the sheriff's hands, but for other more cogent reasons. The possession of the receiver in 1902 would effectually prevent the enforcement of any writ of execution.

Re Hope and Central Ontario R. W. Co., 1 O.W.N. 437 (Boyd, C.).

—Judgment — Application to sell lands under execution—Release of other lands—Effect of—Equities—Registry Act.]—

Re Bank of Liverpool, 5 E.L.R. 380 (N. S.).

—Judgment — Execution — Defective process — Discharge of debtor out of custody —Action of escape against sheriff — Damages.]—

Smiley v. Currie, 5 E.L.R. 536 (N.S.).

—Subject matter of suit — Seizure — Exemptions Ordinance.]—A judgment solely for costs does not entitle the judgment creditor to seize under execution the article, the price of which formed the subject matter of the action in respect of which the cases were incurred.

Byers v. Murphy, 3 Terr. L.R. 169.

—Sheriff's fees — Money realized from goods.]—Executions, goods and lands were placed in the sheriff's hands in two cases. In one the money was made from goods, in the other by voluntary payment to the solicitor. The sheriff transmitted to the Registrar of Land Titles certificates of satisfaction, and charged the fees in respect thereof to the solicitor for plaintiffs. At the request of the solicitor such costs were taxed and by the taxing officer allowed. On review:—Held, that it was the duty of the sheriff to forward to the Registrar a certificate of satisfaction on the money being made, and to charge his fees in respect thereof. 2. That such fees not being payable by the debtor must be paid by the execution creditor, and were properly so charged by the sheriff.

In re Brown, 3 Sask. R. 94.

—Exemption — Homestead — Evidence of filing execution.]—Plaintiffs caused defendant's land to be seized under a writ of execution, and the defendant claimed the same as exempt, being his homestead. On an interpleader application by the sheriff, it appeared that the defendant acquired the land by homestead entry; that no buildings were ever erected thereon, nor did he ever live on the land, his duties as to residence having been performed by residing on purchased land. He swore, however, that it had always been his intention to make the land his permanent home. The Local Master before whom the application was heard, allowed the claim. The plaintiffs then applied for leave to appeal, and leave was given to serve notice of motion, the date fixed for leave to appeal, and leave was given to serve notice of motion, the date fixed for the return being the King's birthday, a statutory holiday, and when the motion was heard the following day, it was objected that the notice of motion was void, and it was also objected that no evidence was given that any execution had ever been filed against defendant's land, and that, unless such writ was so registered, the land was not bound:—Held, that the date for the return of the notice of motion having been fixed by the Judge granting leave to appeal, it must be held that this was tantamount to granting leave to make the notice returnable on a statutory holiday, and the notice was therefore good. 2. That while no evidence was given of the actual filing of the execution against the land in question, yet, the material disclosed that the seizure had been made, and, in the absence of evidence to the contrary, such seizure would be deemed to be regularly made, and as it could not be so made unless the writ was regularly filed, it must be presumed to have been filed. 3. The mere fact that the debtor intends to make his permanent residence on land claimed as exempt does not constitute such land an exemption, but the land must be in the actual occupation of the debtor, and there must be thereon a dwelling-house in which the debtor lives.

Imperial Elevator Company v. Shere, 3 Sask. R. 197.

—"Wagon" includes buggy—Debtor's right to mortgage his exemptions.]—Where it appears that a debtor is not possessed of any ordinary farm wagon, but has two buggies, one of these buggies is exempt as a "wagon" under the Exemptions Ordinance, and the debtor has the choice of buggies. A chattel mortgage given by a debt-

or on a wagon which is exempt will not be set aside at the instance of a creditor, even if it is proven that the chattel mortgage was given under circumstances which would except for the exemption, constitute a fraudulent preference under the Assignments Act.

Ashcroft v. Hopkins, 2 Alta. R. 253.

Seizure of goods by sheriff—Action against execution creditors.]—In an action against the sheriff and several execution creditors of A. O. for trespass in seizing the goods of the plaintiff under the writs of execution, the statement of claim did not allege that the defendants the execution creditors had interfered directly and ordered the sheriff to seize particular goods:—Held, that the statement of claim disclosed no reasonable cause or ground of action against the defendants the execution creditors; but, upon a motion by one of those defendants to dismiss the action, the plaintiff was allowed to amend by inserting an allegation that those defendants had specifically directed the sheriff to seize the particular goods.

Olsen v. Van Wart, 13 W.L.R. 661.

—Sale of land under writ of fi. fa.—Authority of sheriff—Change in territory of judicial districts.]—An application to confirm a sale of land made by the sheriff of Edmonton under a writ of execution against lands was opposed by a mortgagee of the land, upon the ground, among others, that the sheriff of Edmonton had no authority, because the land was in the judicial district of Wetaskiwin. The writ was issued before the creation of the judicial districts of Edmonton and Wetaskiwin, the action in which the judgment on which the writ was issued was obtained having been brought in the judicial district of Northern Alberta. By Ordinance c. 6 of 1903, 2nd sess., it was provided that the Lieutenant-Governor might alter the boundaries of judicial districts, and make such provision as he might deem necessary to protect the interests affected thereby. Under the authority of this Ordinance, by order in council of the 1st September, 1906, the judicial district of Northern Alberta was wiped out, and the area comprised therein divided into 3 districts, Calgary, Wetaskiwin, and Edmonton. The order in council provided that "all writs . . . pending in the old judicial districts shall have effect and continue according to their tenor in the new judicial districts respectively within whose limits suit was first entered or proceedings begun." This suit was first entered in the sub-district of the Northern Alberta judicial district of the Deputy Clerk at Edmonton, which comprised the area of the two new districts of Edmonton and Wetaskiwin:—Held, that, as there was nothing in the order in council authorizing a sheriff of one district to exercise any of his powers outside of his own district, the sale made by the sheriff of the Edmonton judicial district, could have no local authority in the Wetaskiwin judicial district, unless he possessed such authority as the former deputy sheriff of the Northern Alberta judicial district. Nothing was done by the deputy sheriff of Northern Alberta except to receive the writ. He could not make a seizure, for the debtor had no interest in the lands till long after the Northern Alberta district had ceased to exist. The writ was filed in the land titles office in July, 1906. Held, following Re Blanchard, 5 Terr. L. R. 240, that such filing, even if the debtor owned the land at the time, would not constitute a seizure or inception of execution of the writ. Held, therefore, that the sheriff of the Edmonton judicial district, either as such or as former deputy sheriff of the Northern Alberta judicial district, to whom the writ was directed and delivered, had no authority to sell these lands, which were in the district of another sheriff, who was the successor of the deputy sheriff of Northern Alberta, in so far as the lands in his district were concerned; and, in consequence, the sale was void, and the application to confirm it should be refused.

Reliance Loan and Savings Co. v. Goldsmith, 15 W.L.R. 53 (Alta.).

—Irregularity — Judgment — Amendment.]—

Carbonneau v. Letourneau, 2 W.L.R. 113 (Y.T.).

—Judgment debtor as claimant — Seizure of building under fi. fa. goods — Annexation to freehold — Homestead exemption — Workshop.]—

Eastern Townships Bank v. Drysdale, 2 W.L.R. 423 (Terr.).

—Seizure of grain—Claim by vendor of land under agreement as to delivery of crops—Bona fide sale—Actual and continued change of possession—Time when property passes—Interpleader.]—

Re Godkin, 9 W.L.R. 430 (Sask.).

—Irregularity—Death of original defendant—Ex parte order of revivors—Order for leave to issue executions in name of defendant by revivor—Failure to serve orders.]—

Stone v. Goldstein, 9 W.L.R. 365 (Y.T.).

—Fi. fa. goods—Seizure of lien notes—Exemptions sold by auction.]—

Jones v. Jesse, 10 W.L.R. 627 (Sask.).

—Seizure of grain—Claim by purchaser — Actual and continued change of possession.]—

McCormick v. Anderson, 5 W.L.R. 76 (N.W.T.).

—Irregularity — Death of original defendant—Ex parte order of revivor.]—
Stone v. Goldstein, 11 W.L.R. 551 (Y.T.).

—Irregularity — Judgment — Amendment.]—
Carbonneau v. Latourneau, 1 W.L.R. 273 (Y.T.).

—Seizure of crops—Claim under lease given as security — Bills of Sale Ordinance not applicable.]—
Massey-Harris Co. v. Marchand, 10 W.L.R. 62 (Sask.).

—Sheriff's sale — Auction — Land knocked down to highest bidder — Sheriff re-opening biddings.]—
Re Hind, 7 W.L.R. 806 (Sask.).

—Homestead exemption — Mortgage—Sale —Lien on proceeds.]—
Bocz v. Spiller, 1 W.L.R. (N.W.T.), 280 and 366.

—Seizure of unpaid shares on executions against company.]—
See COMPANY.

—Receiver—Fund not presently payable—Contract.]—Held, reversing the decision of Middleton, J., 22 O.L.R. 36, upon the facts, that the defendant was not in a position to enforce payment to him of the fund in the hands of the city corporation, and the plaintiffs were in no better position, and were not entitled to have a receiver appointed to receive the fund in equitable execution of their judgment against the defendant.
Manufacturers Lumber Co. v. Pigeon, 22 O.L.R. 378.

—Exemption from seizure—Books of professional men.]—Where there was a running account between the plaintiff and the defendant in which appeared debits of law books supplied to the defendant and credits of money paid by the defendant and an action was brought and judgment obtained for the balance due:—Held, that where payments had been expressly appropriated to certain items for law books those law books were exempt as books of a professional man: but:—Held, that the payments made generally on the account will not be appropriated by the Court to effect payment of items as far as such payments will extend so as to increase the number of books exempt, and those books in the account not specifically paid for are subject to seizure under execution as being the subject matter of the judgment.
Canada Law Book Co. v. Fieldhouse, 2 Alta. R. 384.

—Opposition pending—Seizure—Removal of goods.]—Proceedings in execution begun pending the disposal of an opposition to the judgment are valid if the opposition is eventually dismissed. The guardian is not obliged to remove the effects seized from the place where the seizure was made even if offered the expense of such removal. The guardian cannot be sentenced to imprisonment if the rule nisi does not give him the option of paying the amount due the seizing creditor or the value of the effects not produced and the Court cannot amend the rule by itself adding such option. The guardian who succeeds in having a rule nisi dismissed for irregularity, but who does not, in moving against the rule, offer to produce the effects placed in his care, will not be awarded costs.
Bailey v. Fortin, 11 Que. P.R. 167.

—Judicial sale—Agreement between parties—Rights of purchaser.]—The judicial sale of movables made at 10.45 a.m., though announced for 10 o'clock, and to a single bidder, is valid even though there had been an agreement between the seizing creditor and the saisi that it would only be a matter of form to be cancelled by satisfaction of the judgment within a stated time. These facts, and the fact that the movables had been left in possession of the saisi who undertook to repay the price with an addition as indemnity cannot be set up by the saisi against the purchaser who has taken a saisie-revendication, especially when the original seizing creditor is not in the cause and does not offer to pay back the purchase money which he received.
Frank v. Donahue, Q.R. 38 S.C. 253 (Ct. Rev.).

—Interests under "oil leases" — Goods or lands.]—The interests of the defendants under certain "oil leases," in substantially the same form as the instrument the effect of which was considered in McIntosh v. Leckie (1906), 13 O.L.R. 54, were held, following the decision in that case, to be interests in land, and not liable to seizure under execution as goods.
Canadian Railway Accident Co. v. Williams, 21 O.L.R. 472.

—Seizure—Sale of perishable goods.]—The guardian alone can be authorized to sell perishable goods under seizure.
Charbonneau v. Gosselin, 11 Que. P.R. 106.

—Judgment—Provisional execution.]—Provisional execution of a judgment which does not authorize it and which has been reversed on appeal or on review, cannot be authorized by the Court of first instance which is disseized of the cause.
Latour v. Guevremon, 11 Que. P.R. 126.

—Immovables exempt from seizure—Judicial hypothec.]—A judgment against the donee of an immovable exempt from seizure by the terms of the donation, cannot be registered, with the necessary notice,

though the exemption does not involve inability to alienate. Therefore, the donee in such case has a right of action for radiation of the judicial hypothec resulting from such registration against his judgment creditor.

Latour v. Latour, Q.R. 38 S.C. 193.

—Alimentary pension—Seizure.]—An alimentary pension created by a deed of donation with an onerous title may be seized under execution.

Biron v. Biron, 11 Que. P.R. 426.

—Opposition to seizure.]—It is by opposition afin d'annuler and not by petition contesting it that a defendant should attack a seizure under execution.

Frank v. Paillard, 11 Que. P.R. 221.

—Seizure—Exemption.]—A cow belonging to a debtor may be exempt from seizure though the owner is not an agriculturist.

Seminary St. Charles v. Cabana, 11 Que. P.R. 315 (Cir. Ct.).

--Guardian—Bailiff.]—The bailiff making a seizure can, on refusal by the saisi to appoint a guardian constitute himself the guardian of the goods seized. The guardian can exercise the saisie-revendication against one who dispossesses him of the goods under his case.

Beaufort v. Hétu, 11 Que. P.R. 306.

—Seizure of movables—Caretaker—Action for remuneration.]—The caretaker appointed to the custody of movables seized under execution, to whom the bailiff making the seizure has agreed to pay a certain sum for such services, has a right of action against the seizing creditor to recover the amount. Against such action the creditor cannot set up the taxation in his bill of costs for a less amount as the prothonotary has power to tax the costs recoverable under judgment only and not those arising out of an agreement.

Fortin v. Simard, Q.R. 37 S.C. 470 (Ct. Rev.).

—Homestead—Abandonment — Intention.]—The claimant acquired certain land by homestead entry, and, after completing his duties, he rented a farm some distance away to which he removed with his family, and where he remained until the sheriff seized the homestead under execution, when he returned and took up his residence, claiming it as exempt. It appeared that the rented farm had a much larger area of cultivated land than the homestead, and that the landlord assisted him to work it, and that during the two years preceding the seizure no work had been done on the homestead, nor was there anything to indicate that it was the home of the claimant beyond his statement that he considered it his home. The interpleader application was first heard before the Local Master at Arcola, who allowed the claim, and the creditors appealed. On appeal, it was argued that as the title to the land was involved, the Local Master had no jurisdiction to determine the question:—Held, that a Local Master has jurisdiction to hear and determine interpleader applications involving claims to land seized under execution if he is disposing of the claim in a summary way under Rule 440. 2. When the execution debtor is not living on the homestead claimed as exempt, the onus is on him to show that the place is still his actual and bona fide residence, and that he has not abandoned it as his residence. 3. That to satisfy this onus the debtor must show the new residence acquired was only of a temporary character for a definite purpose, with a constant and abiding intention to return to the original homestead. 4. That a mere statement of intention to return is not sufficient, but he must be able to show facts and circumstances from which it may be inferred that he intended to return. 5. That under the circumstances of the case, it must be held that the homestead had been abandoned and a new domicile acquired, with no evidence indicating an intention to return to the original domicile.

Re Hetherington, 3 Sask. R. 232.

—Registration against homestead—Effect.]—Defendant recovered a judgment against one D.W.F., and registered an execution against lands thereunder. After recovery of this judgment, D.W.F. transferred his homestead to his wife, the plaintiff, and the registrar endorsed upon her certificate of title a memorandum that the title was subject to such execution. The plaintiff thereupon brought this action for a declaration that the execution was not a charge upon the land and for an order that it be removed:—Held, that an execution against land charges only such lands as are not exempt from seizure, and, therefore, the land in question was not charged. 2. That, the land being exempt, the debtor could dispose of it as he pleased, and the plaintiff, therefore, took the same without any charge thereon.

Fredericks v. North-West Thresher Co., 3 Sask. R. 280.

—Execution against lands — Conveyance subject thereto—Discharge of execution upon payment.]—E. recovered judgment against L., and issued executions against his lands. L. subsequently conveyed to G., who in turn conveyed to H., who again conveyed to S., who mortgaged to the plaintiffs. The plaintiffs, desiring to have E.'s execution removed from the title, tendered the amount due thereon, and asked for a certificate of satisfaction. The sheriff at that time had other executions against L., and, claiming that the money tendered must be divided among all the creditors, under the provisions of the Creditors' Relief Or-

dinance, refused a certificate unless all executions were satisfied, which plaintiffs refused to do, and brought an action for relief:—Held, that, under the Creditors' Relief Ordinance, only moneys levied are to be distributed as therein directed, and money paid as the plaintiffs proposed paying it in this case, could not be said to be money levied, in as much as there had been no seizure, and without a seizure there can be no levy. 2. In any event this money was not realized out of the property of the debtor, but was the money of the plaintiffs, paid by it to discharge an encumbrance on its title, and therefore the Ordinance did not apply. Howard v. High River Trading Co. (1899), 4 Terr. L.R. 109, followed.

Trust and Loan Company v. Cook, 3 Sask. R. 210.

—Execution against lands—Debtor owner of unregistered equitable interest—Transfer.]—Plaintiff sold certain land to defendant S. under agreement for sale, whereby he became entitled to a transfer upon payment of the agreed purchase price and compliance with stated conditions. Subsequently the American Abell Co. recovered a judgment against S., and registered execution in the usual form against his land. S., after such registration, assigned his whole equitable interest in such land to the defendant T. J. S. The legal title during this time remained in the plaintiff. In an action by plaintiff under the contract, the American Abell Co. claimed a right to intervene as having an interest in the land under their writ of execution:—Held, that, having regard to the provisions of the Land Titles Act, it was evidently the intention of the Legislature that writs of execution should bind only the interests of registered owners of land, and that the execution did not bind the equitable interest of the defendant S. 2. That no lien is created by an execution against land, only such rights being acquired as are given by the Land Titles Act, and which are not available as against equitable interests.

Canadian Pacific Railway Co. v. Silzer, 3 Sask. R. 162.

—Sheriff—Sale of land under judgment and execution—Adverse possession.] —In an action brought by plaintiffs, trustees under the last will of D., to recover possession of a lot of land bought by plaintiffs at sheriff's sale under execution on a judgment recovered by D. against M., defendant relied, among other defences, upon the ground that, at the time of the sale by the sheriff, he was in adverse possession of the land:—Held, that a sheriff selling under execution is not within the class of cases which apply to a person selling land held adversely by another. The objection was also taken that at the trial plaintiffs failed to give evidence of the death of D:—Held, that the objection was one which under O. 21, r. 5, must be specifically taken. Held, also, that the reception in evidence, without objection, of a certified copy of the will of D. was an implied admission of his death. At the trial plaintiffs put in evidence a certified copy of the deed to M., the judgment debtor without showing that the original was not in plaintiffs' possession. Held, that this was a matter as to which plaintiffs should be permitted to amend by filing the usual statutory affidavit. Held, also, that defendant having failed on the only substantial question arising, his appeal should be dismissed with costs. Per McDonald, C.J. Held, that the registry of the judgment obtained by D. had the same effect, so far as his title was concerned, as if he held a mortgage. Held also, the judgment being registered, and securing the title, that the statute of limitations would not begin to run until after the date of the recovery of the judgment.

Doull v. Keefe, 34 N.S.R. 15.

—Sheriff's title—Good faith—Nullity absolute and relative—Arts. 412, 1484 C.C.]—The possessor of property under title from the sheriff is a holder in good faith up to the time when his title is declared void by the Court, and his title is valid through its subsequent annulment deprives it retrospectively of effect. A contract annulled for an absolute nullity is deemed never to have had a legal existence and to be incapable of producing any effect in law either in the past or the future; but a contract or title, which has been acted on and afterwards annulled, is, notwithstanding Art. 412, C.C., sufficient to establish the good faith of the holder. Such holder has a right to retain the fruits he has received and to be reimbursed for the improvements he has made, as he will be liable for deteriorations he may have made on the property.

Savoie v. Castonguay, 10 Que. K.B. 459.

—Place of sale—Art. 637 C.P.Q.]—A defendant may oppose the sale at his domicile of goods seized in proceedings against him if they were not seized there and are not there at the time of the sale.

Adams v. Mulligan, 19 Que. S.C. 398 (S.C.).

—Guardian—Rule nisi—Option—Art. 657, 658 C.C.P.]—A rule nisi, against a guardian to effects seized under execution, which (besides giving him the option of paying the amount due the seizing creditor) gives him the option of producing the effects, or of paying the value thereof, without the value being mentioned or ascertained, is illegal, and will be set aside.

Simard v. Crevier, 19 Que. S.C. 133 (Curran, J.).

—Judgment—Temporary execution — Executor — Legacy.] — Temporary execution

may be granted of a judgment ordering the testamentary executor to deliver to the heir a legacy consisting of enjoyment of revenues of a seigniory and possession.

Masane v. Resther, 3 Que. P.R. 499 (C.R.).

—Supreme Court of Canada—Judgment of certified to Court below—Leave to issue execution.]—When a judgment of the Supreme Court of Canada has been certified to the clerk of the Court appealed from, as provided by R.S.C. c. 105, s. 67, it becomes a judgment of the latter Court, and it is not necessary to obtain leave to issue an execution to enforce the payment of costs awarded to the applicant by the said judgment.

Ex parte Jones, 35 N.B.R. 108.

—Chattel mortgage—Creditors' Relief Ordinance—Priorities.]—Held (Wetmore, J., hesitante), that executions against goods placed in the hands of a sheriff subsequently to the making of a chattel mortgage by the execution debtor, on the goods seized, attach only on the equity of redemption and are not entitled under the Creditors' Relief Ordinance to share with executions placed in the hands of the sheriff prior to the giving of a mortgage. Roach v. McLachlan, 19 A.R. 496, and Breithaupt v. Marr, 20 A.R. 689, followed.

Howard v. High River Trading Co., 4 Terr. L.R. 109.

—Costs of execution.]—The costs incurred upon a writ of execution against the movable property of the debtor and upon a seizure by garnishment, may be added to the costs of suit for the purpose of justifying the issuing of a writ against immovable property.

Lamothe v. Wigney, 19 Que. S.C. 201 (Lavergne, J.).

—Notice — Seizure — Custodia legis — Abandonment.]—Goods were seized under execution by the sheriff, who left them in possession of the judgment debtor's wife, who claimed to be the owner, upon her agreeing to hold them for him. Some months after the sheriff, under the same writ, took the goods, which were then in the possession of the claimants, Thompson & Nelson. They claimed to have bought from one Hodgson, who claimed to have bought from the wife after the original seizure:—Held, in view of "The Administration of Civil Justice Ordinance, 1884," s. 83, that there was no abandonment by the sheriff; that he was right in resuming actual possession, and that, therefore, the execution prevailed over the claimants' title.

Brittlebank v. Gray-Jones, Thompson & Nelson, claimants, 1 Terr. L.R. 75.

—Chose in action—Seizure of—Execution —Creditor's action.]—The sheriff cannot sell under execution the interest of a partner in partnership assets; only the partner's interest in tangible property of the partnership on which he has levied can be sold. Whatever may be the case under R.S.O. 1897, c. 51, s. 58 (5), notice to the debtor of the assignment of a chose in action was not necessary under R.S.O. 1887 c. 122, ss. 6-12, in order to perfect the transfer as between assignor, assignee, and debtor, but it was to protect the assignee against further assignments or any other right of set off, and secure the debtor against other claims. A chose in action is not bound by execution put in the sheriff's hands, but only by seizure made thereunder. A creditor not suing on behalf of all but seeking preferential payment out of a chose in action assigned by a debtor not shown to have been insolvent at the time of transfer and held by a bank for a valid debt cannot impeach the assignment as contrary to the Bank Act.

Rennie v. Quebec Bank, 1 O.L.R. 303.

—Receiver — Equitable execution — Claim against Crown — Voluntary payment.] — Held, by a Divisional Court, Boyd, C., and Lister, J.A., reversing the decision of Meredith, C.J., 19 P.R. 227, that payment of the money in question was to be made by the Crown to the judgment debtor purely out of bounty, and was not enforceable by any Court, and was not to be made in pursuance of any contract; and therefore the money could not be reached by the judgment creditor by means of a receiving order.

Willcock v. Terrell (1878), 3 Ex. D. 323, distinguished. Steward v. Jones, 1 O.L.R. 34.

—Receiver—Equitable execution — Trustees—Rents.]—The Judicature Act, s. 58, sub-s. 9, does not give jurisdiction to appoint a receiver in cases where prior to that Act no Court had such jurisdiction. And, in order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act. Where the plaintiffs were judgment creditors of the defendant, and were also the trustees entitled to receive the rents and other property in respect of which they asked that they should be appointed receivers, to which the defendant was beneficially entitled:—Held, that there was no impediment in the way of their receiving such rents and other property, and their motion for an order appointing them receivers was unnecessary.

O'Donnell v. Faulkner, 1 O.L.R. 21.

—Covenant for use of hay on the premises —Rights of execution creditor of tenant.] —Plaintiff leased a farm as a dairy farm

and a number of cows, the lease containing the following clause: "All the hay, straw and corn stalks raised on the . . farm to be fed to the said cows on the said . . farm:"—Held, that while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle and consumed on the premises, and that he could not have the beneficial use of it or take it off the farm, and an execution creditor of his had no higher right than he had.

Snetzinger v. Leitch, 32 O.R. 440.

—**Sale under mortgage—Collateral security—Execution creditors.**]—Execution creditors, though they probably cannot sell under their writs the interest of their execution debtor in land subject to more than one mortgage made by him, are nevertheless, encumbrancers, upon that interest, and upon the proceeds thereof in the event of a sale of the land by a mortgagee, and entitled to payment thereout according to priority. A mortgagee who sells the land and pays off an encumbrancer who holds, to his knowledge, collateral security, must take over that collateral security for the benefit of subsequent encumbrancers, including execution creditors, and is liable to them for the value thereof if he fails to do so.

Glover v. Southern Loan and Savings Company, 1 O.L.R. 59 (C.A.)

—**Sheriff's sale—Purchase by husband of owner—Immovables.**]—The husband separated as to property may validly purchase at sheriff's sale an immovable belonging to his wife, and if he fails to pay the price of adjudication, is subject to the usual proceedings, for folle enchère.

Buchanan v. O'Brien, 18 Que. S.C. 343.

—**Sheriff's sale of immovables—Minutes of seizure—Arts. 706, 741, 743 C.C.P.**]—1. The formalities prescribed by Arts. 706, 741 and 743 of the Code of Procedure, for the sale of immovables by the sheriff, are imperative, and the omission in the procès-verbal or minutes of seizure of the name of the street in which the immovable is situated is a fatal defect which annuls the sale. 2. Where the exceptions mentioned in Art. 741, C.C.P., do not apply, a sale of an immovable commenced at the registry office and terminated at the sheriff's office, instead of being made at the door of the parish church of the locality where it is situated, is null.

Sawyer v. Rioux, 18 Que. S.C. 173.

—**Writ of possession—Enforcement by sheriff—Claim of a third party to possession.**]—

See INTERPLEADER.

Hall v. Bowerman, 19 Ont. P.R. 268.

—**Opposition to secure servitude—Right of way—Hypothec.**]—

See EASEMENT.

Re Thompson, Hatton v. Masson, 19 Que. S.C. 218, 254 and 256.

—**Saisie-arret—Hire of movables—Right renewed—Opposition—Art. 651 C.C.P.**]—A third party, who has hired out effects seized and reserved his right to retake possession if the saisie has not regularly paid his instalments, may exercise such right by opposition to the seizure.

Farand v. Emond, 5 Que. P.R. 58 (Sup. Ct.).

—**Writ of execution—Costs—Tariff.**]—When a writ of execution is issued from the Superior Court the costs should be according to the amount for which it is issued, but if the amount is less than $100 then it is the tariff of the fourth class of the Superior Court which should be applied; but when the execution of the writ is not by an opposition taken to have it set aside on the ground that the amount due has been paid, and which opposition is maintained with costs, the fees of the attorney should be according to the sum claimed by the writ.

Morinville v. Baril, 20 Que. S.C. 327 (Sup. Ct.).

—**Distribution of moneys—Insolvency—Affidavit—Arts. 191, 672-4, 790, 824 C.C.P.**]—In the case of distribution of moneys, when there is an allegation of the insolvency of the debtor, it is not necessary to support such allegation by an affidavit, but the creditors should be summoned to file their claims before any distribution can be made.

Décarie v. Bro, 4 Que. P.R. 202 (Sup. Ct.).

—**Distribution of proceeds—Art. 793 C.C.P.**]—A motion asking for the payment of moneys realized on execution, according to a list of creditors mentioned in the motion and who would evade payment of the prothonotary fees, will be refused.

Evans v. Chaput, 4 Que. P.R. 199 (Sup. Ct.).

—**Seizure—Opposition.**] — Where effects seized are separately owned by several persons they cannot by a joint opposition each claim the article which belongs to him, especially if their respective ownership is not of the same character.

Hill v. Howley, 20 Que. S.C. 269 (Sup. Ct.).

—**Fieri facias — Goods — Liquor licenses —Covenant to assign license—Covenant running with the land — Interpleader—R. S. O. 1897, c. 245, s. 37.**]—A license under the Liquor License Act cannot be seized by a sheriff under a fieri facias against

goods. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into a license. The right to sell liquor at a particular place under such a license is a personal one, and is not assignable by the holder of it except under the conditions imposed by s. 37 of the Liquor License Act, R.S.O. 1897, c. 245.—Semble, a covenant in the lease of an hotel by the lessee that he will from time to time apply for a license, and at the expiration of the lease assign to the lessor the license, if any, then held by him, is not a covenant binding on the assignee of the term as such, being merely personal and having nothing to do with the land or its tenure.

Walsh v. Walper, 3 O.L.R. 158 (Div. Ct.).

—**Land Titles Act—Execution—Renewal—Refiling with registrar.**]—The Land Titles Act, 1894, s. 92, sub-s. 1, is amended by 63-64 Vict. (1900) c. 21, s. 2 (assented to July 7th, 1900), by the addition of a proviso, "that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the registrar . . . unless before expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him." This proviso is not retroactive so as to apply to a writ of execution, which would have expired, but was renewed before the 7th July, 1900; such a writ, therefore, remains in full force though a renewal thereof has not been filed with the registrar either before or after that date. The execution creditor in such a writ should consequently be notified of an application for the confirmation of a tax sale of land of the execution debtor.

Re Town of Prince Albert, 4 Terr. L.R. 510.

—**Saisie gagerie—Inscription en faux—Chose jugee.**]—A party may, without inscribing en faux against a procès-verbal of the seizing officer declaring that he has given to the defendant all the movables which he had a right to take care of, prove that he had not done so. A judgment declaring a saisie-gagerie valid, and ordering a sale of the goods seized, is chose-jugée on an opposition to set aside the seizure based on defects and irregularities therein.

Adams v. Mulligan, 20 Que. S.C. 251 (Sup. Ct.).

—**Costs of unsuccessful—Motion for leave to appeal.**]—An application to a Judge of the Court of Appeal for leave to appeal from an order of a Divisional Court having been dismissed with costs, the same were taxed and a certificate issued, which, with the order of dismissal, was filed in the High Court, and a fi. fa. issued to levy the amount of such costs placed in the sheriff's hands:—Held, that the order directing payment of costs was properly made under ss. 77 and 179 of the O. J. Act; and that execution was properly issued out of the High Court under Rule 3, by analogy to the procedure under Rule 818.

People's Building and Loan Association v. Stanley, 4 O.L.R. 247 (Meredith, J.).

—**Sale under fieri facias—Unassigned dower in equity of redemption—Share in equity of redemption.**]—A right of dower in an equity of redemption before assignment is not exigible under a writ of fieri facias; nor is the share of one of several tenants in common of an equity of redemption. Where a person dies possessed of lands mortgaged by him, his widow, before assignment of dower, though entitled to redeem, has no estate in the land, and is therefore not an "assign" of her husband, nor a "person having the equity of redemption" within s. 29 of the Execution Act, R.S.O. 1897, c. 77, and her interest does not come within s. 30 of that Act, and therefore is not saleable under it, nor under s. 33. In such a case an execution creditor seeking equitable execution should proceed under Con. Rules 1016, 1017 and 1018, and not by action.

Canadian Bank of Commerce v. Rolston, 4 O.L.R. 106 (Div. Ct.).

—**Appeal—Removing stay of execution—Rule 827—Discretion—Grounds for removal.**]—An appeal lies to the Court of Appeal from an order of a Judge thereof, in Chambers, under Rule 827, directing that the execution of the judgment appealed from shall not be stayed pending the appeal. Such an order is not a purely discretionary one; a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause. A Judge in Chambers, having ordered the removal of the stay upon the ground that the appellant's financial position was weak, his order was reversed by the Court, where the appeal appeared to be presented in good faith and on substantial grounds, and the effect of the execution would practically be to close up the business of one of the appellants.

Centaur Cycle Co. v. Hill, 4 O.L.R. 92 (C.A.).

—**Seizure of movables—Duty of caretaker.**]—The caretaker of movables seized who has removed them from the premises must return them to the saisi when the seizure has been set aside.

Adams v. Mulligan, 20 Que. S.C. 203 (Sup. Ct.).

—**Seizure by garnishment — "Decayed pilots' fund"—Alimentary debt—Art. 599 C.C.P.**]—A pension granted by the Mont-

real Harbour Commissioners to a sick pilot, from the "Decayed Pilots' Fund," is an alimentary allowance, and is exempt from seizure, under Art. 599, s. 9, C.C.P., except for an alimentary debt. (2) An alimentary pension can only be seized for an alimentary debt incurred while the pension is in force, and not for a debt incurred before the pension began to run.

Hamelin v. Perrault, 21 Que. S.C. 51.

—Third mortgage—"Exigible under execution"—Rule 903.]—A third mortgage upon real estate made by a judgment debtor is not a transfer of property "exigible under execution," within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver.

Canadian Mining and Investment Co. v. Wheeler, 3 O.L.R. 210.

—Seizure of movables and immovables—Opposition as to movables—Sale—Arts. 613-4, 649, 729 C.C.P.]—The plaintiff, having caused seizure to be made, at the one time of movables and immovables of the defendant and a third party having, by opposition, claimed the movables as his, may proceed to the sale of the immovables without waiting the result of the proceedings on the opposition, as he is not obliged to urge forward the inquiry as to the movables. The sheriff having before the return of the writ with his procedure and the opposition to the seizure of the movables, taken a copy of said writ and of the procès-verbal of the seizure of the immovable, may, without further authorization and without waiting for judgment on the opposition proceed to advertise the immovable for sale and to sell it.

Gaudreau v. Tétu, 20 Que. S.C. 402 (Sup Ct.).

—Saisie-arret—Insolvency of debtor—Arts. 692, 1036 C.C.P.]—That there may be ground for an opposition à fin de conserver in the insolvency of the debtor after judgment has been given on a saisie-arrêt it is necessary that the seizing creditor should have had knowledge of the insolvency.

Dansereau v. Bradshaw, 4 Que. P.R. 198 (Sup. Ct.).

—Saisie sur saisie—Seizure by coroner—Return—Second writ to sheriff—Arts. 35, 36 C.C.P.—Substitution—Non-seizability—Debt of testator—Art. 711 C.C.P.—Art. 935 C.C.]—The sheriff Pouliot obtained judgment against the defendant on which he issued a fi. fa. addressed to the coroner (Arts. 35, 36 C.C.P.), who seized defendant's immovables. On opposition to the seizure the coroner made return of the will, the opposition and all the proceedings Afterwards the plaintiffs, under their judgment, caused a writ of fi. fa. to be issued against defendant addressed to the sheriff who seized thereunder the same immovables:—Held, that the ancient maxim "saisie sur saisie ne vaut" only remains in force as modified by the Code of Procedure; that the sheriff was not obliged to note the second writ upon that addressed to the coroner; that Art. 711 C.C.P. did not apply to this case; and that the sheriff, on receiving the second writ, had no recourse but to seize since he was not in possession of the first which, moreover, had never been addressed to him. P. Michaud had bequeathed his property with full ownership and in perpetuity, to L. Michaud without reserve, constituting him his "universal legatee and as owner" from the day of testator's death, on the condition expressed that he could only dispose of said property for the benefit of his children, in portions equal or unequal as he should deem just when he would make a partition of his other property. L. Michaud accepted the legacy, and afterwards by his will, bequeathed all his property (except that received from P. Michaud) to his son, J. B. Michaud, the present defendant, "on the express condition that he shall preserve the above-mentioned property for his children, and divide it equally or unequally among them. . . . And, further, the testator desiring to discharge the trust contained in the will of the late P. Michaud . . . makes choice of his said son to receive the property left by the latter, and he therefore gives and bequeathes to him all the said property," and he adds that he wishes and intends that the property coming from the testamentary succession of P. Michaud "shall be preserved in the same manner as the property bequeathed by me under the present will." L. Michaud concluded his will as follows:—"I wish and intend that the enjoyment of the above property bequeathed to my son T. M shall be non seizable, and I declare that I give him this legacy for the purposes of maintenance (à litre d'ailments). L. Michaud, having died, his son accepted his will. Plaintiffs having obtained judgment against said T. Michaud, as universal legatee, for a debt contracted by his father, caused seizure to be made of immovables coming from P. Michaud. Defendant made opposition, claiming that this property was substitué for his children and invoking also the clause against seizure imposed by the will of P. Michaud:—Held, that the substitution decreed by the will of L. Michaud as to the property coming from P. Michaud, in favour of the defendant's children was valid, but that the decree could not purge the substitution; that defendant, who is the grevé, could not invoke this substitution by his opposition; that the clause against seizure of the goods

coming from P. Michaud, imposed by the will of L. Michaud, was valid and within the powers of the latter, but it could not be invoked against the lawful debts of L. Michaud, which defendant, as his universal legatee, is obliged to pay.

Richer v. Michaud, 20 Que. S.C. 442 (Sup. Ct.).

—**Seizure by sheriff—Bank notes paid in a bank—Property in the money.**]—A superannuated civil servant having presented his certificate at the wicket of a bank which paid superannuation allowances for the Government, the teller counted out the amount in notes and placed them on the ledge in front of the wicket, when, before the payee had touched it, the money was seized by a sheriff's bailiff under an execution against him:—Held, that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it. Judgment of the local Master at Ottawa affirmed.

Hall v. Hatch; Bank of Montreal v. Hatch, 3 O.L.R. 147.

—**Writ against land—Advertisement—Distribution—Costs of execution creditor—Creditors' Relief Act.**]—Where two writs of execution against lands were placed in the sheriff's hands on the same day, and, no further steps being taken by the first execution creditor, the second execution creditor directed the sheriff to advertise and sell the lands, which he did under the second execution creditor's writ:—Held that the advertisement was in law the seizure of the lands under the second execution creditor's writ; and, there being no seizure or sale under that of the first, the second was entitled, under s. 26 of the Creditors' Relief Act, R.S.O. 1897, c. 78, to payment in full of his taxed costs and the costs of his execution, which exceeded the amount of the residue of the proceeds of the sale after payment of the sheriff's fees.

McGuinness v. McGuinness, 3 O.L.R. 78.

—**Appeal to Privy Council.**]—Where leave to appeal has been granted by the Judicial Committee of the Privy Council, but no security for the costs incurred in the Courts below has been given, execution may issue for such costs pending the appeal.

Consolidated Car Heating Co. v. Came, 5 Que. P.R. 48.

—**Opposition to seizure—Right of debtor to withdraw effects—C.P. 598, 651.**]—An opposition to a seizure, based on the fact that some of the effects seized could have been withdrawn and selected by the debtor, must show that he was not allowed to select and withdraw them; otherwise it will be dismissed on motion.

Beaubien Produce and Milling Co., Ltd., v. Lecuyer, 5 Que. P.R. 71.

—**Opposition to seizure—Default to set up title to effects claimed.**]—On action to reject an opposition the title of the opposant to the effects claimed, and on motion by the opposant to amend by setting up that a delay will be granted to the opposant to amend her opposition by setting up her title and the date thereof, upon her paying such title: costs of both motions au préalable, and that in default by her of so doing with such delay, the opposition will stand dismissed.

Senecal v. Chappell, 5 Que. P.R. 72.

—**Judgment for part of amount demanded—Appeal by plaintiff.**]—A plaintiff who has obtained judgment for less than the amount demanded, and appeals from that judgment to have the amount increased, cannot, in the meantime, obtain an execution in satisfaction of the judgment so rendered.

Migneron v. Yon, 5 Que. P.R. 60.

—**Territories Real Property Act—Charging lands—Sale under execution—Indemnity to sheriff—Unregistered conveyances prior to execution.**]—T. was the sheriff's advocate and also advocate for a judgment creditor. On behalf of the judgment creditor he delivered to the sheriff an execution and a requisition to charge lands then registered in the name of the execution debtor as the said execution debtor's interest therein might appear. The lands were accordingly charged by the sheriff, under the provisions of the Territories Real Property Act as amended by 51 Vict. c. 20, s. 94, and advertised for sale under the execution. Subsequently, transferees of the lands registered deeds of conveyance dated prior to the execution, and served notices upon the sheriff forbidding the sale. T., following the decision given in re Rivers, 1 N.W.T. Rep. pt. iv. 66, which had not then been reversed, advised the sheriff to proceed with the sale notwithstanding the notices. Actions were then successfully prosecuted by the transferees against the sheriff and execution creditor and an order obtained restraining the sale proceedings and cancelling the execution as a cloud upon the titles. In these suits T. appeared as advocate for both the sheriff and the execution creditor and filed a joint defence, without interpleading for the sheriff, on the ground that the unregistered transfers were inoperative as against the execution. He also applied, without success to the trial Court, and again to the Court in banc, to have the sheriff's name struck out as a defendant in these suits. The sheriff did not appeal against the judgment in favour of the transferees and brought the present action against T. to recover damages for the amount of his costs on the ground that

T. had been guilty of negligence in advising as he did and in pleading the joint defence without interpleading:—Held, reversing the judgment appealed from, that T. had followed the approved practice in pleading the joint defence, that he was justified in assuming that the decision In re Rivers was correct, and, therefore, that he was not liable in an action for negligence. Held, also, reversing the judgment appealed from, that neither T. nor the sheriff was liable for tort in charging or advertising the lands for sale, as they were both acting in discharge of their respective duties,that as the proceeding by T. had been taken to secure to his client the fruits of his judgment, no implied indemnity arose on his part toward the sheriff in consequence of the proceedings taken, and, further, that neither the requisition nor the advice given by the advocate could be construed as an express indemnity by him to the sheriff against costs or damages in respect of the execution. In the action for damages, T. counterclaimed, first, for alleged overcharges made by the sheriff in bills previously paid to him for fees and charges in respect of matters in the sheriff's office wherein T. had acted as advocate for parties interested, and secondly, for costs in defending the sheriff in the suits brought by the transferees. In respect to the latter part of the counter claim it did not appear that T. had rendered a signed bill of his costs to the sheriff before filing the counterclaim. Held, that T. could not recover with respect to the first part of his counterclaim, as the moneys, if recoverable, did not belong to him but to the clients for whom he had acted, but that he was entitled to recover the reasonable charges in the second part of his counterclaim, notwithstanding the omission to render a signed bill of costs pursuant to the statute. Appeal allowed with costs.

Taylor v. Robinson, 31 Can S.C.R. 615.

—Garnishment before execution—Effect of.]—Where a creditor of the plaintiff, before execution against the defendant, caused a writ of garnishment to be served on defendant, such writ does not suspend the proceedings under the execution, unless the defendant deposits into Court the amount of the judgment with interest and costs.

Montambault v. Niquette, 4 Que. P.R 411.

—Exemptions from.]—See EXEMPTIONS.

—Assignment of property—Seizure of debtor's immovables and arts. 878, 879, C.C.P.]—After the assignment of property by a debtor for the benefit of his creditors, one of the creditors cannot in execution of the judgment that he has obtained against the debtor, cause to be seized and sold, without the consent of the curator of the other creditors, or of the Court, the immovables of such debtors, but the seizure and the sale of these immovables must be made on proceedings by the curator.

Burk v. Lewis, 8 Que. K.B. 517, discussed; Demers v. Gagnon, 11 Que. K.B. 498.

—Assignments and preferences—Judgment—Execution—Sheriff—Sale of land.]—Under a writ of fieri facias a sheriff seized the interest of a judgment debtor in certain lands and advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors pursuant to the provisions of R.S.O. 1897, c. 147. The assignee gave notice to the sheriff of the assignment and asked for a statement of the costs incurred to that time. No tender of the costs was made or undertaking given to pay them, and the sheriff proceeded with the sale and sold the land to the plaintiff. The assignee, notwithstanding the sheriff's sale, assumed to sell the lands to, and executed a conveyance in favour of, the defendant's son, who allowed the defendant to remain in possession as his agent:—Held, that the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, and that the sale by the assignee was nugatory and void and the sheriff's vendee entitled to possession of the land.

Elliott v. Hamilton, 4 O.L.R. 585 (Britton, J.).

—Judge's order for costs—Direction for set-off—Service of allocatur—Production of order.]—Where a Judge's order requires the defendant to pay interlocutory costs to the plaintiffs, and the Judge makes an oral direction that costs previously awarded to the defendant should be set off pro tanto, the deduction should be made before execution issues on the Judge's order. It is not necessary to serve the certificate of taxation of the costs awarded by an order, where the party to pay has been represented upon the taxation and has notice of the amount payable. When execution is issued upon a Judge's order, the order itself or an office copy should be produced to the officer issuing it; a mere copy is not sufficient, unless such officer is the one who has official custody or access to the book in which the order is entered.

People's Building and Loan Association v. Stanley, 4 O.L.R. 644 (Div. Ct.).

—Patent of invention.]—A patent of invention issued by the Dominion Government may be seized under execution.

Farand v. Emond, Q.R. 23 S.C. 2 (Sup. Ct.).

—**Life rent in favor of donor himself not exempt from seizure.**]—A life rent constituted by the donor of immovable property, in his own favor and secured by hypothec, does not fall under the provisions of paragraph 4, Article 599 C.P.; and is not exempt from seizure by creditors of the donor.

Bradford v. Lasnier, 24 Que. S.C. 53, (Lynch, J.).

—**Judicial sale—Irregularities—Addition made to seized goods on day of sale—Sale en bloc at request of debtor.**]—A portion of a debtor's stock-in-trade having been seized under a writ of execution, the bailiff, on the day fixed for the sale, added other goods of the debtor to the list of those seized, and, at the request of the debtor, who was desirous of repurchasing his stock-in-trade, sold the entire stock en bloc. The proceeds of the sale were distributed among the creditors in due course of law. The debtor having, shortly afterwards, made an abandonment of his effects, his curator, by the present action against the purchaser at the bailiff's sale, sought to have the sale annulled as irregular and void, and the goods returned, or their value paid to the plaintiff:—Held, that, although the sale was irregular, and improperly included goods which had not been seized or advertised for sale, yet the purchaser having acted in good faith and even offered to retransfer the goods, the price being a reasonable one, and the proceeds distributed according to law, and the creditors, moreover, having suffered no injustice in consequence of the irregularity of the proceedings, the sale should not be annulled.

Bernier v. Depocas, 24 Que. S.C. 70, (Davidson, J.).

—**Resale upon false bidding—Sheriff's fees—Double commission and tax.**]—When a property is resold upon false bidding, the sheriff is only entitled to one commission and tax, as if there had been but one sale.

Nieuwenhuyse v. Town of Farnham, 5 Que. P.R. 160 (Lynch, J.).

—**Failure of sheriff to sell under—Reduction and measure of damages.**]—A partnership existing between C. and S. was dissolved, C. taking all the assets and assuming all the liabilities of the firm:—Held that, in the absence of fraud, the goods of the firm were effectually transferred to C., and were subject to an execution placed in the hands of the defendant sheriff with instructions to levy upon and sell the goods of C. Defendant, after having levied upon the goods under plaintiff's execution, sold the goods under two executions placed in his hands subsequently, and paid over the proceeds to the creditors at whose instance such executions were issued. Held, that he was liable to plaintiff in damages for so doing. Held, that defendant was not to be held liable for depreciation resulting from delay in selling occasioned by the act of the court. Held, that the case was not one for punitive damages, or for other damage than the actual value of the goods at the time of the sale.

Crowe v. Buchanan, 36 N.S.R. 1.

—**Sheriff's fees—Poundage—Money paid before sale—Possession money.**]—Where a sheriff made a seizure under writs of fieri facias of personal property of the judgment debtor; and a few hours before the sale the judgment debtor come to him and paid the judgment debts in full:—Held, that the sheriff was entitled to poundage on the full amount of the judgment debts, and not merely on the value of the property seized. Held, also, that under the circumstances of this case $2.25 per day was not too much to allow for possession money.

Re Black Eagle Gold Mining Company, 6 O.L.R. 512, Falconbridge, C.J.K.B.

—**Statute of limitations.**]

See LIMITATION.

Lefurgey v. Harrington, 36 N.S.R. 88.

—**Notice of action—Bailiff—Art. 88 C.P.Q.**]—The bailiff who proceeds to sell movables which he has seized under execution exercises public functions, and if he is sued for damages on account of what he did in these circumstances he is entitled to the notice mentioned in Art. 88 C.P.Q. A public officer is entitled to such notice as well when he is sued for an act of omission as when it is for an act of commission.

Dion v. Richard, Q.R. 23 S.C. 403 (Cir. Ct.).

And see Lachance v. Casault, Q.R. 12 K.B. 179.

—**Costs distraits—Consent of attorney—Opposition.**]—To enable a party to levy an execution against his attorney for costs distraits de plein droit in favour of the attorney of the execution creditor it is necessary that the consent of the attorney should appear in writing on the fiat, the writ of execution and the procés-verbal of the seizure. If the written consent does not appear as above stated the party levying is not the creditor of these costs and cannot make a seizure in his own name; hence an opposition to the seizure based on such default is well founded and must be maintained (Arts. 555 C.P.Q.; 59 R.P.S.C.)

Martin v. County of Arthabaska, Q.R. 23 S.C. 297 (Ct. Rev.), reversing 22 S.C. 302.

—**Nullity of sale in execution—Sale after dismissal of opposition, but before expiry of time for appealing.**]—The appellant company having its chief place of business in the Province of Ontario sold machinery to Kelly Bros. of Joliette, reserving the right of ownership thereof. This machin-

ery was put into a mill which, with the machines, was seized in a suit by the curator of the abandoned estate of Kelly Bros. and of a creditor of one of the insolvents, and appellant filed an opposition which was contested by the respondent and was dismissed by the Superior Court. About four months after the Superior Court judgment the present appellant took an appeal to the Court of Queen's Bench which maintained the opposition, this judgment being affirmed on further appeal by the Supreme Court (27 Can. S.C.R. 406). Nevertheless in the meantime, between the judgment dismissing the opposition and the appeal, the execution creditor obtained a writ of venditioni exponas from the prothonotary by the intervention of a prete-nom of the respondent, the curator caused a decree to be made by the Judge for the sale of the mill and machines. The sale took place subsequent to the appeal, but the appellant had no knowledge of it till after having obtained the Supreme Court judgment and, at such sale, the respondent became purchaser of the mill and machines and subsequently disposed of them:—Held, reversing the judgment of DeLorimer, J. (Blanchet, J., dissenting), that the respondent, to which the appellant had made known his ownership of the machines and the nullity of the seizure thereof which had been made, could not by obtaining the decree and becoming purchaser, make title against the appellant, and that, by disposing of the machines as belonging to the bank, the respondent became responsible for their value towards the appellant.

Waterous Engine Works Co. v. Banque d'Hochelaga, 12 Que. K.B. 258.

—**Exemption under B.C. Homestead Act—Thing seized of a value over $500.**]—Held, in an interpleader issue, that the execution debtor was entitled, as an exemption under the Homestead Act, to $500 out of $1,000 realized by the sheriff on the sale of a steamship, the only exigible personalty of the debtor. Vye v. McNeill (1893), 2 B.C.R. 24, approved. Semble, notice of claim of exemption is necessary.

Yorkshire v. Cooper, 10 B.C.R. 65.

—**Return of nulla bona and nullae terrae—Right of prothonotary to re-address writ to another sheriff.**]—1. If the sheriff to whom a writ of execution is addressed makes a return of nulla bona and nullae terrae, the prothonotary has not the right to re-address the writ to the sheriff of another district by an addition in the margin. (2) An opposition to the sale of a portion of a railway seized under a writ of execution will not be dismissed upon demurrer on the ground that there is no formal allegation that the portion of the railway so seized does not constitute a section as this may be shown by the evidence.

Atlantic and Lake Superior Railway Co. v. Dillon, 5 Que. P.R. 191.

—**Sale by sheriff—Conditional debt—Opposition by execution debtor.**]—Upon a sale by the sheriff the execution debtor has the right of contesting the collocation of a hypothecary creditor whose debt is conditional but who is collocated as an ordinary creditor, because, if the condition does not happen, the creditor having received the money and furnished no security as required from a conditional creditor, the debtor would possibly be left without recourse for the money thus paid over.

Benoit v. Ste. Marie, 5 Que. P.R. 222.

—**Sheriff's sale of land—Lease for one year.**]—A lease for one year, whether registered or not, does not constitute a charge on the immovable leased and gives no right to the lessee to make an opposition a fin de charge when the immovable is advertised for sale by the sheriff.

Lantaigne v. Skelling, Q.R 22 S.C. 304 (Sup. Ct.).

—**Lien of execution creditor—Expiry of writ—Preservation of Lien—Notice—Bona fide purchaser for value.**]—In proceedings for partition under the Partition Act by a tenant in common, the fact that a judgment creditor having a fi. fa against the lands of another tenant in common in the hands of the sheriff is made a party respondent to the petition and that an order allowing the petition has been made and a certificate thereof registered is not sufficient to preserve a lien on the debtor's undivided share, the fi. fa. having in the meantime expired. The allowance of a petition has not the force of a judgment or order establishing the claims of any of the parties. At the date of the filing by the plaintiff of a petition for partition the defendant company had in the hands of the sheriff a writ of execution against the lands of the defendant L., who was entitled to an undivided interest in the lands sought to be partitioned, and their lien by virtue thereof was still in existence at the date of the allowance of the petition to which they were made parties, and the registration of a certificate thereof, but their writ, not having been renewed, expired before the date of a conveyance by the defendant L. to the defendant G., a bona fide purchaser for value:—Held, that the company's lien was not preserved by the proceedings taken before the conveyance to G., and that she was not affected with notice of the lien. The company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the Court recognizing their claim as an existing one against the lands.

Macdonell v. Best, 6 O.L.R. 18 (Moss, C.J.O.).

—**Seizure of books of account—Assignment of debts.**]—A ledger or account book containing a list of debts which have been assigned in writing and which are described in the writing as "All the debts in a certain ledger marked A," is a mere incident to the debts, and is no longer a chattel as it was before the entries were made in it. It is, therefore, not seizable in execution against a judgment debtor, the former owner of the debts, as against the person to whom they have been so assigned by him.

Corticelli Silk Co. v. Balfour, 5 Terr. L.R. 385 (McGuire, C.J.).

—**Exemptions Ordinance—Sale of homestead—Mortgage taken in part payment.**]—The Exemptions Ordinance, C.O. 1898, c. 27, s. 2, sub-s. 9, declares the following real property of an execution debtor and his family free from seizure by virtue of all writs of execution, namely: (9) "The homestead, provided the same is not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon:"—Held, that mortgage moneys, forming part of the proceeds of the sale of the defendant's homestead, do not come within this provision. This provision exempts the homestead only so long as it remains a homestead, and where the debtor has voluntarily disposed of it the language of the ordinance is not wide enough to extend the exemption to the proceeds, unless they are reinvested in other exempt property before a creditor has acquired a charge or lien upon them.

Massey-Harris Co. v. Schram, 5 Terr. L.R. 338.

—**Liability to seizure—Declaration d'emploi—Registration.**]—A declaration alleging that property had been acquired by means of money bequeathed to the owner on condition that it would not be subject to seizure can be made in opposition to the claim of a creditor though it was not registered until after the debt accrued.

Baird v. Murphy, Q.R. 23 S.C. 497 (Ct. Rev.), affirmed by Court of King's Bench, 23rd April, 1903.

—**Legacy for maintenance.**]—Money bequeathed by way of maintenance (a titre d'aliments) and declared to be non-seizable and inalienable, cannot be seized under execution for a debt for maintenance contracted before the will containing such legacy was made.

Kelly v. Mason, Q.R. 23 S.C. 97 (Cir. Ct.).

—**Gift from husband to wife—Possession—Married Woman's Property Act.**]—The defendant purchased certain pictures between 1895 and 1898, and bringing them home handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother, and all were hung up in the house occupied by her and her husband. An execution creditor of the defendant caused the sheriff to levy on them:—Held, that since the Married Woman's Property Act, 1884 (R.S.O. 1897, c. 163, s. 3), a married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband; and that here the subsequent possession of the pictures was the wife's, although the house was occupied by her husband and herself. Held, also, that the effect of sub-s. 4 of s. 5 of R.S.O. 1897, c. 163, enacting that a woman married since 1889 may hold her property free from the debts or control of her husband, "but this sub-section shall not extend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from the husband during marriage liable to the husband's debts.

Shuttleworth v. McGillivray, 5 O.L.R. 536 (D.C.).

—**Sale by auction—Sale of real estate in several blocks.**]—The sheriff cannot, under the provisions of Arts. 6 and 7 of the tariff and Art. 706 C.C.P., claim more than a fee of fifty cents for each additional immovable included in a seizure, and if different lots seized merely constitute one and the same immovable property he has only a right to charge a fee of fifty cents for each additional lot seized.

Gault v. Duford & The Sheriff of Montreal, 5 Que. P.R. 353.

—**Reformation of judgment after opposition—Writ of execution—Return by Sheriff—Writ remitted by order of court.**]—On 29th June, 1900, plaintiff obtained judgment against defendant, ex parte, for $500 damages and $78.36 costs. On 25th July, 1901, plaintiff seized lot No. 1010 St. Sauveur, in execution of this judgment for debt, interest and costs. On 3rd September, 1901, opposition to judgment was filed and certificate thereof left with the sheriff who, on 4th September, made his return on the writ accordingly. The opposition denied nearly all the allegations of the declaration in the action and confessed judgment for $50 and costs of an action for $1,000. On 15th April, 1902, the second judgment was affirmed, on review. On 17th July, 1902, the plaintiff caused the same immovable to be seized anew for the costs granted by the second judgment. On 21st August, 1902, the defendant paid these latter costs and obtained a discharge of this second seizure. On the same day (21st August, 1902), the opposant, Laberge, bought the lot from the defendant. On 22nd August, the sheriff on request of the plaintiff stayed his proceedings and returned the second writ. On 23rd August, the plaintiff's attorney de-

livered the first writ of execution again to the sheriff with an indorsement to the effect that the judgment of $500 had been reduced to $50, and that he required execution merely for the $50. On 10th September, 1902, Laberge made an opposition afin d'annuler as proprietor of the lot of which the sheriff gave notice of sale. The plaintiff contested this opposition. On 16th June, 1903, the Superior Court dismissed the opposition. The Court of Review reversed this latter judgment and held (1), that the seizure in virtue of the writ of execution of the ex parte judgment for $500 had ceased to be valid and binding when that judgment was reformed on opposition by a second judgment which maintained the opposition and condemned the defendant only to pay the $50 which was confessed to be due. (2) Such seizure having become effete could not be executed under the same writ for the latter amount and the defendant could dispose of the lot notwithstanding such seizure after the judgment maintaining the opposition. (3) A writ of execution which has been returned into Court by the sheriff upon the filing of a certificate of production of an opposition to judgment, cannot, afterwards, be taken out of the record of which it forms part for re-delivery to the sheriff with instructions to continue his proceedings thereon without authorization of the Court or a Judge.

Demers v. Defresne, 5 Que. P.R. 465.

—Seizure of immovable—Opposition a fin d'annuler.]—The intervenant, having obtained judgment against one Vendette, caused to be seized under execution thereon, an immovable of which the latter was in possession and the plaintiff opposed the seizure by opposition a fin d'annuler, claiming to own the immovable by purchase from Vendette. The intervenant contested the opposition alleging the sale to the plaintiff to be fraudulent. The opposition was maintained by the Superior Court whose judgment, however, was reversed by the Court of Review, which dismissed the opposition, confirmed the seizure, and ordered the immovable to be sold under writ of venditioni exponas. In pursuance of this decree the immovable was sold to one Champagne, and sold by him to the defendant. After the judicial sale, but within the time limited for appeal, the plaintiff appealed to the Queen's Bench from the judgment of the Court of Review, and desiring to give security for the costs of the appeal only, signed the declaration required by Art. 1214 C.P.Q. consenting to execution of the judgment against her The Court of Queen's Bench reversed the judgment of the Court of Review and restored that of the Superior Court. The plaintiff then brought the present action against the defendant for revendication of the immovable ordered to be sold, and the intervenant, seizing creditor, intervened and contested such action:—Held, that the seizure having been made against a person in possession animo domini and the decree pronounced after all the legal formalities had been observed, and before the plaintiff instituted her appeal, such decree was valid and deprived the plaintiff of her right of ownership which right was reduced to a claim for the price for which the property was sold.

Renaud v. Denis & Pilon, intervenant, Q.R. 23 S.C. 16 (Ct. of Review).

See also the case of The Waterous Engine Works Co. v. La Banque d'Hochelaga, Q.R. 12 K.B. 258.

— Registered judgment—Fraudulent conveyance.]—See FRAUD.

Roberts v. Hartley, 14 Man. R. 284.

—Levy on mining interests.]—See MINING.

—Seizure of railway.]—See RAILWAY.

—Lands—Renewal —Limitations Act—Lien.]—An execution against an existing interest in lands ceases to be a lien thereon in ten years from the time of its delivery to the sheriff even though it has been duly renewed from time to time and kept in force continuously, and sale proceedings cannot be taken under it after that time. Judgment of Street, J., affirmed.

Re Woodall, 8 O.L.R. 288 (D.C.).

—Sale of property en bloc—Discretion of sheriff.]—A quantity of gold mining machinery, consisting of boilers, engine, stamps, etc., was sold by the sheriff en bloc, under execution, against plaintiff company:—Held, that the method of sale, whether en bloc or otherwise, is a matter in the sound discretion of the sheriff, to be determined in each case by the particular facts, and that the question, whether, in view of the particular facts, he has acted oppressively, must be determined in an action against him. Also, that the equitable rule that where there is an adequate remedy at law, the court will not exercise its equitable powers, was applicable to the state of affairs in this case. Quaere, whether, even where the action of the sheriff is oppressive, the sale can be set aside as against an innocent purchaser, as irregular and void. Part of the property sold consisted of machinery ordinarily used in connection with a gold mining mill. The evidence showed that the boiler could only be lifted out of its place by pulling off the top of the wall and that portion of the wallover the lugs of the boiler; also, that the mortar was connected to a foundation of cement and timber extending down to bed rock by a number of iron bolts 30 inches in length. Held, reversing the judgment of the trial Judge on this point, that the mill was a fixture and part of the real

estate, and therefore not liable to be levied upon and sold by the sheriff as personal property. Held, also, that the effect of the abandonment of their action as against the sheriff, by plaintiffs, was not to release their action against the remaining defendants.

Liscomb Falls Mining Co. v. Bishop, 36 N.S.R. 395.

—**Interpleader—Interest of execution debtor as co-owner.**]—A sheriff acting under the plaintiff's execution entered upon the lands of the claimant and seized hay and oats alleged to be the property of the execution debtor. The owner of the land asserted that he was absolute owner of all the hay and oats seized. The execution creditor alleged that the execution debtor was entitled to a one-half interest therein. —Held, that the sheriff was entitled to an interpleader order; the issue to be framed so as to determine whether the execution debtor had any, and if so what, interest in the hay and oats seized.

Lucas v. Holliday, 8 O.L.R. 541 (D.C.).

—**Sheriff — Seizure of land — Mortgage—Prior assignment — Contestation.**] — The right of a sheriff to an interpleader order depends upon either having the subject matter of the interpleader in his possession or having the right under an execution accompanied with the intention to take possession. And where an execution debtor, who was a mortgagee of lands, had assigned the mortgage, which was not registered until after the notice of seizure required by s. 24 of the Execution Act R.S.O. 1897, c. 77:—Held, that the mortgage could not be seized under the provisions of s. 23 et seq. of that Act, and that the sheriff could not proceed until the execution creditors had in an action obtained a declaration that the assignment was void and that he could not interplead.

Keenan v. Osborne, 7 O.L.R. 134.

—**Land exemptions—Conveyance in trust.**] —The defendant Mrs. Rea who lived on the property in question, conveyed it to her son without consideration because she thought she might thereby prevent the sale of the land to realize the plaintiff's claim, and both she and her son admitted that fact in this action and that the property was the mother's and that the son had no interest in it. The plaintiff sought a declaration that the land belonged to the mother and that the son held it only as trustee for her and asked a sale of the land to satisfy the lien of his registered judgment:—Held, that the plaintiff was entitled to the declaration asked for but not to a sale, as the property was exempt under s. 9 of the Judgments Act, R.S.M. 1902, c. 91, it being the actual residence and home of the judgment debtor, and not worth more than $1,500. Roberts v. Hartley (1902), 14 M.R. 284, and Merchant's Bank v. McKenzie, (1900), 13 M.R. 19, distinguished on the ground that there both the grantor and grantee united in asserting the reality of the transfer and neither alleged nor proved any trust in favor of the grantor.

Logan v. Rea, 14 Man. R. 543.

—**Seizure of immovable—Sale subject to charges—Insufficient description.**]—When an immovable seized is annouced for sale subject to charges not sufficiently described—in this case to charges created by deed of which the date was mentioned, and the name of the notary with no statement of the nature of the charges—the defendant against whom the seizure was made may oppose the sale by way of opposition afin d'annular.

Corbeil v. Dangenais, Q.R. 13 K.B. 205.

—**Exemption from seizure—Carter—Agriculturist.**]—A contractor who uses his horse in carrying on the work under contract, is not a carter, and cannot, as such, oppose the seizure of the horse. A debtor engaging in divers occupations can claim exemption from seizure only of the implements employed in his main business. Exemption of two horses or two working oxen is only given by law to the agriculturist whose chief occupation consists in the culture of his farm.

McManamy v. Pelletier, Q.R. 24 S.C. 127 (Cir. Ct.).

—**Seizures—Rights of two guardians.**]—The second seizing creditor is only bound to appoint the same custodian as the first when the debtor has been dispossessed of the effects seized. The two custodians appointed on different seizures who have allowed the debtor to retain possession of the effects may, either of them, take possession at any time before sale. If they both wish to have possession, the court, on petition therefor, will determine their respective rights, granting such possession however, unless sufficient grounds against it are presented to the custodian appointed in the case in which the sale should have first taken place.

Couture v. McManamy, Q.R. 24 S.C. 357 (Sup Ct.), affirmed on review 31st May, 1904.

— **Seizure of tools — Exemption — Opposition.**]—The workman who demands the withdrawal of a seizure of necessary tools should not ask for costs against the seizing creditor, as the bailiff making the seizure could not distinguish between tools which the debtor was entitled to reclaim and other tools.

Cunningham v. Guilbault, 6 Que. P.R. 75.

—**Effectual levy—Claimant's action for trespass.**]—Goods seized by the sheriff

under an execution, at the suit of B. v. R., were claimed by E. R., the wife of R., as her property. After a formal levy it was arranged between the sheriff and E. R. that she should hold the goods for the sheriff until they were required for sale under the execution. After the seizure, and before sale, a suit was commenced by E. R. against the sheriff, and a declaration was filed containing two counts: 1st, for seizing, taking away and converting the plaintiff's goods; 2nd, for detention. Part of the goods seized were sold, and part released:—Held, that a verdict for the full value of the goods sold was proper, though the sale did not take place until after the commencement of the action. That, as far as the sheriff was concerned, the levy was effectual and complete.

Rideout v. Tibbits, 36 N.B.R. 281.

—**Possession—Undivided property.**]—An execution creditor can only cause to be seized the movable property in possession of the debtor. A third party, one of the owners of undivided movables seized in proceedings against his co-owner, can prevent the sale of the same to the extent of his rights therein.

Turner v. Bradshaw, 6 Que. P.R. 184, (Mathieu, J.).

—**Plaintiff acting for bailiff in seizing under execution.**]—Under sections 82 and 83 of the County Courts Act, R.S.M. 1902, c. 38, before the amendment of section 83 at the session of 1904, a seizure under execution made by the execution creditor himself under the authority of the bailiff was not unlawful or invalid (Richards, J., dissenting). Where wood piles were seized under execution and notices of the seizure attached to the different piles, and a person living near asked by the plaintiff to look after them, and a week or two later the bailiff came and placed the same person in charge, it was held that there was no abandonment of the seizure.

Huxtable v. Conn, 14 Man. R. 713

—**Judicial sale—Interest of owner.**]—After the sale under decree of the immovable of which he had been owner, the debtor has no interest to entitle him to have the immovable relieved of a hypothec which he claimed to have been illegally registered, and could not, therefore, maintain an action for such purpose.

Karentz v. Leveille, Q.R. 24 S.C. 537 (Sup. Ct.).

—**Necessaries—Gifts to wife.**]—A fur coat may be a necessity for a man of a certain age and social standing, and, therefore, non-seizable under the provisions of Art. 598 C.P.Q. The right of retention claimed by one who has repaired such a coat does not authorize the creditor to cause it to be seized under writ of execution. A man being obliged to furnish clothes for his wife, necessary garments given to his wife during coverture do not come within the prohibition as to husband and wife conferring benefits on each other, and these garments from time to time delivered to the wife become her individual property, and are therefore not liable to seizure for her husband's debts.

Robertson v. Honan, Q.R. 24 S.C. 510 (Sup. Ct.).

—**Seizure—Liability of guardian.**]—The guardian appointed on a seizure is discharged from liability from the time that he delivers the effects seized to a bailiff directed to sell them, and, if the bailiff does not sell all, the guardian is not responsible for those unsold.

Gingras v. Parent, Q.R. 25 S.C. 271 (Sup. Ct.).

—**Division court execution against land.**]

See DIVISION COURT.

Turner v. Tourangeau, 8 O.L.R. 221.

—**Homestead exemption.**]—The Exemption Ordinance, c. 45, R.O. 1888, s. 1, sub-s. 9, exempted from seizure under execution the homestead, to the extent of 160 acres, of the execution debtor. This sub-section having been declared ultra vires of the Legislative Assembly in Re Claxton, 1 Terr. L.R. 282, the Dominion Parliament by 57 & 58 Vict. (1894), c. 29 (D.), declared that the territorial legislation on this subject "shall hereafter be deemed to be valid, and shall have force and effect as law."—Held, that an execution filed against the homestead of the defendant prior to the passing of the validating statute constituted—but that an execution against the lands of the defendant filed subsequently to the passing of the said Act, did not constitute—a charge upon the homestead.

Massey v. McClelland, 2 Terr. L.R. 179.

—**Renewal—Seizure—Registration of writ—Transfer in fraud of creditors.**]—The Judicature Ordinance (No. 6 of 1893), s. 327, enacted: "Every writ of execution shall bear date of the day of its issue, and shall remain in force for one year from its date (and no longer, if unexecuted, unless renewed), but such writ may, at any time before its expiration, and so on from time to time during the continuance of the renewed writ, be renewed by the party issuing it for one year from the date of such renewal, etc. This section was amended by Ordinance No. 5 of 1894, s. 12 (which came into effect 7th September, 1894), by substituting "two years" for "one year" in both instances:—Held, that the amendment could not be construed as reviving or enabling an execution to be revived which had expired before the amendment was passed, nor as continuing in force for two

years an execution which had been renewed only for one year. The registration by the sheriff of a writ of execution against lands in the Land Titles Office under s. 94 of the Territories Real Property Act, as amended by s. 16 of 51 Vict. c. 20, cannot be construed as a seizure, and is not sufficient to continue the execution in force without renewal. An execution issued on 20th October, 1893, was renewed on 20th October, 1894. Held, that the renewal was made in time and the execution continued in force. In an action to set aside a conveyance of lands as a fraud upon creditors, if the action is not brought on behalf of all the creditors of the debtor, the plaintiffs must show that they have obtained both judgment and execution, and if their executions have lapsed for want of renewal before the commencement of the action, the action will fail. A. D. made a homestead entry on certain lands, but by mistake his homestead duties were performed on adjoining lands. The government cancelled his entry, but agreed to sell the lands to the nominee of A. D. at $1.00 an acre. In pursuance of this agreement the lands were sold by the government to one Alloway, as A. D.'s nominee, and Alloway received a patent for the same:—Held, that Alloway held the lands as trustee for A. D., and that a transfer of the lands from Alloway to the defendant, the wife of A. D., for which the defendant gave no consideration, and which was made at a time when A. D. was, to the knowledge of the defendant, in insolvent circumstances, should be set aside as fraudulent and void. A letter written by A. D. to one of the plaintiffs subsequently to the date of the transfer attacked, was held to be inadmissible as evidence against the defendant.

McDonald v. Dunlop (No. 2), 2 Terr. L.R. 238.

—Opposition afin de charge—Order for security.]—An order requiring opposants afin de charge to furnish security that lands seized, if sold in execution subject to the charge, should realize sufficient to satisfy the claim of the execution creditor was held to be interlocutory and non-appealable (33 Can. S.C.R. 340). Subsequently, upon default to furnish such security, the opposition was dismissed. On appeal from the judgment of the Court of King's Bench affirming the order for the dismissal of the opposition:—Held, that, under the circumstances, the order dismissing the opposition was the only one which could be properly made, and that the merits of the former order could not be reviewed on appeal from the final judgment.

Desaulniers v. Payette, 35 Can. S.C.R. 1.

—Seizure by notice—Exemption from seizure—Option of debtor.]—A seizure of goods under an execution and a notice that goods 20 miles away in the same bailiwick belonging to the same execution debtor are under seizure do not operate as a seizure of the latter goods. Quære, whether a debtor's right of exemption is absolute or a privilege to be exercised within two days: Sehl v. Humphreys (1886), 1 B.C.R. (Pt. 2) 257 and in re Ley et al. (1900), 7 B.C.R. 94, questioned in this regard. Semble, goods cannot be seized by telephone.

Dickinson v. Robertson, 11 B.C.R. 155.

—Sale of goods under fi. fa.—Liability of sheriff for acts of his bailiff—Satisfaction of judgment.]—1. Notwithstanding the provisions of section 21 of The Executions Act, R.S.M. 1902, c. 58, a sale of goods by a sheriff's bailiff under fi. fa. was, under the circumstances of the case, held to have been good, although made immediately after seizure and without the notice required by that section. 2. A sheriff is responsible for all money realized by his bailiff by a sale under a fi. fa., though the money be stolen from the bailiff as a result of his carelessness and never comes to the sheriff's hands. 3. A seizure by a sheriff of sufficient goods to satisfy a judgment in part will be a discharge to the debtor as to such part. 4. When the goods seized are subject to a chattel mortgage the sale of the goods themselves, instead of only the equity of redemption, will be good unless objected to by the mortgagee. 5. It is not an absolute rule that a sheriff's sale under execution must be for ready money; but, if the sheriff does not comply with such rule, he will be responsible for the money if he fails to collect it. 6. The fact that the sheriff failed to comply with section 25 of The Executions Act, by advertising the amount realized and keeping the money to be distributed rateably, is no answer to the defendant's claim to have such amount credited upon the execution against him, when nearly three years have elapsed and there is no evidence that any other execution against the defendant has been placed in the sheriff's hands.

Massey-Harris Co. v. Mollond, 15 Man. R. 364, Dubuc, C.J., and Perdue, J.

—Creditors Relief Ordinance—Execution—Expiry—Renewal—Priorities.] — Held, (1) The priorities of several executions against lands is not affected by the provisions of s. 94 T.R.P. Act, and that therefore such priorities are not determined by the order in which copies-execution and accompanying memoranda are deposited with the registrar, but by the dates of delivery to the sheriff. (2) The distribution of the proceeds of the sale was governed by the provisions of the Creditors' Relief Ordinance. (3) Although no question was raised before the Judge of first instance, as to the effect of the Creditors' Relief Ordinance, and it was there conceded that

the respective execution creditors had the right to have the proceeds of the sale applied on the executions in the order of their legal priority, this could not be construed as a consent on the part of the claimants to the fund that it should be disposed of in the same manner as if the ordinance were not in force, but merely as a contention on their part that the whole fund should be applied on their executions, and in the absence of consent on the part of the sheriff and all the parties interested in the fund, the provisions of the ordinance must govern its disposal.

Limoges v. Campbell, 2 Terr., L.R. 356.

—Writ of attachment—Abandonment of seizure—Estoppel.]—A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ, that he had seized the goods. The sheriff subsequently seized and sold the goods under executions of other creditors. In an action against the sheriff: —Held, reversing the judgment of the Supreme Court of Nova Scotia, that the act of leaving the goods in the possession of S was not an abandonment by the plaintiff's solicitor of the seizure, and if it was the sheriff was estopped by his return to the writ from raising the question. Held, also, that the act of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

Duffus v. Creighton (1887), 1 S.C. Cas. 78.

—Sheriff's sale of lands—Opposition afin de charge—Default in furnishing security —Res judicata.]—In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon and, under the provisions of articles 726 of the Code of Civil Procedure, a Judge of the Superior Court ordered that the opposants should within a time limited furnish security that the lands, if sold subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On failure to give security as required the opposition was dismissed, and, on appeal to the Supreme Court of Canada, the judgment dismissing the opposition was affirmed (35 Can. S.C.R. 1). Subsequently the proceedings in execution were continued and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale. The judgment appealed from maintained a subsequent order made under art. 651 C.P.Q. which revoked the order staying the sale and dismissed the opposition. Held, that, the judgment dismissing the opposition on default to furnish the required security was chose jugée against the appellants and deprived them of any right to give such security or take further proceedings to secure their alleged charge upon the lands under seizure. Per Taschereau, C.J.—In a case like the present an appeal to the Superior Court of Canada would be quashed, on motion by the respondent, as being taken in bad faith. Per Girouard, J.—As the order by the judge of first instance was made in the exercise of judicial discretion, the Supreme Court of Canada, under section twenty-seven of the Act, was deprived of jurisdiction to entertain the appeal.

Fontaine v. Payette, 36 Can. S.C.R. 613.

—Execution de bonis—Bailiff's return—Motion to compel same.]—A bailiff who has made a sale of movables is bound to make a return of the writ and the proceedings had thereon, and at least the duty due to the government, and he cannot make the payment of the government duty by the party asking for the said return, a condition precedent thereto.

Dubuc v. Duclos, 7 Que. P.R. 168 (Davidson, J.).

—Exemptions from seizure—Debtor who has ceased to carry on trade.]—1. The privilege granted the debtor by Art. 598 C.C.P., paragraph 10, of selecting and withdrawing from seizure "tools and implements and other chattels ordinarily used in his profession, art or trade to the value of $200," only exists while the debtor is carrying on his profession, art or trade. When he has ceased to do so, his right to make the selection is at an end, and, therefore, his creditor can have no right, under Art. 1031 C.C., to make such selection. 2. In any case the right of the creditor, under the last mentioned article, is merely to bring back certain effects to the patrimony of the debtor, for the benefit of his creditors generally, and cannot be exercised for the exclusive benefit of the creditor seeking to avail himself of the provisions of the article.

Stephens v. Toback, 26 Que. S.C. 41, C.R.

—Deceased plaintiff—Continuance—Arts. 607-273 C.P.]—Art. 607 C.P. applies to a voluntary continuance on the part of the representatives of a deceased plaintiff. If the adverse party wishes to compel the heirs to continue the suit he must do so by a demand in the form provided by Art. 273 C.P.

Routheir v. Nelson, 7 Que. P.R. 205, (Davidson, J.).

—Execution—Appeal—Reversal of decree —Measure of damages.]—Where goods of

the defendant were sold under a decree subsequently reversed for error, he was held to be entitled for the sum the goods sold for, and not to their value or to damages.

Robertson v. Miller, 3 N.B. Eq. 78.

—Moneys made under execution—Reversal of judgment—Liability to refund—Interest.]—Under a judgment against the defendant, the plaintiff issued execution and realized a sum of money which was in his hands when the judgment was reversed, and he became liable to repay it to the defendant. The money, however, was claimed by another execution creditor, and the plaintiff gave notice of an application for an interpleader order, but did not proceed with it. By consent of all parties the money was paid to the solicitor for the defendant, but without interest:—Held, that the plaintiff was liable for interest, notwithstanding the conflict as to who was entitled to the money, for he could have protected himself by paying the money into court or obtaining a waiver of the right to interest; and the interest should be at the legal rate of 5 per cent., for the same reason.

Adams v. Cox, 10 O.L.R. 96.

—Execution—Exemption from seizure—Exemption by will—Registration—Substitution of property.]—The legal axiom that goods in possession of a debtor are the common pledge of his creditors only creates a presumption which may be rebutted. Therefore, a provision in a will that property devised shall be exempt from seizure can be opposed to a creditor of the devisee notwithstanding that the will was not registered until after the debt was contracted. The following clause in a will, "my intention in making the bequests aforesaid being that the said property or that by which it shall be represented shall be insaissable the same being given to secure a provision for the support of the said beneficiaries" is not contrary to the provisions of Art. 599 of the Code of Civil Procedure pars. 3 and 4, as the law empowers a donor or testator to declare exempt from seizure not only the immovables devised by the will but also those acquired in substitution therefor.

Baird v. Ferrier, Q.R 13 K.B. 317, affirming 23 S.C. 497.

—Chose in action—Book debts.]—Rule 356 of the Judicature Ordinance provides that writs of execution against goods and chattels shall bind "all the goods and chattels" of the judgment debtor, book debts are bound. Rule 359 sets out what character of choses in action may be seized under execution, and they consist of "any money or bank notes, any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money belonging to the execution debtor." Held that book debts are not liable to seizure under those rules or at common law.

Jobin-Marrin Co. v. Betts, 1, W.L.R. 369 (Wetmore, J.).

—Sale of book debts.]—A sale by the sheriff of book debts without statutory authority is void, and confers no right upon the purchaser.

Moore v. Roper, 37 N.S.R. 161.

—Sheriff's sale—Railway—Descriptions.]—The description in the notice of sale, published by the sheriff, of a railway by name and mentioning the route covered by stating the points of departure and termination and also the numbers, according to the registered cadastres of the several lots of which it is composed, is sufficient especially when the seizing creditor has obtained an order, under Art. 754 C.P.Q. for the sale of the said property en bloc.

Begin v. Levis County Railway Co., Q.R. 27 S.C. 180 (Ct. Rev.).

—Timber licenses — Partnership — Execution against partner.]—See PARTNERSHIP.

Canadian Pacific v. Rat Portage Lumber Co., 10 O.L.R. 273, C.A.

—Sheriff's sale of mining leases—Knowledge of prior mortgage.]—See MINING.

—Trade Fixtures attached to realty—Sale under execution.]—See MINING.

—Creditors' Relief Act—Filing sheriff's certificate—Affidavit of claim.]—Where a prior creditor has filed a sheriff's certificate under s. 7 of the Creditors' Relief Act, R.S.O. 1897, c. 78, it is not necessary for subsequent creditors to do so:—Semble, that the provisions of s. 7 as to filing a sheriff's certificate are directory only and not imperative. Semble, also, that it is not open to another execution creditor to question the sufficiency of an affidavit of claim where the execution debtor does not object.

Re Secord v. Mowat, 12 O.L.R. 511 (D. C.).

—Judgment — Transfer — Execution in name of original plaintiff.]—The transferee of a judgment has a right to sue out an execution in the name of the original plaintiff. An opposition afin d'annuler founded on the fact that the judgment was transferred for a consideration which was paid by the transferee, will be dismissed for want of interest in the opposant.

Deserres v. Atlantic & Lake Superior Ry. Co., 7 Que. P.R. 383.

—Sale of immovables—New advertisement and new grouping of lots.]—A new grouping of lots in the sheriff's notice of sale,

and the allegation of prescription incurred since the date fixed for the new sale, are facts subsequent to the proceedings by which the sale was stopped in the first instance, and are sufficient reasons for a new opposition.

Canada Industrial Co. v. Kensington Land Co., 7 Que. P.R. 463 (Davidson, J.).

—Building on substituted lands.]—The ownership of a building may be in a person other than the owner of the land on which it is constructed. Art. 415 of the Civil Code establishes a rule different from that of the Roman law, ædificium solo cedit, which it superceded. Consequently, a house built by a substitute on substituted lands, declared exempt from seizure, belongs to him, and may be seized and sold under execution by his creditors.

Lacombe v. Brunet, Q.R. 14 K.B. 465.

—Land Titles Act—Execution—Equitable mortgage—Unregistered charge—Priority.]—Notwithstanding that by the Land Titles Act, 1894, differing in this respect from the Territories Real Property Act, an execution is declared to be an "instrument," the principle established in Wilkie v. Jellett, 2 Terr. L.R. 133, 26 S.C.R. 283, still applies; and therefore an unregistered equitable mortgage takes priority over a writ of execution against lands delivered to the Registrar subsequently to the creation of the equitable mortgage.

Sawyer & Massey Co. v. Waddell, 6 Terr. L.R. 45.

—Sale under execution—Warranty—Obligations of prosecuting creditor.]—(1) The purchaser at a forced sale of the rights of the judgment debtor in an immovable who sells them, as they are conveyed to him in the sheriff's title, is bound to indemnify the buyer for loss from eviction of the immovable by reason of its never having belonged to the judgment debtor. (2) The prosecuting creditor is only bound to warrant the purchaser at a forced sale against eviction by reason of informalities in the proceedings or of the property seized not ostensibly belonging to the debtor.

Mahony v. Diotte, 28 Que. S.C. 314 (C.R.).

—Sheriff's sale—Execution against lands—Possession animo domini—Adjudication.]—The holder of a title deed, registered in the office for the registration of deeds for the division where lands are situated, by which he appears to be owner thereof, is reputed to possess them animo domini within the meaning of Art. 699 C.P.Q., more particularly when such lands are uncultivated and that no person may have ostensibly done any act of possession in respect thereof. Consequently, where such lands have been seized and sold in execution for taxes charged thereon, at the suit of a municipal corporation against such ostensible owner, the adjudication is valid and a third party who claims a better title than that of the execution debtor cannot have it annulled in an action against the municipality. (2) An unregistered right to real property is of the class of claims which are purged by judicial sales. (Charbonneau, J., dissented.)

Ville d'Outremont v. Cabana, Q.R. 14 K.B. 366.

—Establishment owned by married woman and carried on under the name of her husband—Judgment obtained against husband for injury for which wife is liable.]—A married woman who, without registration, for years carries on business under the name of her husband whom she allows to hire employees and to deal with them and the public as if he were the owner of her establishment, who allows a suit to be brought and judgment to be recovered against him by an employee for damages caused by an injury for which she is liable, is estopped from opposing the seizure under such judgment of the movables in the establishment in question.

Cuillerier v. Roy, 30 Que. S.C. 321.

—Sheriff's sale—Want of interest—Collocation.]—A purchaser who has transferred his rights has no longer an interest in the moneys produced by a sale by the sheriff and, therefore, has no right to contest a collocation.

Eastern Townships Bank v. Arahill, 8 Que. P.R. 109 (Fortin, J.).

—Seizure—Exemption—Carter.]—The exemption from seizure of a horse and harness can only be invoked by a carter who uses them as a means of livelihood and not by a butcher who owns them and uses them for a special purpose and in carrying on his business.

Lecavalier v. Brunelle, 8 Que. P.R. 245 (Fortin, J.).

—Writ of seizure—Renewal.]—When a writ of seizure of movables and immovables (de bonis et de terris) is issued on execution of a judgment it remains in force so long as it is not satisfied which prevents the issue of a new writ. In consequence the seizure of an immovable under a second writ issued before the first has run out (epuisé) is null.

Owens v. Conway, Q.R. 30 S.C. 325 (Ct. Rev.).

—Provisional execution—Appeal — Security.]—Provisional execution of a judgment, pending appeal, will only be permitted when otherwise irreparable injury will ensue, or when the appeal is without merits; especially will it be refused when the security on the appeal covers all ordinary and prospective damages.

Carter v. Urquhart, 8 Que. P.R. 219 (K.B.).

—Issue of certificate of title to executor—Executor entitled as residuary devisee — Execution against him personally — Entry of, upon certificate of title.] — Where an executor is by the will entitled as legatee to the lands of the estate, a registrar should not register against them an execution against the executor personally until he has satisfactory evidence that the debts and other charges against the estate have been satisfied.

Re Galloway, 3 Terr. L.R. 88.

—Judgment.]—Under Ont. Con. Rule (1897) No. 843, a judgment creditor is entitled to sue out execution instanter upon judgment being signed, and without waiting until it is duly entered. For purposes of execution a judgment under which a sum of money is payable is complete when it is signed.

Rossiter v. Toronto Street R.W. Co., 15 O.L.R. 297.

—Sheriff's sale—Erroneous designation of the immovable.]—A party has no right to have a sheriff's sale set aside for the reason that the notices of sale were for the whole lot whereas the party whose property was sold, was the owner of but one-half of the lot; the buyer being the only one who could complain.

Orr v. Barry, 10 Que. P.R. 34.

—Judgments Act, B.C.—Non-registration of conveyance—Execution debtor.]—Execution creditors registered their judgment in April, 1907, against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of s. 74 of the Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the learned trial Judge ruled that s. 74, making registration of conveyances a sine qua non to the passing of any title, at law or in equity, to lands, governed:—Held, on appeal, that the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors judgment was obtained, was a dry trustee of the land for plaintiff. Levy v. Gleason (1907), 13 B.C.R. 357, explained.

Entwisle v. Lenz, 14 B.C.R. 51.

—Exemption from seizure—Tools of trade.] —The horse used by a butcher in delivering meat to his customers does not come under the designation of "tools, implements and other 'chattels'" in par. 10 of Art. 598 C.C.P. An opposition with the object of having it withdrawn from the movables seized under execution, on the ground that it was employed in carrying on his business, should be dismissed on motion therefor under Art. 651 C.C.P.

Lecavalier v. Brunelle, Q.R. 33 S.C. 145 (Ct. Rev.), 9 Que. P.R. 209.

—Execution of judgment—Payment of debt—Seizure for costs—Opposition.]—Where a judgment orders payment of a sum with costs the debtor, by sending to his creditor by mail a cheque for the debt is not discharged from liability for the costs. The seizure of movables four days later in the name of the creditor is therefore valid for the amount due. A telegram from the creditor saying "have instructed solicitor to withdraw" is not a remission of the costs nor an engagement by him to pay them. Therefore, an opposition by the debtor to the seizure based on payment should be dismissed.

Canada Wood Specialty Co. v. Henry, Q.R. 33 S.C. 140 (Ct. Rev.).

— Staying execution pending appeal and trial of counterclaim.]—By s. 70 (2) of the Ontario Judicature Act, R.S.O. 1897, c. 51, a Judge is disabled from sitting as a member of the Divisional Court hearing an appeal from a judgment or order made by himself, and he has therefore no jurisdiction, after the setting down of an appeal from his judgment, to make an order that execution shall not be stayed. In an action for goods sold and delivered the defendant counterclaimed for trespass. The plaintiff recovered judgment at the trial of his claim, and the trial of the counterclaim was adjourned. The defendant appealed to the Divisional Court, on the ground that the amount for which the plaintiff had recovered judgment should be reduced by $214.50 as damages for breach of warranty:—Held, on application, under Con. Rule 827 (2), to the Judge at the trial, to stay execution on the judgment, that he had no right to make any order, but that as the order was a proper one on the merits, it was ordered by the Divisional Court that execution should not be stayed save as to the $214.50, as the counterclaim was not one which should have been joined with the action, and it was not shown that if a verdict were obtained on the counterclaim, there would be any danger of the amount not being recoverable from the plaintiff; and that, as to the $214.50, it was proper to stay execution, notwithstanding affidavits on behalf of the plaintiff of his belief that the defendant's appeal was merely for delay, and as to his uncertainty in respect to the defendant's financial ability to pay the claim, there being no suggestion or evidence that by

staying the execution to this extent the plaintiff would pobably lose his claim.

Mullin v. Provincial Construction Co., 16 O.L.R. 241.

—Life rent—Alimentary provision—Cessation of payment—Rights against third party.]—A life rent, payable as part of the price of an immovable sold by a father to his son, cannot be held free from liability to seizure on the ground that it is an alimentary provision. Such exemption could not have been effectually stipulated for being in the nature of an onerous title. Evidence that the creditor of a life rent payable by his son had taken up his abode with the latter since which time he has not demanded payment does not establish extinction, by abandonment, of the obligation to pay as against a third party who has taken out a saisie arrêt.

Lamoureux v. Blanchard, Q.R. 32 S.C. 150 (Ct. Rev.).

—Fi. fa. goods—Overdue chattel mortgage—Equity of redemption—Bona fide sale before seizure.]—Under R.S.O. 1897, c. 77, s. 17, as amended by 62 Vict. c. 7, s. 9, and 3 Edw. VII. c. 7, s. 18 (O.), a fi. fa. goods does not bind goods of the execution debtor, which at the time of the delivery of the writ to the sheriff are subject to an overdue chattel mortgage, until actual seizure under the writ, and a bona fide purchaser from the execution debtor, before seizure, will acquire his interest in the property free from the execution.

Allan v. Place, 15 O.L.R. 476 (D.C.).

—Notice of sale—Newspaper—Non-juridical day.]—Although a newspaper is published on a non-juridical day, it may lawfully contain notices of juridical sales.

Wallace v. Honan, 9 Que. P.R. 222.

—Exemption — "Metier."]—The word "metier" used in par. 10 of Art. 598 C.C.P should not be taken in too literal a sense; it applies to any manual labour performed for the purpose of gaining a living. Therefore, the table utensils, furniture of the dining room of a boarding-house mistress are articles used in carrying on her business (metier) and as such are exempt from seizure.

Boily v. Guillot, 9 Que. P.R. 337 (Sup. Ct.).

—Rule for imprisonment—Abandonment of property.]—(1) A party against whom a rule nisi has been declared absolute and who has made an abandonment of his property, is entitled to give security to avoid imprisonment until such contestation which may be made of his bilan has been determined, or if a contestation is not filed, until the delays for such contestation have expired. (2) The costs of such motion to give security shall be paid by the party asking leave to put in such security.

Rennie v. Mace, 9 Que. P.R. 165.

—Seizure—Costs of caretaking.]—When a bailiff, after the seizure of certain animals, has appointed a guardian to take care of them, he cannot afterwards apply for monies necessary for the safekeeping of these animals; he has no interest to justify this application, for his responsibility ceased when he appointed the guardian at defendant's suggestion and without objection by plaintiff.

Boulanger v. Martineau, 9 Que. P.R. 405.

—Exemption—Buildings.]—Where the property seized under a writ of execution against goods consisted of a blacksmith's shop in the occupation of the execution debtor:—Held, that the question whether the shop was or was not part of the freehold could not be raised upon an interpleader by the sheriff. Held, also, that the building was not exempt from seizure by virtue of the Exemptions Ordinance, not being the residence of the execution debtor or a building used in connection with his residence.

Eastern Townships Bank v. Drysdale, 6 Terr. L.R. 236.

—Homestead — Exemption — Proceeds of sale under mortgage.]—An execution against lands does not bind the homestead of the execution debtor, and mortgagees of the land subsequent to the executions are entitled to sell it free from the executions. Such a mortgagee may invoke the provisions of the Exemption Ordinance for the purpose of securing his priority. The sale of a homestead under a mortgage is a compulsory sale and consequently the proceeds after payment of the mortgages are exempt from seizure under execution to the same extent as the land. The rights of the parties appearing to be interested in the land may be determined upon an originating summons for sale under a mortgage.

Boez v. Spiller, 6 Terr. L.R. 25.

—Exemptions—Seizure of goods for the price—Suit on bill of exchange.]—Goods generally exempted from seizure under execution by virtue of s. 29 of the Execution Act, R.S.M. 1902, c. 58, but withdrawn from such exemption by s. 36 of the Act when the purchase price of them is the subject of the judgment proceeded upon, are subject to seizure although the judgment has been recovered only upon a bill of exchange for the price accepted by the judgment debtor.

Canada Law Book Co. v. ——— 17 Man. R. 347.

—Petition to set aside sheriff's sale—Seizure super non domino—Registration.]—When a party wishes to have the seizure,

sale, adjudication and sheriff's title of an immovable set aside and declared null as having been made super non domino, he must proceed by a petition in nullity of sale; an exception to the form alleging that the plaintiff should have made an opposition to the seizure will be dismissed.

Foster v. Vineberg, 9 Que. P.R 425.

—Contest between assignee and receiver by way of equitable execution of fund.]—Where the application of a judgment creditor for a receiver by way of equitable execution of a fund is opposed by a party claiming under a prior equitable assignment by proceedings (e.g., chamber summons) analogous to interpleader, the assignor is not a necessary party. A valid equitable assignment may be made by parol and may be enforced notwithstanding J. A. (1873), s. 25, sub-s. 6 (England). When moneys have been paid out of a fund under an order which is subsequently reversed, the party who has received them may be ordered to refund them, in whole or in part, under "Judicature Ordinance," s. 8, sub-s. 5.

Detro v. Haggard, 1 Alta. R. 221.

—Homestead—Exemption for benefit of execution debtor and his family—Contest between execution creditors and mortgagees.]—The exemption of a homestead from seizure under execution is for the benefit of the debtor and his family only, and the claim of execution creditors to the proceeds of the sale of the land will consequently be preferred to that of mortgagees subsequent to the registration of the writs of execution where the execution debtor can in no event have any interest in such proceeds.

Purdy v. Colter, 6 Terr. L.R. 294.

—Homestead — Exemption — Advertisement of sale under execution.]—A quarter section of land, although all the land owned by an execution debtor, is not his "homestead" within paragraph 9 of s. 22 of the Exemptions Ordinance, where he has not occupied it for nine years and appears to have no animus revertendi. Where the advertisement of a sale under an execution had been published in a weekly paper, and had appeared in every issue of the paper published during two months, but there had been no issue in two weeks of the period:—Held, that, it not appearing that the sale of the property had been affected in any way, there had been a sufficient compliance with the provisions of rule 364 of the Judicature Ordinance. Proceedings to confirm a sale of lands under a writ of execution are proceedings under the Land Titles Act, 1894, not in the cause in which the writ issued, but that the proceedings are entitled in the cause and not "In the matter of the Land Titles Act," is nevertheless no objection to them. An affidavit of execution of a transfer upon a sale under a writ of execution sworn before the clerk of the Court, is bad, but leave may be given to reswear it pending an application to confirm the sale.

John Abell Engine Co. v. Scott, 6 Terr. L.R. 302.

—Lands—Sale by sheriff—Action to set aside—Purchase by execution creditor—Agreement for re-sale.]—A firm of solicitors, defendants in this action, recovered judgment against the plaintiff for $97, and placed in the hands of the sheriff a fi. fa. lands, under which the plaintiff's life estate in land said to be worth $3,500 was sold, subject to certain charges, for $70, to one of the solicitors, who had previously made an arrangement with their co-defendant, wife of the plaintiff, to allow her the benefit of the purchase. In an action to set aside the sale or to declare the defendants trustees for the plaintiff:—Held, that the execution creditor had the right to purchase, and was not affected by any irregularities or omissions on the sheriff's part; nor could a sale under process of law be successfully attacked for mere inadequacy of price, unless, perhaps, it was so grave and extreme as to compel a conclusion of fraud or malversation. Where the conveyance has been executed by the sheriff, the fact that the purchaser has entered into a binding agreement to sell at an advance to another, does not afford ground for invalidating the deed. Semble, that the sheriff (since deceased) might have been guilty of negligence in disposing of the property; and, if there were evidence to support an action against his estate or his sureties, such an action would not be barred by this action.

McNichol v. McPherson, 15 O.L.R. 393.

—Costs—Sheriff's sale.]—The purchaser at a sheriff's sale against whom an action is brought by an insolvent to have the decree for sale set aside which action has been dismissed, has no recourse against the saisi for the costs due to his attorney in such action.

In re Beaudry, 9 Que. P.R. 101 (Ct. Rev.).

—Fi. fa. goods in sheriff's hands—County Court execution — Interpleader—Application of proceeds of sale by bailiff.]—Under a County Court execution in this case the bailiff seized an automobile and was proceeding to sell it, when the sheriff notified him that he held prior writs against the defendant, and told the bailiff that he would allow him to go on and sell, if he afterwards paid the money to the sheriff. Upon an interpleader issue in the County Court between the plaintiff and sheriff:—Held, that the bailiff in making the sale was really acting for the sheriff, who there-

upon became entitled to the proceeds in the same manner as if he had seized.

Maw v. Moxam, 18 Man. R. 412.

—Buildings placed on land by tenant—Property in.]—An execution debtor placed certain buildings on land, the property of the defendant in the issue, for which it appeared a ground rent was paid. These buildings were of wood resting on loose stone foundations to which they were not affixed nor were the foundations let into the earth, but the earth had been levelled to make the foundation level. A cellar had been dug in the earth under one building. A judgment creditor seized these buildings, and the defendant, the owner of the fee simple, claimed them as part of the freehold, and an issue was directed:—Held, that to be a parcel of the freehold a building must be affixed to it or something connected with it, or there must be evidence to show that it was intended that the buildings should be part of the freehold; the buildings in question not being affixed to the freehold, and there being no evidence that they should be a part of it, the buildings were the property of the debtor and liable to seizure.

Hamilton v. Chisholm, 2 Sask. R. 227.

—Exemption—Seizure of a horse—Carter.]—An opposition to the seizure of a horse by the defendant on the ground "that he is the agent of a company dealing in gas fixtures, that he installs the same and that the said horse is necessary to him to carry on his business," will be dismissed, the opposant being neither a carter nor a coachman.

Rousseau v. Nadeau, 10 Que. P.R. 351.

—Movables in lodging house—Lien.]—One who lives in a lodging house has his domicile there and a bailiff having a writ of execution against him can levy on his movables there. The proprietor of the house cannot, after the seizure, by opposition, claim that the saisi is a third party within the meaning of Art. 677 C.P.Q. and that the seizing creditor should have proceeded by way of saisie-arrêt. The proprietor as a creditor guaranteed by pledge may, by opposition, have the seizure set aside as to a movable on which he has a lien.

Mercier v. Pigeon, Q.R. 36 S.C. 324 (Ct. Rev.).

—Possession by judgment debtor—Procedure by bailiff—Adjudication upon invalid seizure.]—The hull of a steamer sunk in a canal had been attached under judicial process and, while standing on the bank at a distance from which he could not see or touch the materials, a bailiff assumed to make a second seizure, gave no notice of his proceedings to those on board the hull, and appointed a guardian other than the one placed in charge of the hull at the time of the first seizure. The execution debtor, named in the second writ, had made a bargain for the purchase of the hull subject to the price being paid before delivery, but had not paid the price nor had the property been delivered into his possession. Subsequently, the bailiff adjudicated the hull to the appellant by judicial sale at auction:—Held, that there had been no valid seizure under the second writ; that the purchaser acquired no title to the property, by the adjudication, and the sale to him should be rescinded; that, under the circumstances, there could be no application of the maxim "en fait de meubles possession vaut titre" and that the maxim "main de justice ne dessaisit pas" must be taken subject to the qualification that a seizure under judicial process places the goods seized beyond the control of an execution debtor. Connecticut and Passumpsie Rivers Railroad Co. v. Morris (14 Can. S.C.R. 319), distinguished, and the judgment appealed from (Q.R. 17 K.B. 193), affirmed.

Brook v. Booker, 41 Can. S.C.R. 331, affirming 17 Que. K.B. 193, and Booker v. Brook, 32 Que. S.C. 142.

—Interpleader—Application by sheriff.]—The sheriff, under writs of execution, seized certain goods of the defendant, such goods being claimed by the wife of the defendant. The sheriff thereupon notified the execution creditors of the claim, and applied for an interpleader summons. The material in support of the sheriff's application did not show when the notices of claim were served, but it appeared by affidavits filed on behalf of one of the execution creditors that such notices were served on the 26th of October, while the summons was issued on the 29th of October. On the return of the summons objection was taken that the summons was issued too soon:—Held, that the provision for interpleader on the part of the sheriff being purely statutory, the sheriff must show that all notices have been given, and that the time required by the rules has expired, before he is entitled to interplead, and that, as the material did not show this and as it appeared that the necessary time had not elapsed, the proceedings were irregular.

Sanderson v. Hotham, 1 Sask. R. 501.

—Land exempt as homestead—Right of mortgage to plead exemption.]—Plaintiff applied for foreclosure or sale of a quarter-section of land against which a number of executions were registered in priority to the mortgage in question. The mortgagee contended that the land in question was, when the mortgage was given, the homestead, and still was the homestead, of the debtor, and that the executions in question did not charge the land. The creditors, in

addition to denying that the land was a homestead, also contended that only the debtor could avail himself of the exemption:—Held, that the execution in question never charged the land if it was a homestead, and that the mortgagee was in as good a position as the mortgagor, and could invoke the provisions of the Exemption Ordinance to procure priority for his mortgage.

Baker v. Gillam, 1 Sask. R 498.

—**Homestead—Exemption—Sale of homestead under mortgage—Rights of prior execution creditors.**]—Three-quarters of a section of land were sold under a mortgage and after satisfying the mortgagee's claim the balance was paid into Court. The title was subject in addition to the first and second mortgages to a number of executions and third and fourth mortgages. The mortgagor claimed one of the quarters sold as his homestead and that the proceeds of the sale of such homestead were not available for the purpose of satisfying the executions, and the subsequent mortgagees contended that as such moneys were not available for the purpose of satisfying the executions they should be applied in payment of their respective mortgages:—Held, that as the executions bound only the portions of the land not exempt subject to encumbrances thereon and it appearing that the amount realized for the portions not so exempt was not sufficient to satisfy the prior encumbrances the money in Court must be held to be the proceeds of the homestead and not available for the purpose of satisfying the executions. That the fact that the mortgagor would not benefit by the allowance of the exemption in as much as the subsequent mortgagees would secure the whole sum did not cause such fund to lose its character of an exemption in as much as the execution debtor had a right to mortgage or otherwise dispose of his exemption so long as he did not convert it into property which would not be exempt.

Purdy v. Colton, 1 Sask. R. 288.

—**Opposition—Seizure—Delay.**]—The seizing creditor who permits more than a year to elapse after an opposant had filed a deed of conveyance under which he claimed to be owner of the things seized cannot contest the opposition by invoking the nullity of the deed as made in fraud of the creditors of his debtor. A deed of sale in which the price mentioned is simulated or fictitious may be valid as a donation.

Ross v. Lefebvre, Q.R. 36 S.C. 210.

—**Damages awarded to the father for the death of his son.**]—(1) All of the debtor's property is liable for the debtor's debts, save in so far as it has been declared specially exempt from seizure. (2) A judgment allowing damages to the father for the killing of his son is not in the nature of an alimentary allowance, and the amount of these damages can be seized if they have not been declared exempt from seizure. (3) A question put to the jury as to the said son being the sole support of his father is irrelevant and cannot affect the character of the condemnation.

Leroux v. James, 11 Que. P.R. 13.

—**Replacement of exempted object.**]—The condition of exemption from seizure, given to one object cannot be extended to another. Therefore, a piano may be seized which was purchased with insurance money on another piano destroyed by fire which had been given to the debtor under condition of exemption.

Alexander Milling Co. v. Cloutier, Q.R. 36 S.C. 196.

—**Execution — Discharged debt — Good faith.**]—A seizure on execution pursuant to judgment, made in good faith and without malice to realize an amount due for costs which, without the knowledge of the creditor had been paid to his deceased attorney, does not make him liable for damage which may result therefrom.

Filiatrault v. Village of Coteau Landing, Q.R. 35 S.C. 205.

EXECUTORS AND ADMINISTRATORS.

Ontario.

Accounts—Surrogate Court—Estoppel.]—The Surrogate Courts of Ontario are invested with the authority and jurisdiction over executors and administrators, and the rendering by them of inventories and accounts, conferred in England on the Ordinary under 21 Henry VIII. c. 5, the effect of Rule 19 of the Surrogate Court Rules of 1892, as limited by s. 73 of the Surrogate Courts Act, R.S.O. 1897, c. 59, being to bring the practice back to that in force under the ancient statute. It is not only the duty of an executor or administrator to file an inventory and render an account when duly called upon to do so, but it is his privilege to do so voluntarily in any case in which he is liable to be called upon, and this privilege, in case of his death, extends to his personal representative, though not at the same time the representative of the original testator, and where there is a surviving representative of the original testator. Where, therefore, the executors of an executor brought into the proper Surrogate Court an account of the dealings of their testator with the assets of the estate of the original testat-

or, treating in the account as cash received by the accounting executor the amount of a certain promissory note, and the account was audited and approved after due notice to the surviving executor of the original testator, it was held in an issue in the High Court between the surviving executor of the original testator and the executors of the deceased executor, upon pleadings so framed as to raise not only the question of the property in this note but also the question of the right to the proceeds thereof, that the audit and approval of the account were a binding adjudication as against the surviving executor, that the proceeds of the note were payable to the estate of his deceased co-executor. Judgment of Falconbridge, C.J., affirmed.

Cunnington v. Cunnington, 2 O.L.R. 511.

—Purchase by executor.]—A testator died possessed of shares in a company. Afterwards, upon fresh allotments of stock being made, his executrix took up the additional shares, paying the premium out of her own money as to some of the shares and selling her right to others:—Held, that she was not entitled as against the estate to such new shares, but only to a lien thereon for the amount advanced by her to take them up.

Re Sinclair, Clark v. Sinclair, 2 O.L.R. 349.

—Devolution of Estates Act—Partial intestacy—Widow's statutory preference.]—Section 12 of the Devolution of Estates Act, R.S.O. 1897, c. 127, as to the widow's statutory claim for $1,000, does not apply where there is partial intestacy, as in this case, where a testator failed to dispose of his residuary estate. Re Twiggs' Estate, [1892] 1 Ch. 579, followed.

Re Harrison, 2 O.L.R. 217.

—Goods exempt from execution—Right of widow to—Effect of provision for wife in will—Gift of property belonging to wife—Election.]—Goods of a deceased husband exempt from seizure under the Execution Act, R.S.O. 1897, c. 77, are not, except as to funeral and testamentary expenses, assets in the hands of his executors for the payment of debts, the effect of s. 4 of that Act being to give his wife a parliamentary title thereto. The fact of the wife being residuary devisee, under the husband's will, does not put her to her election as to taking such goods either under her statutory title or under the gift of the residue, unless the testator clearly assumes to deal with them as part of the residue, and the fact that under the terms of the will the provision made for her should be in lieu of dower does not create a presumption that he is dealing with the goods. Section 4 of the Devolution of Estates Act, R.S.O. 1897, c. 127, which makes all the personal property of a testator in the hands of his personal representatives subject to the payment of his debts, must be read as being subject to s. 4 of the Execution Act. A piano belonging to the wife, who was the residuary devisee of the real and personal estate, was dealt with by the husband under his will, as part of his estate, by giving it to his son:—Held, that the wife must elect either to allow the son to retain it, or to take it herself, making good to the son the value thereof out of the provision made for her in the will.

Re Tatham, 2 O.L.R. 343.

—Devolution of Estates Act, (Ont.)—Payment of debts—Distinction between real and personal property.]—The Devolution of Estates Act, R.S.O. c. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise specially provided by s. 7, the order in which different classes of property are applicable to the payment of debts has not been changed by the Act.

Re Hopkins Estate, 32 O.R. 315.

—Surrogate Courts—Administration—Application for in more than one Surrogate Court—Jurisdiction.]—When applications for letters of administration to the estate of a deceased person are made in more than one Surrogate Court, preference will be given to that made by the party nearest in the order in which administration is usually granted, and jurisdiction to proceed was conferred on the Surrogate Court in which application was made by a mother as next of kin against that on behalf of creditors, in another county.

Re Tougher, 3 O.L.R. 144.

—Interpretation of wills.]—See WILLS, II.

—Representation ad litem—Tort—Survival of action—Death of party pending action—R.S.O. 1897, c. 129, s. 11—Con. R. 1897, 194, 195.]—R.S.O. 1897, c. 129, s. 11, providing that a person wronged in respect to his person or property by one, since deceased, may maintain an action against the administrators or executors of the latter, does not authorize such an action against an administrator ad litem merely, but only against an executor or general administrator, clothed with full power to collect the assets, pay the debts, and divide the estate which he represents:—Held, therefore, that for this, apart from other reasons, the appointment of an administrator ad litem should be refused in this action, which was brought against five persons for malicious prosecution, one of whom had died after issue joined but

before trial, and whose widow and children refused to administer to the estate. Judgment of Lount, J., reversed.

Hunter v. Boyd, 3 O.L.R. 183.

—Mortgage—Notice of sale—Service of —"Assigns"—Devolution of Estates Act—Caution—Non-registration of—Service of notice of sale on infant heir.]—By a provision in a mortgage of realty no want of notice required by the mortgage was to invalidate any sale thereunder, but the vendor was alone to be responsible. The conveyance made on a sale under the power of sale in the mortgage contained a recital that service of the notice had been duly made on the mortgagor and his wife, who had joined to bar her dower, and there was no evidence of the untruth of such recital and the purchaser's knowledge of its untruth:—Held, that a subsequent vendor of the land in making title on a sale thereof could not be called on to furnish any other evidence of such service. Held, also that the objection being as to proof of service on the wife no such evidence was in any event required, for by the terms of the power of sale in the mortgage which was made in pursuance of the Short Form Act service was to be made on the mortgagor, his heirs or assigns, and the wife was not an "assign" within the meaning of the power. After the coming into force of the Devolution of Estates Act and after the expiration of a year from the death of the mortgagor a married woman, no caution having been registered, sale proceedings under the power were taken on the mortgage. Held, that service of notice of sale on the husband and the heirs of the mortgagor, two infant daughters, was sufficient, it not being necessary under such circumstances to serve the personal representatives.

Re Martin and Merritt, 3 O.L.R. 284.

—Devolution of Estates Act—Real representative—Sale of land—Lapse of year—Vesting in heirs—Injunction—R.S.O. 1897, c. 137.]—Letters of administration to the real estate of an intestate who died on October 18th, 1900, were issued to the defendant on October 14th, 1901. Prior to the latter date the defendant had advertised the lands for sale on October 22nd, 1901, on the day preceding which date, the plaintiff, one of the heirs, applied for an injunction to restrain the sale. No caution had been filed within the year nor did it appear that there were any debts of the deceased:—Held, that the plaintiff was entitled to an injunction, for when the defendant advertised the lands for sale he had no right to do so, and at the proposed time of sale he had no right to sell since by the operation of the Devolution of Estates Act the property had vested in the heirs.

Byer v. Grove, 2 O.L.R. 754.

—Direction to set aside certain sum and pay income to life tenant—Productive and unproductive assets—Rights of life tenant.]—A testator directed his executors to set apart and invest $50,000 out of his estate, and pay the income semi-annually to his wife during her life, with power to appoint, and in default of appointment, over. He then gave the residue equally among his children. The estate consisted of income producing securities to the value of $30,000, and a large amount of unproductive land:—Held, that the executors were bound to reserve sufficient productive assets to secure an income adequate to the payment of taxes and other necessary expenses, and the widow was entitled, from the expiration of a year from the testator's death, to a first charge on the unproductive assets for the income so taken, and to the balance of the income from the productive assets, and to have the principal producing such balance, set apart towards the fund of $50,000, ultimately to be made up as the lands were sold, according to the following rules: As lands or other assets were sold the proceeds should be apportioned between capital and income by ascertaining the sum which, put out at interest at the expiration of a year from the testator's death, and accumulated at compound interest with half-yearly rests, would, with accumulations of interest, have produced at the day of receipt, the amount actually received from the sale of the lands or other assets; the sum so ascertained to be treated as capital, and added to the sum theretofore set apart towards the $50,000; and the residue to be treated as income and paid over to the widow. In re Earl of Chesterfield's Trusts (1883), 24 Ch. D. 543; and in re Morley, Morley v. Haig, [1895] 2 Ch. 738, applied.

In re Cameron, 2 O.L.R. 756.

—Grant of administration—Nominee of next of kin in Ontario—Discretion—Revocation—Fraud.]—Only one of the next of kin, the sister, of an intestate, resided in Ontario, and, upon the consent of the sister and her children, letters of administration were granted by a Surrogate Court in the defendant's petition that all of the ter's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in thed efendant's petition that all of the next of kin had renounced in his favour, but it was plain from the renunciation, which was filed, that this statement was intended to refer only to the next of kin resident in Ontario:—Held, that the Surrogate Court had before it all those who were

required by s. 41 of the Surrogate Courts Act, R.S.O. 1897, c. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature of the property of the deceased, and the advanced age and illiteracy of his sister, that the Judge had not exercised his discretion improperly in directing the grant to be made to the defendant. Semble, that, even if the discretion had been improperly exercised, the grant would not have been revoked. The practice of the Surrogate Courts in this province is to apply the provisions of s. 59 of the Act more liberally than do the English Courts the corresponding provision of the English Probate Act. Held, also affirming the finding of the Surrogate Court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant.

Carr v. O'Rourke, 3 O.L.R. 632.

—Administrator ad litem—Locus standi—Con. Rules 194, 195.]—The only living issue and heir at law of an intestate who had brought this action to set aside on the ground of undue influence a transfer of her property (heretofore made by the intestate to the defendant), applied for an order under Rules 194 or 195 appointing him administrator, or administrator ad litem of the deceased:—Held, that the order could not be made either under Rule 194, for reasons given in Hughes v. Hughes (1881), 6 A.R. 373, 380; nor under Rule 195, which is not applicable to a case of a plaintiff who, without right or title, has commenced an action and then seeks to legalize his illegal act by an order of the Court.

Fairfield v. Ross, 4 O.L.R. 534.

—Statute of Limitations—Right of retainer.]—In 1876 the plaintiff advanced to her husband the purchase money of certain land subject to a mortgage and which was accordingly conveyed to him. The existing mortgage was paid off and a fresh mortgage was subsequently executed, the plaintiff joining to bar her dower in it. On his death in 1893 he devised the land to the plaintiff and one of his sons in equal shares. In 1901 the plaintiff obtained an order for partition or sale of so much of the land as had not been sold and a sale being made, she filed a claim upon the proceeds as a creditor for the amount originally advanced by her to purchase the lands. The plaintiff alleged that the land was conveyed to her husband to enable him to vote:—Held, that assuming the purchase money was entrusted by the plaintiff to her husband to invest for her in the purchase of land, that express trust was performed and was at an end when the land was conveyed to him. Held, also, that even assuming the money had been advanced by her by way of loan, her claim was barred by the Statute of Limitations, for there is no reason why the Statute of Limitations should not be applied to such a claim by a wife against her husband in the same way as if she were not his wife. Held, also, that though she was her husband's executrix, she had no longer any right of retainer in respect to her alleged debt, as by her own acts, by registering no caution within twelve months and then treating the property as vested in the defendants, the heirs of her co-devise, she had put the assets out of her own possession and control. Under all the circumstances of the case, and in view of the conduct of the plaintiff, held, however, that the transaction was not a loan but a gift by the plaintiff to her husband.

Re Starr, Starr v. Starr, 2 O.L.R. 762.

—As trustees.]—See TRUSTS AND TRUSTEES.

—Claim against estate—Evidence—Corroboration.]—Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of and endorsed by the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not show on their face whether they had been given on account of rent or in respect of advances.

Re Jelly, Union Trust Co. v. Gamon, 6 O.L.R. 481 (D.C.).

—Devolution of Estates Act—Sale of land by administrator—Non-concurring adult heirs—Approval of official guardian.]—An administrator desired to sell certain lands pursuant to his powers under section 16 of the Devolution of Estates Act, R.S.O. 1897, c. 127. There were certain heirs who were sui juris, but whose concurrences in the sale had not been sought or obtained because of the delay and expense which would be involved in so doing:—Held, that nevertheless, it was proper for the official guardian to approve of the sale, pursuant to his powers so to do under that section, if, after he had made the usual enquiries as in a case of infant heirs or devisees, no good reasons were advanced or discovered for his refusing to do so.

In re Bradley's Estate, 6 O.L.R. 397 (Meredith, J.).

—Devise to executor—Whether in lieu of compensation — Negligent management.]—The executor of the estate of H. was also the executor of the estate of M., in which H. was beneficially interested. In

passing his accounts as executor of another estate after H.'s death, the executor credited himself with having received for H. on account of her share in such last named estate a specified sum of money. On subsequently proving his accounts in the H. estate, and being charged with this sum, as having been received by him for the deceased, he claimed that he had not then received it, but had in fact paid it out in small sums to H. during her lifetime:—Held, that this was not a matter occurring before the death of H., and therefore the evidence of the executor did not require to be corroborated under s. 10 of the Evidence Act, R.S.O. 1897, c. 73. A testatrix by her will devised to her brother, naming him as such, certain lands free from incumbrances, with a direction for the payment out of her general personal estate of any incumbrance thereon, and she appointed him her executor, and provided for the appointment of a successor in such office, in case of a vacancy, without in such an event diverting the benefit from him. Held, that the devise was not given to him in his capacity as executor, but in his personal capacity, and did not preclude him from claiming compensation for his services to the estate. Compton v. Bloxham (1845), 2 Coll. 201, distinguished. The fact of an executor being guilty of acts of negligence, mismanagement, and breach of trust in his management of the estate, there being nothing of a dishonest or fraudulent character, while the losses resulting therefrom were capable of being compensated for, and made good in money, does not deprive him of his right to compensation. Hoover v. Wilson (1897), 24 A.R. 424, referred to.

McClenaghan v. Perkins, 5 O.L.R. 129 (C.A.).

—Claim against estate of deceased person—Corroboration—Special agreement—Running account—Terms of credit—Demand.] —The plaintiff claimed from the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1895. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on the 16th May, 1895. This action was begun on the 4th May, 1901. The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible, to get on without the money and to leave it in the hands of the deceased, who said he would save it for the plaintiff, and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go in to the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinct, was given by another witness:—Held, that there was sufficient corroboration of the plaintiff's statement. Held, also, that the plaintiff was not obliged to prove a definite term for which credit was given; the agreement was in effect one that the testator was to hold the money at least until the plaintiff demanded it; and, as there was no demand before the 16th May, 1895, the action was in time. Held, also, that the agreement was not one which offended against the law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it.

Wilson v. Howe, 5 O.L.R. 323 (C.A.)

—Irregular judgment—Refund by executors.]—A testator by his will gave to two trustees his estate real and personal and directed the trustees to pay, (1) to a sister a legacy of $500, and in case of her death to her daughter, and in case of the death of the daughter, to the daughter's children in equal shares; (2) to a niece a legacy of $500; (3) to the children of another niece a legacy of $500; and (4) to a charitable institution a legacy of $500; with a direction that should there not be sufficient to pay all the legacies there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to, and my said trustees or the survivor of them in even and equal shares and proportions:—Held, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each. Proceedings were taken in the year 1882 for the administration of the estate, and without, as was held in the previous judgment of this Court, 27 A.R. 242, proper proceedings being taken whereby they might have been bound, the children of the niece were ignored and their legacy and their share in the residue were divided between the charitable institutions, the trustees, and one of the other legatees:—Held, that the trustees and the charitable institution were bound to re-pay the excess which they had received, with interest from the date of the proceedings taken by the children of the niece. Judgment of Moss, J.A., 3 O.L.R. 208, varied.

Uffner v. Lewis (No. 2); Boys' Home v. Lewis (No. 2), 5 O.L.R. 684 (C.A.).

—Fatal Accidents Act—Action before administration.]—An action was brought to recover damages because of the death of a workman, the plaintiff alleging that she was his widow. Her status was put in issue, and she obtained letters of administration as the deceased's widow, and by amendment claimed also as administratrix: —Held, that having failed to prove her status as widow she could not succeed as administratrix, the rule that letters of administration relate back to the time of the bringing of the action not applying where the person setting them up was not really entitled to obtain them. Trice v. Robinson (1888), 16 O.R. 433, distinguished.

Doyle v. Diamond Flint Glass Company, 7 O.L.R. 747 (Idington, J.).

—Costs of unsuccessful action—Personal estate exhausted—Right to resort to real estate.]—An executor, without direct authority or obtaining indemnity, brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party:—Held, that though the general rule is that an executor, acting in good faith, is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor in this case resorting for this purpose to specifically devised real estate.

In re Champagne, St. Jean v. Simard, 7 O.L.R. 537 (Teetzel, J.).

—Administration—Cash on deposit—Rate of interest—Bequest of use of chattels for limited period—Land partly in state of nature — Right to dower—Payment to widow for release—Compensation of executors—Infants—Contingent legacies — Interest as maintenance.]—Executors found a sum of money belonging to the testator in the hands of a loan company upon savings bank account, and allowed it to remain there at 3½ per cent. per annum, for more than two years after obtaining probate of the will. In January, 1902, they closed the savings bank account and invested the money at 4 per cent. in a debenture, but, 20 days later, fearing that they would be called on to distribute the money, they took over the debenture themselves as from its date, and put the money into a chartered bank at 3 per cent. The trusts of the will, so far as the property not specifically devised was concerned, were to provide for annuities and to divide the surplus amongst the residuary legatees:—Held, that the executors would not have been justified in making long or permanent investments of the money which came into their hands; in strictness they should have deposited it from the beginning in a chartered bank, where it would have earned only 3 per cent.; and, in accounting, they should not be charged with more interest than they actually received, that is, 3½ per cent., while the money was on deposit with the loan company, 4 per cent. for 20 days during which it was invested in a debenture, and 3 per cent. thereafter until distributed. Inglis v. Beaty (1878), 2 A.R. 453, and Spratt v. Wilson (1890), 19 O.R. 28, distinguished. (2) A part of the will was as follows:—"I leave my stock and implements to my son H.; he to have the use of them for ten years; at the end of that time to replace them." The stock and implements were sold by the executors, at H.'s request, and the proceeds were paid to him:—Held, that the bequest was merely of the use of the chattels for ten years, with the right of possession vested in H. for that period only; but the executors, with H.'s consent, having done what they should have done at the end of the period, all that he could have was the interest for ten years upon the proceeds of the sale; and, therefore, H. should repay the proceeds, for which the executors were bound to account. (3) The testator was the owner in fee at the time of his death of a timbered lot containing 100 acres, from 15 to 20 acres of which he had taken the timber; a part of the cleared land had been prepared for cultivation, and seeds planted, but, owing to the nature of the soil, with little or no result. The testator had contracted to sell the whole lot for $2,000, and after his death the purchaser called on the executors to receive the balance of the purchase money and to make title. The widow claimed her dower, and her claim was compromised by the executors at $390, which they paid her, and she released her dower; they then conveyed to the purchaser under section 24 of the Trustee Act, R.S.O. 1897, c. 129:—Held, that as the lot was not in a state of nature at the time of the death, the widow's dower attached upon the whole of it; she was entitled to have one-third of such part as was not woodland assigned to her, and one-third of such part as was woodland, with the right to take from the woodland firewood for her own use and timber for fencing the other part, and the executors had the right, under section 3 of R.S.O. c. 129, to apply the money of the estate in the purchase of a release of the widow's dower; and were entitled to charge the estate with the $390. (4) The estate was not a simple one to deal with, owing to conflicting interpretations of the rights of the beneficiaries under the will, the nature of the trusts, their number and complication, and, to a more limited extent, the character of a portion of the assets. The executors took over about $60,000

worth of property in cash, mortgages, notes, farm property, and furniture. Of this they distributed a little less than half, and set apart the remainder for payment of annuities, legacies not matured, etc. They collected about $6,500 of interest. They managed the estate for a period of a little more than four years down to the date of a report providing for their remuneration:—Held, that they were not entitled to an allowance upon taking over the estate, but should be allowed 2½ per cent. upon such portion of the corpus of the estate as they had taken over and distributed, and when the remainder of the corpus taken over should be distributed, they should have a like allowance upon the portions distributed from time to time; they should be allowed 5 per cent. on the interest collected, and to be collected; and $100 a year in addition for the first two years, and $75 a year for the last two years, for management of the estate and services not covered by the other charges, including the care and preservation of the corpus. (5) The testator bequeathed to his two infant sons $4,000 each, contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate:—Held, that interest as a means of maintenance is payable out of the general residue of an estate, upon a legacy which is merely contingent, when the legatee is the infant child of the testator, and no other maintenance is provided; and it was proper in this case that an allowance should be made for the maintenance of the infants until their majority, out of the interest on sums set apart to answer the legacies; the gift of a share in the residue was not intended as a provision for maintenance. The will was to be read as directing the executors to apply the income of each legacy for the benefit of the infant during minority, to the extent required for maintenance, and this involved the reserving and investing of an amount equal to the amount of each legacy, not as the legacy, but to secure the amount of it in case it should become payable.

Re McIntyre, McIntyre v. London and Western Trusts Co., 7 O.L.R. 548 (Street, J.).

—**Surrogate Courts—Jurisdiction—Accounting—Falsifying inventory of assets.**] — The jurisdiction of the Ecclesiastical Court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details, is now vested in the Surrogate Courts of Ontario. For full inquiry and accounting resort must be had to the administrative powers of the High Court. Where, upon an accounting by executors before a Surrogate Court Judge it was objected by the residuary legatees that a certain sum of money, not included in the executors' inventory of the assets of the estate, should have been included, and it appeared that the widow of the testator, who was one of the executors, claimed the sum as a gift from the testator in his lifetime:—Held, that the Judge had no jurisdiction to pass upon the question thus raised; all that he could do was to report that a claim had been made that there was another asset of the estate, stating what it was, which he was unable to investigate, and could, therefore only approve of the rest of the accounts submitted to him.

Re Russell, 8 O.L.R. 481 (D.C.).

—**Letters of administration—Relation back to date of death.**]—See Lord Campbell's Act.

Doyle v. Diamond Flint Glass Co., 8 O. L.R. 499 (D.C.).

—**Action by administrator before issue of letters of administration—Relation back.**]—Letters of administration issued, after action and before the trial, where the plaintiff brings his action as administrator, are sufficient to support the action, even where the plaintiff has no interest in the estate. Fell v. Lutwidge, (1740), Barnardiston Ch. 319, followed. Humphreys v. Humphreys (1743), 3 P. Wms. 349, Trice v. Robinson (1888), 16 O.R. 433, Chard v. Rae, (1889), 18 O.R. 371, and Doyle v. Diamond Flint Glass Co. (1904), 7 O.L.R. 747, and ante 499, considered. The order of the Judge of the proper Surrogate Court, on the day this action was begun by the issue of the writ of summons, that letters of administration should be issued to the plaintiff, was such a declaration of the plaintiff's right to obtain letters as would make them, when issued, relate back to the date of the order. Judgment of Idington, J., reversed.

Dini v. Fauquier, 8 O.L.R. 712 (D.C.).

—**Ont. Division Courts—Action against an executor de son tort—Jurisdiction.**]—An executor de son tort is not within the meaning of R.S.O. 1897, c. 60, s. 72 (d), giving enlarged jurisdiction to Division Courts "when the amount is ascertained by the signature of . . . the person whom, as executor or administrator, the defendant represents," and a Division Court has no power in the same proceeding to declare a defendant executor de son tort and pronounce judgment against him as such for the amount claimed.

Re Dey v. McGill, 10 O.L.R. 408.

—**Will—Executors—Power of sale—Devolution of Estates Act.**]—Where the authority to sell real estate is given to the execu-

tors, the fee simple is impliedly vested in them for that purpose. The testatrix in the first part of her will gave her whole estate, real and personal, subject to the payment of debts, to her stepson and his wife, and their three children, "to be divided and shared equally between them." She then proceeded: "It is my will that my personal effects that have not been disposed of during my lifetime shall be kept in the family, excepting any furniture . . . but the real estate, if I have not disposed of it, shall be sold and equally divided, and I appoint my stepson . . and his daughter . . to execute this, my will":—Held, that the right of the executors to sell the real estate of the testatrix was not affected by the Devolution of Estates Act, but that, independently of that Act, the executors had, upon the true construction of the will, an express power to sell the real estate.

Re Roberts and Brooks, 10 O.L.R. 395 (Teetzel, J.).

—Legatee not heard of for seven years—Presumption of death—Burden of proof.] —A testator, dying in 1895, gave his estate (subject to his wife's life interest), to his brothers and sisters, share and share alike. One brother was living in 1885, but had not been heard of for more than seven years before the death of the testator. There was no evidence that he was in fact dead, nor that he survived the testator. Letters of administration to his estate were granted in 1903, upon the presumption that he was dead:—Held, that the onus of proof that he survived the testator lay upon those who claimed under him; and, there being no evidence that he survived, the administrator of his estate failed to establish any right to share in the testator's estate; and distribution among the other legatees or their representatives was ordered, subject to their undertaking to refund should it be established at some future time that the absentee or his representative was entitled.

Re McNeil, 12 O.L.R. 208 (Teetzel, J.).

—Resignation of executors in foreign country—Ancillary probate in Ontario.] — A testator who died domiciled in Michigan, U.S., leaving property there and in this province, appointed certain persons executors, making them also trustees of four-sixths of his estate and the proper Probate Court in Michigan granted probate to them in 1900. In 1903 they tendered to that Court their resignation as executors, though not as trustees, and requested and obtained the appointment of a trust company as administrators de bonis non with the will annexed, in their place. In 1904, however, they resumed an application which had remained suspended since 1900, to the Surrogate Court of the County of Essex, for ancillary probate, which was opposed by the beneficiaries of the estate in Ontario, who asked for administration de bonis non to be granted to the trust company or its nominee:—Held, affirming the Surrogate Judge, that the Court here ought to follow the Michigan grant to the trust company, and could not look into any of the circumstances which led up to it.

In re Medbury, Lothrop v. Medbury, 11 O.L.R. 429 (D.C.).

—Surrogate Court — Passing accounts — Creditor's claim.]—A Surrogate Court Judge on passing the accounts of an executor, administrator or trustee, under the provisions of section 72 of the Surrogate Courts Act as amended by 5 Edw. VII. c. 14 (O.), has no jurisdiction to call upon a creditor of the estate to prove his claim and to adjudicate upon that claim and allow it or bar it. If, however, the executor, administrator or trustee, has in good faith paid the claim of a creditor before bringing in his accounts, the Surrogate Court Judge has jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts. Order of the Surrogate Court of Elgin barring the claim of a creditor set aside as having been made without jurisdiction.

Re MacIntyre, 11 O.L.R. 136 (D.C.).

—Devolution of Estates Act—Administrator, only adult interested in real estate —Consent — Registration of caution.]—An intestate owning real estate left her surviving her husband and two infant children. Letters of administration were granted to the husband, who registered a caution under sub-s. 5, s. 14, of the Devolution of Estates Act, R.S.O. 1897, c. 127, and with the consent of the official guardian sold the real estate. On an application under Con. Rule 972:—Held, that although administrator, he being the only adult interested in the real estate, was not deprived of his right to consent, and that his application to register the caution was sufficient evidence of his consent.

Re Hart Estate, 13 O.L.R. 379.

—Distribution of estates—Absentee next of kin—Advertisement for creditors and others.]—The administrators of the estate of an intestate, who died in 1906, inserted three times in a newspaper published at the place in Ontario where the intestate was residing at the time of his death, an advertisement headed "Notice to Creditors," given pursuant to R.S.O. 1897, c. 129, calling upon "all creditors and others having claims against the estate" of the deceased to send them in to the solicitor for the administrators by a named date, and stating that after such date

they would not be liable to any person of whose claim notice should not have been received. One of the next of kin, who would, if alive, have been entitled to a distributive share of the estate, had left Canada, in 1876, and no communication had since been received from him or information about him, except that soon after his departure a sister of his heard that he was in Oregon, and in 1895 an aunt heard that he was dead. Diligent inquiry was made for him in 1882, but he was not then found. No one had ever heard of his marrying. No claim was made on his behalf upon the estate:—Held, that the advertisement was sufficient; that it covered next of kin; and that the absentee would be barred if he was hereafter to make any claim; and therefore the administrators should divide the assets amongst those entitled as though the absentee were assuredly dead without ever having had issue.

Re Ashman, 15 O.L.R. 42 (Riddell, J.).

—**Surrogate Courts—Taking accounts — Jurisdiction to rescind order on account of mistake.**]—A Surrogate Judge acting as the Surrogate Court has inherent jurisdiction to set aside an order which he has been induced to make by fraud of the applicant, and also to set aside or vary an order which he has made by mistake, though not to correct errors made in the judicial determination by him of any question; thus in this case it was held that he had jurisdiction to vacate an order made by himself upon the taking of executors' accounts and to reopen the accounts and further investigate them without reference to the order made. The acts of the Surrogate Judge in passing accounts of executors are those of the Court and not of the Judge as persona designata. Consolidated Rule 642, which substitutes a proceeding by petition for the practice of filing certain kinds of bills abolished by the General Order of 1853, does not apply to a petition to a Surrogate Judge to vacate an order made by him on the passing of executors' accounts, but must be confined to cases in which under the former practice such relief as is mentioned in it could be obtained by one or other of such bills.

Re Wilson and Toronto General Trusts Corporation, 13 O.L.R. 82 (D.C.).

—**Passing of accounts—Reference to take accounts in Master's office—Prior account in Surrogate Court.**]—By section 72 of the Surrogate Courts Act, R.S.O. 1897, c. 59, "Where an executor or administrator has filed in the proper Surrogate Court an account of his dealings with the estate of which he is executor or administrator, and the Judge has approved thereof in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court, such approval except in so far as fraud or mistake is shown, shall be binding upon any person who was notified of the proceeding taken before the Surrogate Judge, or who was present or represented therein, and upon every one claiming under such person." The defendant, an executor brought into the proper Surrogate Court the accounts of certain estates of which he was the executor, which were passed by the Judge in the presence of the solicitor for the plaintiff, a beneficiary. Subsequently the plaintiff brought an action in the High Court, and without any pleadings being delivered, an order was made, by consent, for the removal of the executor and the appointment of a trust company in his place, and for the passing of the accounts, adopting the common form of the order for such purpose:—Held, that on the taking of the accounts in the Master's office the account taken and passed by the Surrogate Court Judge was under section 72, no mistake or fraud having been shown, binding on the plaintiff, for notwithstanding such consent the judgment must be construed as if made in invitum, and the usual rules of law and procedure, statutory and otherwise, applied thereto. 63 Viet. c. 17, s. 18 (O.), 5 Edw. VII. c. 14 (O.) and Con. Rule 666 and 667 referred to as to the powers and duties of the Master in taking accounts, section 72 applying to trustees as well as executors.

Gibson v. Gardner, 13 O.L.R. 521 (C.A.).

—**Accounts—Surrogate Court — Approval by Judge—Fraud or mistake—Application to re-open accounts.**]—A petition by the cestui que trust to the Judge of a Surrogate Court to set aside an order made by him upon the passing of the accounts of the trustees and to reopen the accounts, was dismissed with costs, subject to the petitioner being allowed to surcharge the accounts of the trustees upon two items, viz., premiums paid by the trustees for fire insurance, from which they should have deducted rebates or commissions allowed to them by the insurance companies, and an overcharge of one cent a share upon a purchase of 3,000 shares of mining stock by former trustees:—Held, affirming the judgment of the Judge of the Surrogate Court (York), that he had properly refused to open up the accounts in regard to the purchase of the mining stock referred to, in regard to an alleged overcharge of interest, in regard to the sale of a property without notice to the petitioner, in regard to certain mortgage accounts, and in regard to other matters. It was contended for the petitioner that the non-disclosure of the fact that the rebates had been allowed amounted to fraud on the part of the trustees entitling the petitioner to

have the accounts re-opened and taken de novo, and that, at all events, coupled with the overcharge as to the mining stock, she was so entitled. The accounts approved by the Judge were brought before him under the provisions of s. 72 of the Surrogate Courts Act, as amended by 2 Edw. VII. c. 12, s. 11, and 5 Edw. VII. c. 14, s. 1. Held, that, under that section, it is only so far as mistake or fraud is shown, and not where mistake or fraud is shown, that the binding effect of the approval is taken away; and the language of the section plainly indicates that it was not intended that the whole account should be opened up, but that the account should be opened up so as to remove from it anything which, owing to fraud or mistake, had not been charged or had been allowed to the accounting party. The principle applicable to the opening of an ordinary stated account, and the consequence of such an account being opened, do not apply to an account taken by the Court in the presence of the parties, where the persons to whom the accounting is being made are brought before the Court for the purpose of enabling them to challenge, if they will, the correctness of the account. While the failure to credit the rebates was not due to a mere accidental omission of them from the account, the intentional retention of the small sum not credited, apparently under the mistaken idea that the trustees were entitled to it, did not amount to fraud, or at all events not to such fraud as would entitle the petitioner to the relief which she claimed or to any further relief than that given to her by the order of the Judge. The petitioner should not have been ordered to pay all the costs of the trustees in the Court below, as she had succeeded to a trifling extent. No costs of the appeal were allowed to either party, but without prejudice to the trustees' right to claim their costs as proper disbursements in accounting thereafter to the petitioner.

Re Wilson and Toronto General Trusts Corporation, 15 O.L.R. 596 (D.C.).

—Letters of administration — Surrogate Court for wrong county—Validity.] — Where letters probate or of administration have issued out of a Court from which they could not properly issue under the Surrogate Courts Act, R.S.O. 1897, c. 59, s. 19, they are nevertheless valid unless and until revoked.

London and Western Trusts Co. v. Traders Bank, 16 O.L.R. 382.

—Revivor by and against.]—See REVIVOR.

—Legacies charged on land—Sale by executors—Statute of Limitations—Application of purchase money.]—The testatrix, dying on the 2nd May, 1904, by her will devised land to M., but charged thereon certain legacies and the payment of her debts and funeral and testamentary expenses, and exempted all the rest of her estate from liability therefor, and gave her executors (M. being one) power to mortgage or sell the land devised for the purpose of paying the sums charged thereon. The will was not proved. The executors on the 24th May, 1899, conveyed the land to M., and he was in possession until the 24th May, 1909, when a person to whom he had contracted to sell the land took possession. These was no assent to any legacy and no setting apart of any sum:—Held, upon a petition under the Vendors and Purchasers Act, that neither the executors as such nor M., were trustees, and the legacies were barred by the Statute of Limitations; but, if not, that M. had the right to sell, and the purchaser was not bound to see the application of the purchase money. Held, also, that the purchaser, having taken possession without any consent, and without any agreement, express or implied, and made alterations in the property, was not entitled to insist upon requisitions as to title being satisfied.

Re Mulholland and Morris, 20 O.L.R. 27.

—Administration order — Practice.]—With the wide powers now possessed by personal representatives for the disposition of the property of deceased persons and the distribution of the proceeds among creditors and persons entitled, it can very seldom happen that an administration in Court is necessary; and the practice of the Court is not to make an order for administration unless a clear case showing the necessity of it is made out. One of the main objects of the Devolution of Estates Act was to render the administration of an estate in Court, in ordinary cases, unnecessary — an object which would be defeated unless the Court was slow to make administration orders. In the circumstances of this case, while it was doubtful whether an administration order should have been made, the doubt was not sufficiently strong to warrant the depriving the parties of the commission and disbursements allowed. The practice of a local Master making an administration order, with reference to himself, is not a satisfactory one. The Master acted without authority in sanctioning arrangement between the testator's widow and the creditors, and in dispensing with payment of money into Court; and his action, in both cases, was, in the special circumstances, confirmed by the Court.

Re Clark, Toronto General Trusts Corporation v. Bank of Montreal, 1 O.W.N. 691 (Meredith, C.J.C.P.).

—Drafts on bank—Death of payee before presentation—Foreign domicile—Rights of foreign administrator.]—Y., domiciled in

the State of California, when on a visit to the Province of Ontario, bought from the Bank of Montreal there two drafts, for $1,000 each, upon a new York bank, and when he died in California they were found among his effects, never having been presented for acceptance or payment. The plaintiff was appointed by a California Court administrator of Y.'s estate, and presented the drafts for payment to the New York bank, who refused to accept, the Bank of Montreal having stopped payment of them. The plaintiff then claimed the amount of the drafts from the Bank of Montreal, and the defendant, the Ontario administrator of Y., also making a claim and bringing an action against the bank, the bank paid $2,000 (less costs) into Court, and an issue was directed between the plaintiff and defendant:—Held, that the Bank of Montreal by becoming the drawers of the bills did not undertake that the New York bank would accept and pay in New York, but did guarantee that if the New York bank did not do so, they themselves would, if duly notified, reimburse the holder; this was a contract with Y., and he might enforce it; it did not die with Y.; and the plaintiff, the duly appointed representative of Y. in California, where the drafts passed into his hands, was the holder in the legal and mercantile sense; and the money paid into Court represented the drafts and was in the same ownership. As the defendant was the next of kin of Y., and all the money was not required for payment of debts, it was considered not advisable to pay money out of Court to a foreign administrator, who would necessarily repay some of it to the defendant in Ontario; consequently the latter was allowed the option of a reference to determine the amount which should be sent to the plaintiff; and the costs of both parties were ordered to be paid out of the fund, those of the plaintiff in priority.

Young v. Cashion, 19 O.L.R. 491.

—Ascertainment of next of kin—Legitimacy—Foreign law—Conflict of expert testimony.]—In an action by the children of a half-brother of an intestate to establish their status and rights as next of kin, it appeared that the mother of the intestate in 1824 was deserted by her husband, and believing him dead, in 1826 entered into marriage relations with another man, which continued until her death in 1833. The plaintiff's father, the issue of this union, was born in 1829. The wife alway remained unaware that her husband was not dead, and acted in good faith. He, in fact, survived her. All the events took place in the State of New York, where the parties were domiciled. The intestate died in Ontario, and his estate consisted entirely of personalty:—Held, that the question of the legitimacy of the plaintiff's father and the right of succession of his descendants to the intestate's property, depended upon the law of the State of New York. The expert evidence as to the law being conflicting, the Court examined the authorities upon which the experts respectively relied, and reading these with the aid of the explanatory, critical and argumentative testimony adduced, and discharging functions analogous to those of a special jury, determined that by the law of the State of New York, referred to in the judgment, the plaintiff's father was legitimate.

Hunt v. Trusts and Guarantee Co., 10 O.L.R. 147, affirmed, 18 O.L.R. 351 (C.A.).

—Registration of caution after expiry of three years—Approval of official guardian.]—Sections 14 and 15 of the Devolution of Estates Act, R.S.O. 1897, c. 127, as amended by 2 Edw. VII. c. 17, apply where the interests of infants as well as those of adults are to be affected; and where, upon an intestacy, land has vested in an adult and an infant (the heirs of the intestate), after three years from the death of the intestate, the land not having been disposed of or conveyed by the administrator, and no caution having been registered, within that period, a caution may be registered, under s. 14, after the expiry of that period, upon the certificate of the official guardian approving of and authorizing the caution to be registered being given and registered with the caution; and the effect, under s. 15 is to revest the land in the administrator, just as it would have been or remained vested if the caution had been registered within the three years; and the administrator, with the consent of the official guardian, acting on behalf of the infants, may then sell and convey as provided in s. 16.

Re Bowerman and Hunter, 18 O.L.R. 122.

Quebec.

—Donatio mortis causa—Ratification by will.]—C., the father of the respondent, had sold an immovable to A.W. and C.B. Morris, for the sum, secured by privilege of bailleur de fonds, of $150,000, of which $50,000 was payable to the respondent after the decease of the vendor, and subsequently he made a will in which he ratified the said donation and delegation of payment. Messrs. Morris were appointed executors of this will. The appellant having become proprietor of the immovable by virtue of a title which obliged her to pay the debts of the respondent, Messrs. Morris, in their quality of testamentary executors of C., granted her a discharge of this debt, and a withdrawal of the hypothec which secured it. On an action in de-

claration of the hypothec of the respondent, demanding the nullity of the discharge granted by the testamentary executors:—Held, 1. Even if the delegation of payment stipulated in favour of the respondent by the deed of sale was null as containing a donation à cause de mort, made by a deed entre vifs, this donation became valid by the subsequent will of C., and the debt in question passed to the respondent with its accessories, and especially with the hypothec and privilege of bailleur de fonds. 2. A testamentary executor only having possession for the purposes of the execution of the will, that is for the payment of the debts and legacies specified, Messrs. Morris had no power in this case to give a discharge to the appellant, there being nothing to show that they required this sum to satisfy the debts of the succession, on the contrary, one of the said executors, assignee of the other, had sold the immovable to the auteur of the appellant, with a charge to pay the amount of the legacy in question to the respondent herself.

Consumer's Cordage Co. v. Converse, 30 Can. S.C.R. 618, affirming 8 Que. Q.B. 511.

—Proof of status—Inscription ex parte.]—A plaintiff who sues in his capacity of testamentary executor on a lease entered into in such capacity with the defendant is not obliged to file the documents proving his quality of executor before he can inscribe ex parte.

Leclaire v. Huot, 3 Que. P.R. 389 (S.C.).

—Domicil—Place of service.]—An action concerning a succession against a testamentary executor as such is within the exclusive jurisdiction of the Court for the district in which the succession was opened, that is to say, of the deceased's last domicil, though he may have died in another district or have temporarily dwelt there at the time of his death; advantage cannot be taken of the provisions of Art. 94 C.P.Q., to take the executor out of the jurisdiction of his proper Judges by serving the action upon him personally in the district in which he happens to be.

Béchard v. Bernier, 17 Que. S.C. 540 (S.C.).

—Assignment of debt—Exception to form—New cause of action.]—Testamentary executors may recover the balance due on a debt assigned to them as executors. If in answer to an exception to the form they set up and produce documents conferring on them powers larger than they would have by virtue of the law alone, this part of the reply will not be rejected on motion as tending to make a new cause of action.

Francis v. Rhine, 3 Que. P.R. 320 (S.C.).

—Appointment of new executors — Account of property.]—Although executors appointed to act jointly and having equal powers, should act in concert, one of them —when they are proceeded against by those replaced to compel the acceptance of an account rendered by the latter and a declaration that all property of the succession has been transferred — may alone contest such action for the purpose of opposing the approval of such account and the declaration that he and his co-executor have received all the property of the succession, but he cannot demand the reformation of the account nor a condemnation for the benefit of the succession.

Desjardins v. Masson, 11 Que. K.B. 195.

—Executor—Possession of estate—Reddition de compte—Year and a day—Reprise d'instance.]—The fact that a debtor of the succession defends an action en reddition de compte brought by an executor claiming that he is not accountable to the succession, does not prevent the executor from taking possession of the property any more than if the debtor, being condemned to render an account to the executor, renders one which brings him in debt, even though the executor has contested it. Hence, the delay of a year and a day runs from the date of the testator's death, the executor being assumed to have knowledge of the will from that date. When the year and a day has passed pending proceedings on examination of the account then there is de plein droit a cessation of the functions of the executor, and the proceedings are suspended de plein droit until the legatee or heir has taken up the instance in the place and stead of the executor.

Francoeur v. Paradis, 20 Que. S.C. 246 (Sup. Ct.).

—Form of action—Removal of executor—Art. 81 C.C.P.]—An action demanding that a legal mandatory (in this case a testamentary executor) be removed from office on account of maladministration and acts of fraud charged against him should be directed, not against the mandatory in such capacity, but against him personally.

Mercier v. Gosselin, 5 Que. P.R. 80 (Sup. Ct.).

—Extension of functions — Exception to form.]—The extension of the powers of a testamentary executor beyond the year and a day, may result from former wills and from the combination of various testamentary provisions relating to the appointment of the executor.

Brunet v. Marien, 4 Que. P.R. 330 (Sup. Ct.).

—Interpretation of wills.]—See WILLS, II.

— Ab-intestate succession — Inventory — Choice of the notary.]—The choice of a notary to proceed to the inventory of an ab-intestate succession belongs to the most diligent party, especially if another party, who has had the control of the estate for some time, has failed to complete the inventory; however, the latter being the choice of the majority of the interested parties, will be appointed to assist the other notary in his inventory.

Mallette v. Mallette, 5 Que. P.R. 422.

—Time for making inventory and deliberating—Act of administration.]—A claim made by a testamentary executor for a sum due to the succession which he is administering does not constitute, on his part, acceptance of a legacy as beneficiary heir and does not deprive him of the time allowed to make an inventory and to deliberate as to acceptance.

Renouf v. Turner, 5 Que. P.R. 373.

—Foreign administrators — Validity of nomination—Art. 80 C.C.P.]—A defendant sued upon a promissory note may plead that the note was given without consideration and invoke such defect against a holder deriving title as administrator illegally named by a foreign tribunal.

Poirier v. Arnault, 5 Que. P.R. 139.

—Accounting by executors.]—Executors are not obliged to render accounts at frequent intervals and an application to compel them to account made in less than four months after a previous application which was complied with will not be granted.

Lapierre v. St. Jean, 11 Que. P.R. 225.

—Succession — Legacy — Acceptance.] — The fact that a universal legatee has claimed from an insurance company the benefits due to the heirs of the testator does not imply the acceptance of his legacy if he is at the same time executor of the will.

Renouf v. Turner, Q.R. 24 S.C. 194 (Sup. Ct.).

—Retaining property—Action against executor.]—The party who takes proceedings to set aside a will is not bound to summon all the heirs, but when there are debts or undivided rights to be effected the party summoned may, by declinatory exception, have the proceedings stayed until all the heirs have been brought into the cause. An executor who is sued for retaining property of the succession after his functions are at an end, cannot, by exception to the form, demand the dismissal of the action which was taken against him personally.

Coleman v. Stevens, Q.R. 25 S.C. 44 (Sup. Ct.).

—Action against estate by default—Joinder of cases.]—Held:—The Court may proprio motu unite two default cases against the same estate, and order its representatives to be personally present at the trial, when the claims are, on their face, considerable, and a privilege might attach thereto to the detriment of the other creditors.

Meunier v. St. Jean, 7 Que. P.R. 62 (Davidson, J.).

—Actions against testator—Renunciation —Seizure.]—An interim injunction may be granted to prevent testamentary executors from abandoning actions against their testator even though a seizure under judgment therein has been quashed as well as a saisie-arrêt for goods in possession of the executors who were not domiciled in the province.

Bowie v. Crawford, 7 Que. P.R. 1 (Sup. Ct.).

—Contestation of account—Grounds of contestation—Negligence and maladministration of accounting party—Amendment.]—(1) Neglect to have an inventory made with due diligence, failure to sell movable property and allowing it to deteriorate and depreciate in value, carrying on an unprofitable business instead of winding it up, neglect to collect moneys due, and, generally, negligence and maladministration resulting in the loss or shrinkage of the assets of an estate, are legal grounds of contestation of an account rendered by executors of their executorship, pursuant to a judgment in an action to account. (2) When the conclusions of a contestation of an account are that the accounting party be condemned to pay the contestant a sum stated to be the balance of the account, the Court, at the final hearing, has power, on motion of the contestant, to allow him to amend them by adding thereto a prayer that the judgment declare the account illegal and false, that no substitution exists of the movable property, and that its proceeds should be distributed, and that the accounting party was guilty of negligence and maladministration causing loss to a stated amount which should be refunded to the interested parties. Such an amendment does not change the nature of the demand, and does not, therefore, come within the prohibition of Art. 522 C.C.P.

Blackwood v. Mussen, 28 Que. S.C. 170 (C.R.).

—Jurisdiction in rem—Defendant residing outside province — Property held in province—Action for account.]—Held, reversing Lavergne, J., in the Superior Court, that the Courts of Quebec have jurisdiction, in actions for account instituted against foreigners who have been duly

summoned before the tribunal of the place where property owned by them may be situate. (2) Residence abroad by a person having property in Quebec does not affect the jurisdiction of the Quebec Courts even when the accounts may be in respect of a succession, the opening of such succession having taken place in a foreign country.

De Bigaré v. De Bigaré, Q.R. 14 K.B. 26.

—Seizin of movable property of succession —Rents of immovable property.] — The seizin of movable property of successions by testamentary executions, under Art. 918, C.C., carries with it the right to collect during the year and a day of its duration, the revenues of the immovable property. Hence, in an action for rent and damages, under a lease by the legatees of the lessor against the lessee, the latter may lawfully plead matter of agreement respecting such rent and damages between himself and the testamentary executors of the lessor, during the period of seizin of the latter.

Saint-Aubin v. Crevier, 28 Que. S.C. 392 (Davidson, J.).

—Testamentary executor—Account—Writ of summons.]—An account can only be demanded from a testamentary executor by action at law, instituted by means of a writ of summons, and not by petition.

O'Borne v. Lemay, 7 Que. P.R. 333 (Doherty, J.).

— Mandamus—Cemetery company—Body of testator.]—An executor is not entitled to a mandamus to compel a cemetery company to deliver to him the body of the testator, which had been deposited in a vault in the cemetery and afterwards, in good faith and in ignorance of the petitioner's capacity, had been delivered by the company to the testator's son; in such case the writ would have no effect as it would not be possible to comply with the demand.

Valin v. Mount Royal Cemetery Co., 8 Que. P.R. 379 (Tellier, J.).

—Resignation of executor.]—The following clause in a will, "I desire that there shall always be two executors of my succession and that in case of the death of one of my two executors . . . or in case of refusal of one to act or to continue to act another should be appointed in his place, and so in this way there may always be two. . ." does not relieve an executor who wishes to renounce from the necessity of having his renunciation accepted by a Judge, the parties mentioned in Art. 911 C.C. being present or duly called. The testator in directing that the substitute for an executor renouncing "shall be chosen en justice on advice of the family council" did not intend to derogate and did not derogate from the provisions of Arts. 911 and 924 C.C.

Rodier v. Rodier, 9 Que. P.R. 429 (K.B.).

—Executor—Application for discharge — Service of notice.]—Notice of application by the executor of a succession subject to substitution devised to universal legatees for a judical order discharging him from the executorship should on pain of nullity, be served on each of the legatees as also should a Judge's order calling the latter together to choose an executor in place of the one discharged. Failure to serve the notice and Judge's order on one of the legatees makes void the order granting the application and that appointing a new executor.

Rodier v. Rodier, Q.R. 18 K.B. 1.

—Executor — Declaration—Penalty.]—The executor from whom a penalty is claimed for default in making, within the time prescribed, the declaration as to the testator's property cannot plead that he has prepared a statement so far as he was able, but has been prevented from completing it owing to the difficulties in his way and has applied for further time to do so. Such defence will be rejected on inscription en droit.

Rainville v. Coutlée, 10 Que. P.R. 187.

—Action of account.]—(1) A judgment of the Court of Review, reversing that of the Superior Court which had dismissed an action, on the ground that the evidence tendered by the plaintiff was inadmissible, and ordering a retrial with leave to adduce the same evidence, is not conclusive, nor binding on the Court, when dealing with the case upon its merits, but is subject, like all other interlocutory judgments, to be then set aside. (2) A party sued to account for his administration of an estate as trustee, cannot, while admitting his acceptance of the trust and the performance of such acts as paying small debts and funeral expenses, deny his accountability on the ground that he never was possessed with any money or property of the trust to administer or account for. An account rendered, judicially closed, is intended, not only to cover and dispose of the matters in it, but also to establish that there is no further accountability.

Slater v. Currie, 18 Que. K.B. 246.

Eastern Provinces.

—Settlement of estate—Parties—Improper rejection of evidence—Costs.]—In settling the estate of W. in the Probate Court the Judge of the Court, at the instance of next of kin of the deceased, undertook to dispose of the sum of $1,000 which the administrator—a brother of the deceased—

contended had been given to him by the deceased, two years before her death as a gift for his two sons. Evidence was tendered by the administrator, for the purpose of showing that the money received by him from the deceased had been invested for the two boys, by paying off a mortgage held by R., and that the fact of the investment had been communicated to the donees. The Judge declined to receive the evidence on the ground that, at the time it was tendered, the Court had been adjourned solely for the purpose of hearing argument by counsel, and that he could not receive further evidence:—Held, that the Probate Judge had power to hear and consider evidence at any time before making his final decree, and that he was wrong in refusing to receive the evidence tendered. Per Townshend, J., Ritchie, J., concurring:—Held, that the Judge went beyond his jurisdiction in dealing with and deciding the question of gift or no gift, where the rights of third parties had intervened who were not before him, and to compel the appearance of whom he had no process, and his decree must be set aside. Re Estate of Ralston, 2 Thom. 195, and Re Estate of McNutt, 24 N.S.R. 264, distinguished. Per Graham, E.J., Weatherbe, J., concurring:—Held, that the administrator's two sons being necessary parties to any litigation to determine whether the amount in controversy belonged to them or not, and the Court of Probate having no jurisdiction over them under the statute relating to that Court, the appeal should be allowed with costs, and the consideration of the accounts adjourned until the ownership of the money was decided in a proper action.

Re Estate of Maria Wheelock, 33 N.S.R. 357.

—Administration—Party accepting letters cannot renounce without order of Court.]—Letters of administration in the estate of H. N. K. were granted to his widow, S. K., and to his two children, E. R. and R. K. S. K., by deed, assigned all her interest in the personal property to E. R. and R. K., and by the same deed, purported to renounce all her right, authority and power as administratrix of the estate. E. R. and R. K. obtained from the Judge of the County Court for District No. 2, an order permitting them to issue execution on a judgment obtained by H. N. K. in his lifetime against defendant:—Held, following Jost v. McNeil, 20 N.S.R. 156, that S. K., having accepted letters of administration, could not renounce without the order of the Court of Probate, and that the order made on the application, and in the names of E. R. and R. K. only, was bad and must be set aside. Held, that the order was bad, further, for want of jurisdiction, because it permitted execution to issue on the judgment "for the benefit of the said E. R. and R. K.," instead of requiring any sum realized to be applied according to law under the direction of the Court of Probate. Held, that as the appellant had failed on the merits, a larger amount appearing to be due on the judgment than was claimed, there should be no costs to either party, either in this Court or in the Court below.

Kaulbach v. Mader, 35 N.S.R. 219.

—Administration suit—Security for costs.] See SECURITY FOR COSTS.

Aiton v. McDonald, 2 N.B. Eq. 324.

—As trustees.]—See TRUSTS AND TRUSTEES.

—Deficiency of personal estate—Order to sell real estate—Petition for.]—A party aggrieved by a decree of a Judge of Probate may appeal therefrom, although he did not appear in the Court below. An order extending the time for appeal made ex parte is not a nullity, and if not set aside the Court will hear an appeal taken under it. A Judge of Probate is not warranted in granted a license to sell real estate to pay debts, unless he is judicially satisfied by proof, and finds the amount of the personalty and the amount of the debts, and thus ascertains what the deficiency is. A bald adjudication that there is a deficiency based on a list of attested accounts, and the evidence of the petitioner that they were filed against the estate is not sufficient.

Re Welch, 36 N.B.R. 628.

—Administration de bonis non—Who entitled—Petition of trust company—Domicile.]—In a contest for administration de bonis non between the next of kin of the deceased administrator, the husband of the intestate, and the next of kin of the intestate, whose status as a petitioner depended on the domicile of the intestate, the Judge of Probate disregarded the fact that letters of administration had been issued out of his Court on the estate of the intestate as domiciled in this province, the petition upon which the letters were granted not having been put in evidence or the statements therein relied upon, and he refused to consider as evidence a statement in the unsworn petition of a trust company applying for administration as the representative of the next of kin of the deceased administrator, that at the time of her death the intestate was domiciled in this province:—Held, on appeal, that the decision was right, and that administration was properly granted to the representative of the next of kin of the intestate.

Re Forester, 37 N.B.R. 209.

— Bond to administer—Construction — Liability of sureties.]—Defendant applied

for and obtained administration of his father's estate upon giving the statutory bond (R.S. 1900, c. 158, p. 565) to administer according to law. Subsequently he applied to the Court of Probate for the settlement and distribution of the estate and obtained a decree for payment of the balance of the estate to himself as next of kin without disclosing the fact that the estate was indebted to the estate of C., of which he and his father were executors and trustees, for moneys of that estate received and not accounted for:—Held, that there had been a breach of the condition for which the sureties were liable in an action on the bond.

Colford v. Compton, 39 N.S.R. 247.

—Interpretation of wills]—See WILLS, II:

—Administrator's deed—Title under—Recitals—License to sell.]—An administrator's deed duly proved and registered under 3 Vict. c. 61, s. 56, reciting all the facts required by the statute, and having the affidavit of the administrator endorsed thereon that the premises mentioned in the deed had been duly advertised and sold according to law, is not sufficient proof of title in one claiming thereunder without proof of the license to sell. A registered deed of lands held adversely to the legal owner at the time the deed was given will not inure to give title or possession to the grantee so as to enable him to maintain trespass against the person in actual possession, although there is evidence of isolated acts of ownership on the land by the grantee after the deed was given.

Johnson v. Calnan, 38 N.B.R. 52.

—Conversion—Evidence.]—

Ferguson v. McDonald, 1 E.L.R. 496 (N. S.).

—Conversion—Evidence.]—

Ferguson v. Garden, 1 E.L.R. 497 (N.S.).

—Conversion—Evidence.]—

Ferguson v. Moxon, 1 E.L.R. 498 (N.S.).

—Action by creditor within twelve months of testator's death — Special grounds necessary.]—

Barrett v. Harper, 3 E.L.R. 89 (P.E.I.).

—Partners — Assets employed in trade — Action by cestui qui trust for accounts of profits—Debt not called in by executor—Payment of interest — Election — Acquiescence.]—

Carvell v. Aitken, 5 E.L.R. 477 (P.E.I.).

—Settlement of estate—Unreasonable delay—Allowance of interest to beneficiary.]—The executor named in a will is not entitled to delay payment of legacies for the period of eighteen months from the decease of the testator where it appears that there were ample funds in his hands to enable him to have paid the same at least after twelve months, and in the absence of evidence to show the existence of debts, claims or difficulties calling for eighteen months to dispose of them. Where it appears that there has been unreasonable delay and a decree has been made allowing the beneficiary interest, after the expiration of the period of twelve months, such decree will not be disturbed. The executor under a will which has been set aside as void, will be entitled, in taking the accounts, to credit for an amount paid out bona fide under the probate of the void will, but such payment is no answer to parties claiming under the terms of a previous will, subsequently admitted to probate, to have the terms of such will carried out.

Cullen v. McNeil, 42 N.S.R. 346.

Western Provinces.

—Administrator—Responsibility in paying claims—Corroborative proof of claims—Declaration proving claims.]—A Judge sitting on the probate side of the Court passing accounts is not bound by the rule of procedure requiring claimants against the estate to give corroborative proof of their claims. This rule of procedure is applicable only when the claim comes to be contested in Court:—Semble, a Judge sitting without a jury is not bound any more than is a jury to apply it under all circumstances. The responsibility of paying claims falls upon the administrator; he must use care and judgment in considering them, and if he does so fairly and honestly, and in the interest of the estate, he will on passing his accounts be allowed such as he has thought fit to pay.

Re Blank Estate, 5 Terr. L.R. 230 (Wetmore, J.).

—Administration—Heir outside jurisdiction—Official administrator.]—The official administrator is not allowed to take out letters of administration in opposition to the heirs of the deceased, such heirs being resident out of the jurisdiction, but having an attorney-in-fact within the province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property, although he died possessed of considerable real estate within the province subject to a mortgage.

In re Lelaire, 9 B.C.R. 429 (Martin, J.).

—Liability of executor for goods supplied for business of testator carried on for benefit of estate under authority in will—Estoppel—Subrogation.]—The estate of

John N. Braun deceased, was being administered in this action commenced in May, 1892, and Velie brought into the Master's office in 1901 a claim for goods supplied to the executor, Henry Braun, between July, 1890, and March, 1892, for use in carrying on the hotel business of deceased under authority conferred by his will. Velie had, in May, 1893, sued the executor in a County Court for the price of the goods in question, but the County Court Judge dismissed the action on the ground urged by the defendant that he was not personally liable, but that the claim should be against the estate. The executor claimed in the administration proceedings that the estate was insolvent, but in April, 1894, an order was made by consent for the transfer of all the assets to him personally upon his undertaking to pay or settle with all the creditors of the estate and paying $1,200 into the hands of trustees for the benefit of the children of the deceased and certain costs, and this order was carried out on both sides. The order contained provisions that the Master should forthwith adjudicate upon and settle all claims against the estate, that the executor should indemnify and save harmless the estate from all such claims and that he should carry out and perform all the terms and provisions of the settlement:—Held, 1. A person supplying goods to an executor under such circumstances has no right against the estate, but he may sue the person who incurred the debt, and he also has a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred: In re Frith, [1902] 1 Ch. 342; Dowse v. Gorton, [1891] A.C. at p. 199. 2. Per Killam, C.J.: —That the executor was estopped by the agreement of settlement he made and by the order confirming the same from setting up the defence of a deficiency of assets out of which to pay, and that under the circumstances Velie's claim should be treated as one against the estate upon which the Master was bound to adjudicate under the consent order. 3. Per Dubuc, J.: —That the executor was estopped by the course he had taken in the County Court suit from disputing the validity of the claim against the estate. 4. There was no ground for setting up that the claim was barred by the Statute of Limitations.

Braun v. Braun, 14 Man. R. 346 (Killam, C.J., and Dubuc, J.).

—As trustees.]—See TRUSTS AND TRUSTEES.

—Promissory note—Endorser becoming administrator.]—See BILLS AND NOTES.

Fraser v. McLeod, 2 Terr. L.R. 154.

—Application for letters of administration by stranger—Public administrator.]—In the absence of an application by a party entitled by reason of relationship to the deceased, it is necessary, in order to justify the grant of letters of administration to a creditor or a person without interest, to show by special circumstances that such grant is in the interests of the estate, otherwise the grant should be made to the public administrator for the district.

Re Morton, 5 Terr. L.R. 409 (Wetmore, J.).

Judgment against estate.]—In view of the statutory provisions in Alberta the proper judgment against administrators or executors, where assets are not distinctly admitted, is a judgment for payment in due course of administration. If there is a distinct affirmative admission of assets on the part of the executor or administrator, the plaintiff is entitled to a judgment against the administrator or executor personally, or, at his option, for payment in due course of administration. In case of the judgment for payment in due course of administration the formal judgment will be a declarative one to the effect that the defendant is liable to pay the amount ascertained at the trial, with interest and costs to be taxed in the due course of the administration of the estate, with liberty to the plaintiff to apply. A judgment in due course of administration is conclusive against the executors, and it is at least prima facie evidence against all the creditors of the estate. If the amount of the judgment is not paid the plaintiff may apply for and obtain the usual administration order ex parte, and if occasion should arise, may obtain the appointment of a receiver of the estate. Forbearance, in fact, is a sufficient consideration to support a promise made upon condition of such forbearance, although the facts may not constitute a binding contract to forbear. The guarantor of a lien note, one of several, given for purchase price of goods, is entitled, upon seizure and sale of the article for which the notes were given, to insist that the amount realized from the sale will be applied pro rata on all the notes.

J. I. Case Threshing Machine Co. v. Bolton, 2 Alta. R. 174.

Executors and administrators—Title to land.]—P. L. died, owning land in fee simple; letters of administration of his estate were granted to J. L.; J. L. died, and letters of administration of her estate were granted to the plaintiffs, who sought by this action to recover possession of the land of P. L., upon the title thus set forth:—Held, that the legal estate passed to J. L. as administratrix of the estate of P. L., but was vested in her solely for the purposes of administration; and, there being no evidence to indicate that J. L. had, in the course of her administration, conveyed the land to herself

for her own benefit, the plaintiffs had no title. The objection to the plaintiffs' title being apparent upon the pleadings, while the action should be dismissed, the defendant's costs should be limited to the amount he would have received had he raised the point of law and had the action disposed of in that way, instead of going to trial.

National Trust Co. v. Proulx, 15 W.L.R. 349 (Man.).

—Statute of Limitations—Administration of estate.]—Application by the administrator of the estate for the advice and direction of a Judge under s. 42 of the Manitoba Trustee Act, R.S.M. 1902, c. 170. The intestate died in 1893 and the administrator in 1896 distributed amongst the creditors whose claims were filed and allowed by him the proceeds of all the assets of the estate of which he had any knowledge, such proceeds being only sufficient to pay the creditors a dividend of about 3.41 per cent. In 1909 the administrator realized a further sum for the estate upon an asset then recently discovered. There had been no payment on account or written acknowledgment made by the administrator to any creditor since 1896:—Held, notwithstanding sub-s. (a) of s. 39 of the King's Bench Act, R.S.M. 1902, c. 40, that the claims of the creditors were barred by the Statute of Limitations, that it would be the duty of the administrator to plead the Statute in any action by a creditor and that the administrator should forthwith distribute the remaining funds of the estate amongst the next of kin. Costs to all parties out of the estate.

In re Bedson Estate, 19 Man. R. 664.

—Administration — Application — No evidence as to grant of administration by Court of domicile.]—Deceased in his lifetime resided in the State of North Dakota and died leaving property in Canada. His widow made application to this Court for letters of administration, but it did not appear that she was the person entitled to administration by the law of the place of domicile; or that any administration had been granted in North Dakota; and on this ground the Surrogate Judge refused the application. The applicant appealed:—Held, that when an intestate dies ex juris leaving property in juris the Court should grant administration to the person clothed by the Court of the country of domicile with the power and duty of administering the estate no matter who he may be, and in the absence of evidence of appointment of an administrator in the place of domicile, or as to the party entitled there to such administration, the application should be refused.

Re Cook, 2 Sask. R. 333.

—Probate—Application for ancillary letters —Exemplification.]—On appeal from the decision of a Judge of the Surrogate Court refusing a petition for ancillary letters probate upon petition of the executor supported by an exemplification of letters probate under the seal of the High Court of Justice for England:—Held, that the production of an exemplification of probate under the seal of the High Court of Justice for England, together with the affidavits under the Succession Duty Ordinance, was sufficient to entitle the executor to ancillary letters probate.

In re Chesshire, 2 Sask. R. 218.

—Executors and administrators—Option to purchase contained in lease.]—The provisions of s. 47 of the Land Titles Act do not apply to the case of an executor or administrator who is registered as owner of the lands belonging to the deceased under the provisions of the L. T. A., as s. 76 sets out the special incidents of his estate; and the last clause of s. 76, qualifying the ordinary incidents of the administrator's title, applies only to registered dealings with land; and notwithstanding the provisions of s. 54, which permits an option of purchase to be inserted in a registered lease, and of s. 135, which negatives the effect of any notice of trust or unregistered interest in the land, an option to purchase contained in a lease by an administrator is invalid and void in the hands of the original grantee, even after registration of the lease, as being a breach of the trust upon which the administrator holds the land of the deceased intestate. The fact that the grantee of the option has, relying upon such option, spent a large sum of money in improving the property will not affect the legal right of the next-of-kin to have the option declared void. The plaintiff brought action, while an infant, in the name of her next friend; a consent of the next friend was executed but not filed. On application at the trial by the defendant for the dismissal of the action on the ground of the consent not being filed, an affidavit was read proving the plaintiff had arrived at the age of 21 years since the action was commenced and that she now adopted the action:—Held, that the trial should proceed.

St. Germain v. Reneault, 2 Alta. R. 371.

—Statutory declarations of indebtedness.]—Declarations of indebtedness must comply with Rule 596 of the Judicature Ordinance, and state whether or not the claimants hold security for their claims. If they refer to accounts or statements alleged to be annexed, containing the particulars of the indebtedness, the annexed bills are to be marked by the officer taking the declarations as being the bills referred to therein.

Re Lilly, 1 W.L.R. 117 (Wetmore, J.).

—Application for administration—Order to render proper account—Affidavit verifying.]—Upon an application for admin-

istration an order was made under English O. 55, R. 10a, (Judicature Ordinance 1898, Rule 487), that the application stand over for six weeks, and that the defendant within one month render to the plaintiff a proper statement of his accounts and dealings with the estate, which was duly furnished and verified by affidavit. The plaintiff did not appear on the further hearing of the application, and some months had elapsed when this application was made to cross-examine the defendant on the affidavit:—Held, that as the affidavit was not filed when notice of the application was served, but only (if at all) by the plaintiff himself on the return, the application must be refused. Quære, whether the rule authorizes a direction that such accounts be verified under oath, and whether such an affidavit is an affidavit "used" or to be used on any proceeding in the cause or matter." (J.O. 1893, s. 261, now R. 282, J.O. 1898). The proper practice in order to obtain explanations of any of the items of accounts so furnished seems to be to formulate objections on the further hearing and have the disputed items adjudicated upon in Chambers.

Allan v. Kennedy, 2 Terr. L.R. 285.

—Passing accounts — Inventory.]—On an application to pass accounts, a statement and account of the administration—a schedule in the nature of an inventory—must be filed, setting forth clearly the details of the estate and of the applicant's disposition thereof.

Re Lopwell, 6 Terr. L.R. 467.

—Supposed death of intestate—Evidence of death — Application by public administrator for letters of administration.]—

Re Tjerstrom, 1 W.L.R. 385 (Y.T.).

—Passing accounts of administratrix—Carrying on business of deceased — Liability for goods destroyed.]—

Re Nugent, 2 W.L.R. 3 (Terr.).

—Land vested in two executors — Power of survivor to make transfer.]—

Re Roneche, 7 W.L.R. 278 (Alta.).

—Sale of land of intestate by public administrator at undervalue — Employment of expert valuers.]—

Re McKay, 5 W.L.R. 79 (N.W.T.).

—Claims of creditors—Claims sent in late—Insolvent estate—Pro rata distribution.]—

Re Nugent, 5 W.L.R. 87 (N.W.T.).

—Caveat — Sale by administrators — Freehold or leasehold.]—

Rowand v. Strathcona, 5 W.L.R. 450 (Man.).

—Compensation for services — Jurisdiction of territorial Court—Rules of Court—Passing of accounts—Payment to solicitors—Moderation of costs—Payment to agents for services.]—

Re Phiscator, 8 W.L.R. 716 (Y.T.).

—Official administrator—Power to sell land of intestate—No necessity for order—Official Administrators Act — Amending Act, 1900—Intestates' Estates Act.]—

Re Neilson, 8 W.L.R. 400 (B.C.).

—Surrogate Courts—Transfer of contentious matter — Notice of application to parties concerned.]—(1) There is no jurisdiction in a Judge of the Court of King's Bench to order the removal, under section 63 of the Surrogate Courts Act, R.S.M. 1902, c. 41, of a contested petition from the Surrogate Court to the Court of King's Bench unless reasonable notice of the application for removal has been given to the other parties concerned, and a son of the deceased, and also of the administratrix of the estate of the deceased, to whom letters had been granted as his widow, is a party concerned in a petition by the sister of the deceased to revoke the letters of administration on the alleged ground that the administratrix was not the lawful widow of the deceased. (2) Under section 58 of the King's Bench Act, an appeal lies to the Court in banc from an order of a Judge of this Court for the removal of a contentious matter to this Court under the Surrogate Courts Act.

Re Estate of B——, 16 Man. R. 269.

—Liability of estate for work done for administrator.]—An estate in the hands of an administrator is not liable for work done or services performed at the request of the administrator, although the estate gets the benefit of the work and services, but the administrator is liable in his personal capacity in such a case. Farhall v. Farhall (1871), L.R. 7 Ch. 123, followed.

Dean v. Lehberg, 17 Man. R. 64.

—Administration pendente lite—Jurisdiction to appoint.]—When a suit is pending in the Court of King's Bench to set aside a will, that Court has exclusive power, under section 23 of the King's Bench Act and sections 18 and 39 of the Surrogate Courts Act, R.S.M. 1902, c. 41, to appoint an administrator pendente lite, and such power may, under Rule 449 of the King's Bench Act, be exercised by a Judge in Chambers. Notwithstanding the generality of the language used in Rule 27 of the King's Bench Act, the Referee in Chambers has no jurisdiction to make such an appointment.

Tellier v. Schilemans, 16 Man. R. 430.

—Administrator pendente lite—When appointed.]—To entitle a suitor to have an administrator pendente lite of an estate

appointed, a case of necessity must be made out. If such case of necessity is shown as to a portion of the estate only, an appointment, limited to such portion, should be made.

Tellier v. Schilemans, 17 Man. R. 303.

—Claim against estate of deceased person —Corroboration.]—The plaintiff sued the executors of one Reid for services rendered in taking care of a child of Reid, after his death. She had been engaged by Reid as a nurse to attend him in his last illness, and her evidence was that Reid, previous to his death, asked her to continue in the house and to look after his wife and child, and deceased had said. "If anything happens, will you promise that you will stop with her?" There was no corroboration of the plaintiff's testimony as to the promises made her by the deceased:—Held, allowing an appeal from the verdict of a County Court in plaintiff's favour, that the contract as alleged was open to two constructions: (1) That the plaintiff was to stay with Mrs. Reid if anything happened to the testator, (2) that she was to take care of the child, and, the plaintiff having contended that Reid meant she was to stay with the child and take care of it. each may have intended a different thing, and consequently no contract was clearly proved; also that corroboration of the plaintiff's evidence was necessary in this case.

Simpkin v. Paton, 18 Man. R. 132.

—Sale of land — Collusion — Fraud — Account.]—

Munroe v. Gillie, 7 W.L.R. 253 (B.C.).

—Application to stay actions against administratrix — Ascertainment of assets of estate—Payment of creditors.]—

Rat Portage Lumber Co. v. Martin 2 W.L.R. 85.

—Application of foreign executors for ancillary probate of will—Proof of letters testamentary granted in foreign Court.]—

Re Wolf, 8 W.L.R. 690 (Sask.).

—Action against administrators to recover possession of chattels found on person of intestate—Proof of ownership — Corroboration.]—

Bakewell v. Mackenzie, 1 W.L.R. 68 (N. W.T.).

—Executor's accounts — Agreement with residuary legatee—Enforcement — Remedy — Action — Originating summons.]—

Re Wilson, 8 W.L.R. 607 (Alta.).

—Executor's accounts — Agreement with residuary legatee—Compromise.]—

Re Wilson, 9 W.L.R. 271 (Alta.).

—Administration order — Insolvent estate —Distribution — Debts and liabilities incurred by executors in carrying on testator's business—Indemnity.]—

Wright v. Beatty, 10 W.L.R. 598 (Alta.).

—Application for letters of administration to estate of deceased person domiciled in foreign country — Evidence as to estate and next of kin—Foreign law.]—

Re Cook, 11 W.L.R. 70 (Sask.).

—Intestate estate of person domiciled in Alberta—Right of child adopted in foreign state to share in estate.]—

Re Throssel, 12 W.L.R. 683 (Alta.).

—Passing administrator's accounts before Judge of probate—Right of administrator to retain moneys to answer claim against estate.]—

Re Easton, 4 W.L.R. 23 (Terr).

—Transfer of land by executor — Powers of executor — Personal estate — Partnership lands — Judgment in partnership action.]—

Re Keating & Olsen, 7 W.L.R. 316 (Y.T.).

—Death of one of several executors—Survivorship—Estate of trustees.] — Apart from the provisions of the Land Titles Act an estate vested in two or more executors, vests on the death of one in the surviving executors. The effect of ss. 47 and 137 of the Land Titles Act is to displace the above rule only in case an entry of "no survivorship" has been marked by the registrar upon the certificate of ownership, issued to the executors. Section 47 of the Act does not make it improper to issue a certificate of title designating the transferees generally "trustees," or specifically "executors" or otherwise, as trustees by reason of a particular office or capacity. The estate of the testator vests in the executors by virtue of s. 47 Land Titles Act, and the terms of the will are not material as to whether they take as joint tenants or tenants in common.

Re Roneche, 1 Alta. R. 255.

—Application for ancillary letters probate —Exemplification.]—This was an appeal from the decision of a Judge of the Surrogate Court refusing a petition for ancillary letters probate upon petition of the executor supported by an exemplification of letters probate under the seal of the High Court of Justice for England:—Held, that the production of an exemplification of probate under the seal of the High Court of Justice for England, together with the affidavits under the Succession Duty Ordinance, was sufficient to entitle the executor to ancillary letters probate.

Re Chesshire, 2 Sask. R. 281.

—Deceased domiciled ex juris—Application by widow—No evidence as to grant of ad-

ministration by Court of domicile.]—Deceased in his lifetime resided in the State of North Dakota and died, leaving property in Canada. His widow made application to this Court for letters of administration, but it did not appear that she was the person entitled to administration by the law of the place of domicile, or that any administration had been granted in North Dakota; and on this ground the Surrogate Judge refused the application. The applicant appealed:—Held, that when an intestate dies ex juris leaving property in juris the Court should grant administration to the person clothed by the Court of the country of domicile with the power and duty of administering the estate no matter who he may be, and in the absence of evidence of appointment of an administrator in the place of domicile, or as to the party entitled there to such administration, the application should be refused.

Re Cook, 2 Sask. R. 333.

—Administration—Application for directions—Disputed account.]—A claim was filed with the administrator of the estate of two deceased persons verified by an affidavit which was technically very irregular and which did not set out with any degree of clearness the nature of the claim, nor did it state whether any security was held for payment. On an application for directions:—Held, that notwithstanding the irregularity and insufficiency of the affidavit in question it constituted notice to the administrator and having regard to the provisions of Rule 596 of the Judicature Ordinance he could not disregard the claim, but should proceed by giving notice under s. 45 of the Trustee Ordinance, c. 11 of 1903 (2nd session). (2) That paragraph 3 of Rule 481 of the Judicature Ordinance does not permit a Judge to dispose of the claim of a creditor on summary application where there are facts in dispute.

Re Mussetter Estate, 1 Sask. R. 369.

—Interpretation of wills]—See WILLS, II:

—Remuneration of.]—In fixing the amount of compensation to trustees, there should be taken into consideration: (1) The magnitude of the trust; (2) The care and responsibility springing therefrom; (3) The time occupied in performing its duties; (4) the skill and ability displayed; (5) The success which has attended its administration. Such compensation, while fair and just, must be reasonable but not necessarily liberal. The duties of the executors in this case were to realize on the real estate of the testator in Manitoba and transmit the proceeds to the Ontario executors. It took nine years to complete the work, and it appeared that the executors had carried out their duties with great faithfulness and unusual success, assisted by the great advance in the values of real estate during that period, and that the total amount of money realized was over $300,000, also that Mr. Riley who had had the chief management of the work, had already received under orders of the Court $19,500 on account:—Held, that an additional compensation to Mr. Riley of two per cent. of the gross amount realized would be fair and reasonable, and that the other two executors should together have two per cent. of the same. Held, also, that Mr. Riley was not entitled to commission as a real estate agent on sales of lands to purchasers secured by him personally, although he might have employed another person at the expense of the estate to perform such services.

Re Sanford Estate, 18 Man. R. 413.

—Deceased domiciled ex juris—Law of domicile.]—Deceased died domiciled in the United States, leaving property in the judicial district of Cannington. On application by the widow to the Surrogate Judge for administration of the estate the application was refused on the ground that there was no evidence that the widow was by the law of the domicile of deceased entitled to administration. On appeal to a justice of the Supreme Court:—Held, that the Surrogate Court is not governed by the law of domicile in granting administration, and while the Court, if a grant of administration is made by the Court of domicile, will follow that grant, yet in the absence of such grant the Court is governed by the law of situs.

Re Mikkelson, 1 Sask. R. 513.

EXEMPTION.

Homestead—Judgments Act, R.S.M. c. 80, s. 12.]—The plaintiff claimed a right to have two village lots owned by defendant sold to satisfy a judgment of which he had a registered certificate. Defendant occupied as his dwelling the upper floor of a two-story building on one of the lots, the ground floor having been built for use as a store. There was a stairway inside the building connecting the two floors, also a stairway from the outside to the dwelling. The two lots were occupied as one property and some use was made of the vacant store for storage of articles used in connection with the dwelling. The Judge at the trial found that the value of the property was $3,000, and that there was a mortgage upon it for an amount exceeding $2,000:—Held, that the defendant was bona fide using the whole premises as his residence and that, under s. 12 of the Judgments Act, R.S.M. c. 80,

the property was free from sale under the judgment. (Bain, J., dubitante.)

Codville v. Pearce, 13 Man. R. 468.

—Tools and implements of trade—More than one trade—Land and buildings — Division or sale—Incumbered land—Exemption out of excess.]—A general assignment for the benefit of creditors was made of all the assignor's real and personal estate, except what was exempt from seizure and sale under execution. The land was not specifically described, but the assignment contained a covenant on the part of the assignor to execute such instruments as should be required to effectuate the assignment. An order for the administration of the estate was subsequently made, and this was followed by the sale of the land under the direction of a Judge, and a transfer by the assignor to the purchaser. The land was subject to two mortgages; and $1,530, the surplus of the price in excess of the mortgages, was paid into Court. The assignor was an alien friend resident in the Territories:—Held, per Richardson, J.:—1. That an alien friend resident in the Territories is entitled to the benefit of the provisions of the Exemptions Ordinance, notwithstanding the provisions of the Naturalization Act, R.S.C. (1886), c. 113, s. 3. Affirmed on appeal to Court in banc. The assignor being by trade a repairer of watches and jewellery, and having received the tools and implements appertaining to that trade, exempt under the Exemptions Ordinance, C. O. 1898, c. 27, s. 2, sub-s. 7. 2. That he could not maintain a claim for such tools and implements as were used in connection with a steam laundry run for him by an expert, "though he sometimes tinkered about the laundry," he himself not being by trade a laundryman. 3. That the assignor was entitled as an exemption to the extent of $1,500, out of the $1,530, the excess of the price of the land beyond the mortgages to which it was subject. Affirmed on appeal to Court en banc. 4. That an execution creditor whose execution was registered subsequent to the mortgages, and was the only one registered prior to the assignment, though other executions were registered prior to the administration order and the execution of the transfer by the assignor, was entitled to the $30 in priority to these subsequent executions. On appeal to the Court en banc, the whole sum of $1,530 was held to be subject, in priority to the first execution creditor, to the claim of the holder of a mechanics' lien, who had obtained judgment, and to his costs, which exhausted his $30. The subsequent execution creditors claimed to be entitled to be paid out of the $1,500 in view of s. 4 of the Exemptions Ordinance, which excepts from its effect "any article . . . the price of which forms the subject matter of the judgment upon which the execution is issued." Their action was upon promissory notes made by the assignor to the plaintiff. These notes were given to and discounted by the assignor for the purpose of paying certain moneys, for which the C. P. R. withheld delivery of certain machinery which went into the building on the land as fixtures, and were sold as part of the land; and the moneys so raised were partly so applied. 5. That the subsequent execution creditors did not come within the provisions of s. 4. 6. That the $1,500 was subject to the payment of a claim under a mechanics' lien which was registered, and on which action was commenced before the date of the assignment; but that it was not subject to the payment of either of two other claims under mechanics' liens registered before the assignment, on the ground (without deciding on the objection that no action to enforce these liens had been commenced, it appearing, however, that the time limited for that purpose had not expired at the date of the assignment), that the claimants had, in their statutory declarations proving their claims against the estate, stated that they held no security for their claims. No fund being left to pay the general creditors. 7. That the petitioning creditors were entitled to their costs out of the $1,500, as it was in consequence of their proceedings, which the assignor's conduct forced them to take, that the rights of the various parties were determined and the fund distributed; that the assignee was entitled out of the same fund to his costs and his compensation and expenses as assignee, that the execution creditor, who was entitled to the excess $30, was also entitled to his costs in these proceedings out of the same fund; and that the assignor's advocate was entitled to a lien for his costs as between advocate and client on the same fund. On appeal to the Court en banc it was held, per Curiam (reversing the decision of Richardson, J.) that the petitioning creditors and the assignee must bear their own costs; that the petitioning creditors were liable to pay the costs of the assignor and the assignee, both before the Judge and in the appeal; and that the assignor was entitled to the $1,530 after payment thereout of the amount of the claim and costs of the lien holder whose claim had been allowed. The costs allowed to the various parties by the Judge, having been paid out to their respective advocates upon their undertakings filed to repay the same if so ordered, the Court, in giving judgment on the appeal, ordered payment accordingly. The Exemptions Ordinance discussed as to the right to call for, and the obligation to submit to, a division of

land and buildings claimed to be exempt. Per McGuire, J.:—The sheriff is bound to leave a debtor what is exempt, the debtor having the right, if he chooses to exercise it, to a choice from a greater quantity of the same kind of articles as are exempt. If he does not see fit to make the choice, it is probable he would not be heard to complain that the sheriff had not made the choice most favourable to the debtor.

In re Demaurez, 5 Terr. L.R. 84.

—Homestead exemption.]—See HOMESTEAD.

—From execution.]—See EXECUTION.

—Homestead—Fraudulent conveyance.]—See FRAUD.

Roberts v. Hartley, 14 Man. R. 284.

—From seizure.]—See EXECUTION.

EXHIBITS.

Exhibits to affidavits—Practice—Chambers.]—It is not necessary to file exhibits referred to in an affidavit filed on an application in Chambers.

Lassen v. Bauer, 5 Terr. L.R. 458.

And see EVIDENCE.

EXPERT TESTIMONY.

See EVIDENCE.

EXPRESS COMPANY.

See CARRIERS.

EXPROPRIATION.

Expropriation — Public harbour — Piers and channel fallen into disrepair.]—For the purpose of forming a public harbour certain uplands together with certain beach lands were expropriated from the defendants by the Crown. Some years before, the defendants had constructed two piers, and had dredged an entrance from tidewater to the pond where such piers were situated; but at the time of the expropriation both of the piers had been allowed to fall into disrepair and the entrance or channel had been completely filled up with sand. The defendants claimed compensation, amongst other things, for the special adaptability of the property expropriated for harbour purposes, and for the value of the stone remaining in the piers at the time of the expropriation. There was no evidence to show that there was any competition of purchasers for the purpose for which the land had been taken by the Crown, or that there was any possibility of the defendants obtaining a purchaser who would use the land for that purpose:—Held, (following in re Lucas and Chesterfield Gas and Water Board (1909) 1 K.B. 16) that the defendants had not made out a case for compensation in respect of their claim for special adaptability. 2. Held, (following Streatham and General Estates Co. v. Commissioners of Her Majesty's Works and Public Buildings) 52 J. P. 615 and 4 T.L.R. 766), that the value of the stone could not be taken into account.

The King v. Inverness Railway and Coal Co., 12 Can. Exch. R. 383.

Municipal corporations — Expropriation of lands for waterworks system—Compensation.]—For the purpose of extending their waterworks system, the town of Owen Sound expropriated certain land belonging to the claimants. Being unable to agree as to the amount of compensation that should be paid the claimants, a reference was had before three arbitrators, who allowed $1,200 to one claimant and $25 each to the other two. On appeal, Britton, J., held, that upon the evidence, the amount of $1,200 should be increased to $2,000, and that sum should be paid with interest at 5 per cent. from June 14, 1909, the date of passing the by-law; that the award should be dealt with under s. 464 of the Mun. Act, 1903, as an award mentioned in s. 463 (1) relating to property to be entered upon, and used as mentioned in s. 451 (1) of that Act, and as an award not requiring adoption by the council. If it were an award not requiring adoption by the council, then s. 462 (1) applied, and by s. 464, the Court should consider not only the legality of the award, but the merits as they appear from the proceedings so filed, and the Court could increase or diminish the amount awarded or otherwise modify the award as the justice of the case might seem to require. That justice required the increase mentioned, but in other respects the award should stand. That the corporation should pay the costs of appeal.

Herriman v. Owen Sound, 1 O.W.N. 759, 16 O.W.R. 98.

Montreal city charter — Local improvements — Expropriation for widening street —Action for indemnity.]—Where the city of Montreal, under the provisions of 52 Vict. c. 79, s. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so effected and, notwithstanding the subse-

quent amendment of the statute in December of that year, by 59 Vict. c. 49, s. 17, the city was bound within a reasonable time to apply to the Court for the appointment of commissioners to fix the amount of the indemnity to be paid, to levy assessments therefor and to pay over the same to the owner, and, having failed to do so, the owner had a right of action to recover indemnity for his land so taken. Hogan v. The City of Montreal, 31 Can. S.C.R. 1, distinguished. The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. The Grand Trunk Railway Co. v. Coupal, 28 Can. S.C.R. 531, followed.

Fairman v. The City of Montreal, 31 Can. S.C.R. 210.

—Expropriation — Appeal — Increase of award — Interest.] — When, under the charter of the city of Montreal, the owner of land expropriated by the city has obtained from the Court of Review, on appeal from the award of the commissioners, an increase of the indemnity granted, he can claim from the city the interest on such increase from the date on which the city took possession to the time of payment of said increase.

Grand Trunk Railway Co. v. City of Montreal, 18 Que. S.C. 534 (S.C.).

—Act of possession—Construction of sidewalk on private property.]—The plaintiff owned a building which did not extend to the street line. The city having authorized the construction of a permanent sidewalk in the street, it was laid close up to the plaintiff's house wall, occupying a small strip of his land. The plaintiff having sued the city for the value of this land:—Held, that the only act of possession being the construction of the sidewalk up to the wall of plaintiff's house, and the placing of the sidewalk in this position not having been authorized by the city, which prayed acte of its willingness to surrender to the plaintiff possession of any property which might belong to him, his action to recover the value of the strip of land could not be maintained.

Burland v. City of Montreal, 19 Que. S.C. 574 (Archibald, J.).

—Expropriation — Appointment of alderman as arbitrator — Disqualification.]—

See ARBITRATION.

Re Abell, 2 N.B. Eq. 271.

—Expropriation — Street widening.]—

See HIGHWAY.

City of Montreal v. Hogan, 31 Can. S.C. R. 1.

—Conditions precedent — Interlocutory injunction.]—

Monaghan v. Provincial Exhibition Commission, 1 E.L.R. 177 (N.S.).

—National Transcontinental Railway — Damages unpaid—Warrant to put commissioners in possession of lands—Order.]—

In re National Transcontinental Railway; Ex parte Bouchard, 4 E.L.R. 253 (N.B.).

—Expropriation of land for market site—Necessity for by-law.]—

City of Edmonton v. Macdonald, 7 W.L. R. 201 (Alta.).

—Water lots—Expectation of enhanced value—Crown grant—Statutory authority.] —Land in Halifax, N.S., including a lot extending into the harbour, was expropriated for the purposes of the Intercolonial Railway. The title to the water lot was originally by grant from the Government of Nova Scotia, but no statutory authority for making such grant was produced. The lot could have been made much more valuable by the erection of wharves and piers for which, however, as they would constitute an obstruction to navigation, a license from the Dominion Government would have to be obtained. $10,000 was tendered as the value of all the land expropriated and the owners, claiming much more, appealed from the judgment of the Exchequer Court allowing that amount:—Held, Duff, J., dissenting, that the owners were not entitled to compensation based on the enhanced value that could be given to the water lot by the erection of wharves and piers and the expectation that a license would be granted therefor, and if they were the amount tendered was, in the circumstances, sufficient. Quære. Can a Crown grant of lands be made without statutory authority? Held, per Duff, J., that there was such authority in this case. Judgment of the Exchequer Court (12 Ex. C.R. 414) affirmed.

Cunard v. The King, 43 Can. S.C.R. 88.

—Special adaptability for apartment purposes — Compensation.]—Certain premises situated on a city street were expropriated by the Crown for the erection thereon of public buildings. The house, although not a new one, was well and solidly built, and the owner claimed that it possessed special adaptability for the purpose of being used as apartments or flats:—Held, that the compensation for the property was to be assessed in respect of its market value, and that upon the facts the alleged special adaptability was not an element of such value.

The King v. Hayes, 12 Can. Exch. R. 395.

—Sales of adjoining property — Basis of valuation.]—In assessing compensation in a case of expropriation of land, the sales of adjoining properties affords a safe prima facie basis of valuation.

The King v. Murphy, 12 Can. Exch. R. 401.

—Compensation — Market value — Good will.]—In addition to full and fair com-

pensation for the value of lands and premises expropriated the owner carrying on business thereon is entitled to compensation for the goodwill of such business. 2. The market price of the lands taken ought to be regarded as the prima facie basis of valuation in awarding compensation for land. Dodge v. The King (38 S.C.R. 149) followed. 3. In this case there was a passage from a street in the rear of the premises where one of the defendants carried on a licensed liquor business, by which customers who desired to visit the bar without attracting notice could do so:—Held, that such passage enhanced the value of the property for the purposes of a bar, and so constituted an element of compensation.

The King v. Condon, 12 Can. Exch. R. 275.

—Wharf—Foreshore—Title.]—In this case certain lands which fronted on a public harbour owned by the Crown in right of the Dominion of Canada were expropriated for the purpose of forming the shore end of a wharf extending out into such harbour. The suppliants had no grant and claimed no title to the beach or the land covered with water at medium high tide. The suppliants claimed that the special adaptability of the lands for wharf purposes should be considered as adding a very large value to the same in assessing compensation:—Held, that as the suppliants did not own the land covered by water nor the beach, that such special adaptability was not to be considered.

Gillespie v. The King, 12 Can. Exch. R. 406.

—Consent of owner—Discontinuance.]—The petition for expropriation is not an offer to purchase but the institution of a real action which may be begun and carried on without the owne.'s consent. A municipal corporation has, then, an absolute right to discontinue its proceedings for expropriation so long as the award is not delivered, such award only creating a right in favour of the owner.

City of Montreal v. Lafontaine Park, 11 Que. P.R. 170.

—By railway.]—See RAILWAY.

Expropriation of demised property — Lessees' loss of profits—Increased cost of carrying on business—Measure of damages.]—The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them for the purposes of their business as coal merchants. By the terms of the lease under which they were in possession the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid two thousand five hundred dollars for the improvements they had made:—Held, that the measure of compensation to be paid to the suppliants was the value at the time of the expropriation of their leasehold interest in the lands and premises. Apart from the sum payable for improvements there was no direct evidence to show what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss and that the cost of carrying on their business had been increased. The amount of the loss and the increased cost of carrying on business during the six months succeeding the expropriation proceedings was in addition to the sum mentioned taken to represent the value to them or to any person in a like position of their interest in the premises. The suppliants also contended that if they had not been disturbed in their possession they would have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed.

Gibbon v. The Queen, 6 Can. Exch. R 430.

—Damage to remaining lands—Access — Undertaking to give right of way—Effect of in estimating damages—Increased value by reason of public work.]—Defendants owned a certain property situated in the counties of Vaudreuil and Soulanges, a portion of which was taken by the Crown for the purposes of the Soulanges Canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under the provisions of 52 Vict. c. 38, s. 3, filed an undertaking to build and maintain a suitable road or right of way across its property for the use of the defendants. The evidence showed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the Court assessed damages for past deprivation only. 2. It having been agreed between the parties in this case that the question of damages which might possibly arise in the future from any flooding of the defendant's lands should not be dealt with in the present action, the Court took cognizance of such agreement in pronouncing judgment. 3. In respect to the lands taken the Court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. Stebbing v. The Metropolitan Board of Works, L.R. 6 Q.B. 37; and Paint v. The Queen, 2 Ex. C.R. 149; 18 S.C.R. 718, followed.

The Queen v. Harwood, 6 Can. Exch. R. 420.

—Of land — Damages — Valuation—Evidence.]—The Crown expropriated land of L. and had it appraised by valuators who assessed it at $11,400, which sum was tendered to L., who refused it, and brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him $17,000. On appeal by the Crown:—Held, Girouard, J., dissenting, that the evidence given on the trial of the petition showed that the sum assessed by the valuators was a very generous compensation to L. for the loss of his land and the increase by the judgment appealed from was not justified. The Court which, considering that a less sum than that fixed by the valuators should not be given in this case, expressly stated that the same course would not necessarily be followed in future cases of this kind.

The King v. Likely, 32 Can. S.C.R. 47.

—Of land by railway.]—See RAILWAY.

—Prospective value for purposes other than present use—Assessed value.]—Where lands at the time of the expropriation had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy purposes such prospective value was taken into consideration in assessing compensation. (2) In assessing compensation in this case the Court looked at the assessed value of the lands, not as to determining consideration, but as affording some assistance in arriving at a fair valuation of the property taken.

The King v. Turnbull Real Estate Company, 8 Can. Exch. R. 163.

—Leasehold property—Tenants' improvements—Expense of removal to new premises—Compensation.]—The suppliant was tenant of certain buildings and wharves erected upon the lands of which he had acquired possession as assignee of two leases. He there carried on business as a junk dealer. The terms for which these leases were made had expired at the time of the expropriation of the said lands by the Crown; but the leases contained a proviso that the buildings and other erections put on the demised premises should be valued by appraisers, and that the lessor or reversioner should have the option of resuming possession upon payment of the amount of such appraisement, or of renewing the leases on the same conditions for a further term not less than three years. No such appraisement had been made, and the suppliant continued in possession of the property as tenant from year to year. The evidence showed that the lessor had no present intention of paying for the improvements and resuming possession of the property:—Held, that in addition to the value of his improvements, the suppliant should be allowed compensation for the value, under all the circumstances, of his possession under the leases at the date of the expropriation.

McGoldrick v. The King, 8 Can. Exch. R. 169.

—Continuing damages.]—See DAMAGES.

—By municipal corporation—Public way—Action petitoire.]—The respondents are owners of houses on St. Louis Street in the city of Quebec, to the west of the old Academy of Music. The ground at this placing is sloping and the houses were originally built on the line of the street, that is, except those of the respondents; they were not square. The consequence is that the western corner of their houses on the street is 13 feet back of the adjoining house to the west. The corner is in line with the properties to the east. It follows that there was, between the line of the street and the front of the houses, a piece of land in the form of a triangle upon which there had been erected two landings with steps to afford access to the houses. In 1896 the appellants, in order to enlarge and regulate the street, acquired the Campbell property adjoining the respondents' houses at the west, pulled it down, and a new building had been erected in line this time with the houses of the respondents. The appellants laid the sidewalk of the street up to the new Campbell house and at the same time laid it in front of the respondents' property up to their houses, taking possession in doing so of the triangular piece of land, but without touching the landing. The respondents by their action claimed the value of the land so expropriated and the appellants pleaded that it did not belong to the respondents, but formed part of St. Louis Street, the sidewalk of which extended to the front wall of the houses and had so extended for more than 30 years. The claim of the appellants to such 30 years' prescription had been set aside by the Superior Court, and by the unanimous judgment of the Court of Appeal.—Held, that under the circumstances above set out the respondents could claim from the city of Quebec the value of the land of which the latter had so taken possession and this without the necessity of having recourse to a petitory action.

City of Quebec v. Caron, Q.R. 13 K.B. 53.

—Laying sewer through private property—Compensation—Condition precedent.]—Before entering on land for the purpose of putting a sewer through it the city of Vancouver must, under its Incorporation Act, compensate the owner of the land

through which it is proposed to lay the sewer.

Arnold v. City of Vancouver, 10 B.C.R. 198.

—Statutory authority — Manufacturing site — Survey—Location — Trespass.] — The town of Sydney was empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the Dominion Iron Steel Co., a plan showing such location to be filed in the office for registry of deeds and on the same being filed the title to said lands to vest in the town. Engineers of the company were employed by the town to survey the lands required by the statute. M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass claiming that it included five chains belonging to him, and, at the trial of such action, the main contention was as to the boundary of his holding. He obtained a verdict which was affirmed by the Full Court:—Held, reversing the judgment appealed from (36 N.S.R. 28) that the only question to be decided was whether or not the land claimed by M. was a part of that indicated on the plan filed; that the sole duty of the engineers was to lay out the land which the town intended to expropriate; and whether it was M.'s land or not was immaterial as the town could take it without regard to boundaries.

Dominion Iron and Steel Company v. McLennan, 34 Can. S.C.R. 394.

—Of land by Crown.]—See PUBLIC WORKS.

—Municipal expropriation — Report of commissioners—Appeal.]—In a matter of expropriation at Montreal under the provisions of 54 Vict. c. 78, s. 11 (Que.), the report of the commissioners has no more the character of chose jugée than it had before the Act was passed; and upon appeal from the decision of the commissioners to the Court of Review the Court, in order to appreciate the award, should have the assistance of the evidence on which it was founded; but the Court of Review can only change the amount of the indemnity awarded because of some omission on a part of the claim or some manifest error in the appreciation of the value of the property. The Court should not base its judgment on the valuation made by the witnesses called by the parties. In estimating the value of an immovable and the damages caused by expropriation the revenues of such immovable and the nature of sales made in the neighborhood should be taken into account.

City of Montreal v. Gauthier, Q.R. 26 S.C. 351 (Ct. Rev.).

—Government railway—Crossing at embankment and cutting—Riparian rights —Access to shore.]—K. was the owner of certain lands bounded on one side by Halifax harbour, and the Government of Canada constructed its railway through the land cutting off her access to the shore and gave her no crossing. Proceedings having been taken in the Exchequer Court to fix the compensation to which K. was entitled, she was awarded (2 Ex. C.R. 21) for damages occasioned by reason of the absence of the railway crossing, the sum of $500. On appeal by K. to the Supreme Court of Canada:—Held, Gwynne, J., dissenting, that the Judge of the Exchequer Court erred, on the question of fact, in not taking into consideration that the character of the embankment and cutting made and the nature of the ground on each side would forbid the making of a reasonably practicable crossing, and that the consequence of the severance would remain notwithstanding all that under the circumstances could be done towards making a crossing, and also had erred, in law, in not giving compensation for the severance once for all, and that, instead of allowing K. $125 a year for four years' severance, he should have awarded her a sum which would produce $125 a year for all time. Held, that there is not obligation in law to construct a crossing over a government railway apart from contract.

Kearney v. The Queen (1889), 1 S.C. Cas. 344.

—Municipal expropriation—Indemnity — Costs.]—Although the charter of the city of Montreal contains no express provision on the subject in a matter of expropriation by the city the costs incurred by the party expropriated in order to establish his claim for indemnity form part of the damages suffered and should be comprised in the compensation awarded, but the expropriation commissioners should confine themselves to stating in their report that the party has incurred such costs and file a statement thereof; they have no right to determine and tax the amount. The costs thus incurred by the party expropriated are taxed according to law and the ordinary course of practice upon a bill drawn up under the tariff established by the Judges of the Superior Court respecting expropriation proceedings and actually in force at the time, and the amount of the bill when taxed should be added to the indemnity. The sole fees which can be taxed against the city in such cases are those allowed by the tariff.

City of Montreal v. Gauthier, Q.R. 26 S.C. 361 (Ct. Rev.).

—Charter of Montreal—Appeal.] — The charter of the city of Montreal, providing

that proceedings in expropriation shall follow the existing law which does not recognize any appeal does not permit recourse to review reserved both by the amendments to the former law and by the charter itself.

City of Montreal v. Poulin, 6 Que. P.R. 457 (Ct. Rev.).

—Tenant at will—Indemnity.]—The tenant whose term has expired and who, after the by-law authorizing expropriation of the land was sanctioned and public notice given nearly a year before such expropriation takes place, continues to occupy the permises as tenant at will of the owner who, threatened with expropriation, is unwilling to renew the lease, has only a precarious occupation liable to be terminated at any moment; he cannot, therefore, be considered an occupant within the terms of Art. 1608 C.C. and cannot claim indemnity for interruption of his occupation. Such an occupant can only recover damages for loss of profits between the time at which the by-law was sanctioned and that at which his lease expired and has no right to claim for the expense of moving, the cost of transfer of his hotel license, and for deterioration in value of his effects, as these losses are not occasioned by the expropriation, but arise only from the expiration of his tenancy at will.

City of Montreal v. Poulin, Q.R. 26 S.C. 367 (Ct. Rev.).

—By municipality — Formalities.] — A municipal corporation cannot expropriate land for a road without first causing it to be valued. The formalities required for expropriation should always be observed even if the owner is not entitled to indemnity.

Laramie v. Township of Hinckes, Q.R. 27 S.C. 27 (Sup. Ct.), affirmed on review, 24 Dec., 1904.

—Entry by Parks Board on land prior to expropriation — Arbitration — Injunction.]—(1) Section 755 of the Municipal Act, R.S.M. 1902, c. 116, giving power to a council of a city to acquire by purchase or expropriation land for park purposes, read together with section 769, does not authorize the council to enter upon the land, without the consent of the owner, without first taking steps to expropriate the land and obtain an award of arbitrators and paying the amount awarded for compensation to the County Court Clerk. (2) Section 44 of the Public Parks Act, R.S.M. 1902, c. 141, giving the Parks Board of a town all the powers of the council under the Municipal Act in regard to all expropriations of lands and property deemed necessary to be taken or entered upon for the purposes of a park, does not warrant the board in entering upon land, or doing anything to injuriously affect it, without the consent of the owner, until after they have regularly expropriated and paid for the property; and a person whose land has been thus entered upon or injuriously affected has a right of action for damages against the Parks Board, and is not restricted to the remedy by arbitration under the expropriation and arbitration clauses of the Municipal Act. (3) Statutes which encroach upon the rights of the subject in respect of his private property, or which enable public corporations to take his property without his consent, must be construed with the greatest strictness. (4) When a trespass is being continued and substantial damage is being caused, the Court will generally interfere to restrain the further commission of the trespass and may grant a mandatory injunction.

Smith v. Public Parks Board, 15 Man. R. 249 (Perdue, J.).

—Land — Compulsory appropriation of by waterworks company.]—Before the lands of any person can be compulsorily appropriated under the provisions of any statute giving a company or corporation such powers, the area sought to be appropriated must be set out and ascertained in accordance with the terms of the statute.

Carroll v. City of Vancouver, 11 B.C.R. 493.

— Expropriation—Assessment—Right to appeal — Proceedings under statute — Grounds of objection.]—(1) When a statute for improvements in a city provides that the cost of the necessary expropriations shall be borne, for one-half, by the city, and, for the other, by a class of proprietors, and awarded and assessed by a board, with a right for such proprietors to appeal from the award, the assessment should be proceeded with, notwithstanding appeals, inasmuch as, if they fail, the assessment will be good, and, if they are allowed, a second assessment can be made to meet any increase of the awards. (2) Proceedings in expropriation under a statute, when otherwise regular and in conformity with its provisions, cannot be attacked for reasons which might have been urged against the passing of the statute, but which do not affect its validity.

Guy v. City of Montreal, 14 Que. K.B. 401.

—Action for trespass—Injunction—Arbitration clauses—Remedy by action—Failure of company to proceed under their Act.]—In an action for trespass on the appellant's land and interference with his

water rights, the respondents pleaded that they were authorized thereunto by their incorporating Act (36 Vict. c. 102, Ont.), and that the appellant's remedy (if any) was to proceed by arbitration under the Act:—Held, that according to the true construction of s. 5 the arbitration clauses only come into operation on disagreement as to the amount of purchase money, value, or damages arising after definite notice of expropriation and treaty or tender relative thereto; and that as the respondents had not proceeded in accordance with the directions of their Act, the appellant had not lost his remedy by action. An injunction was rightly granted in this case, but its effect will cease on the respondents proceeding to expropriate in the manner directed by their Act.

Saunby v. Water Commissioners of the City of London (1906), A.C. 110, reversing London v. Saunby, 34 Can. S.C.R. 650.

—Public work — Damages.]—Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, and it appearing to the Court that the matter was one in which it was expedient that there should be a reference back to the referees under the 19th Rule of Court of the 12th December, 1889, an order was made therefor, in which the following directions were given to the referees: (1) To find what in September, 1902, was the value of the wharf, land and premises taken by the Crown as mentioned in the information. In finding that value the referees were directed to exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referees were also directed to take into account the condition, situation, and prospects of the property taken; but that such value should be one that the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation or prospects. (2) With regard to the remainder of the property, of which that taken formed part, the referees were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance.

The King v. Shives, 9 Can. Exch. R. 200.

—By municipality—Aid to railway.] — See MUNICIPAL LAW.

County of Inverness v. McIsaac, 37 Can. S.C.R. 75.

—Market value—Potential value.] — D. purchased at different times and in sixteen different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown on expropriating the land offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed:—Held, reversing the judgment of the Exechequer Court, 10 Ex. C.R. 208, that there was no user of the land nor any special circumstances to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation. D. claimed the larger price as potential value of the land for orchard purposes to which he had intended to devote it. Held, that as he had not proved the land to be fit for such purpose and the evidence tended to disprove it he could not receive compensation on that ground.

Dodge v. The King, 38 Can. S.C.R. 149.

—Expropriation—Appointment of arbitrator.]—(1) Under section 796 of the Winnipeg Charter, 1 and 2 Edw. VII. c. 77, the appointment by the city of an arbitrator to determine the compensation to be paid for land sought to be expropriated must be signed in the same manner as a by-law, that is, it must be under the corporate seal and signed by the mayor or acting mayor and the clerk or acting clerk, and it is not sufficient that a regularly signed by-law had been passed authorizing the mayor to appoint a named person as arbitrator, and that the appointment had been signed by the mayor alone under the corporate seal. (2) The city charter contains no provision enabling the city to carry on arbitration proceedings to enforce the expropriation of land unless the amount claimed by the landowner does not exceed one thousand dollars, and then only in the manner pointed out by section 789. Order made to prohibit the city and an arbitrator appointed by it from proceeding in the matter of a proposed arbitration to determine the compensation for certain lots sought to be expropriated for a market site.

Devitt v. City of Winnipeg, 16 Man. R. 398.

— City charter — Special provisions.] — When the charter of a city contains general provisions respecting the expropriation of immovables and special provisions authorizing it to make a plan of the city indicating streets and their alignment, and imposing upon it the duty of giving effect to such indications after homologation of the plan by the Court, these provisions are deemed to be an exception to the former. Therefore, the municipality can be mere resolution, authorize the payment for the lands indicated and negotiation with the owners pursuant to the resolution without observing the formalities prescribed by the general provisions.

Guay v. Marsan, Q.R. 16 K.B. 6, reversing 28 S.C. 145.

—Land expropriated for civic work — Compensation—Limitation of right.]—By Act 63 Vict. c. 59, the City of Saint John is empowered to take the lands, tenements, rights, property and premises of persons or corporations for needed public civic works, and provision is made for compensation. By Act 1 Edw. VII. c. 55, the power of the city as to its right to expropriate for a water supply is extended, and the sections in 63 Vict. c. 59, providing for compensation are made to apply. By Act 5 Edw. VII. c. 59, passed for the purpose of further carrying out the provisions of the Act or Acts of the Legislature empowering the City of Saint John to extend its water supply, the city is authorized to take by expropriation or purchase any land that may be needed for the purpose, but no provision is made for compensation, except in the case of certain riparian owners on the Mispec River, and no reference is made to the compensation sections in the other Acts:—Held, that persons other than those specially provided for in the Act 5 Edw. VII., are entitled to compensation, and for this purpose the provision in the other Acts as to assessing and paying damages might be read into 5 Edw. VII.; that the city might expropriate either the land and vest the title or an easement to lay and maintain its pipes, but could not expropriate an easement to erect and maintain telegraph and telephone lines upon the land.

Chittick v. City of Saint John, 38 N.B. R. 249.

—Lease of mud flats—Covenant to pay for buildings and erections—Damages.] — Where the city of Saint John expropriated land under lease from it, consisting mostly of mud flats, to be used for manufacturing purposes only, and the lease contained a covenant to pay at the end of the term for "the buildings and erections that shall or may then be on the demised premises," piling fastened with stringers necessary to make it available for buildings may be a subject of damages for which the city would be bound to pay on expropriation under 63 Vict. c. 59, and should not be excluded from consideration on an assessment of damages.

Sleeth v. City of Saint John, 38 N.B.R. 542. (Same case, 39 N.B.R. 56).

—Third arbitrator—Appointment—Notice of view of land—Award—Form and service.]—For an expropriation under Art. 916 par. 1 M.C., the third arbitrator may be appointed by the prothonotary on application of one party without notice to the other. The five days' notice to the party whose land is to be taken prescribed by Art. 912 M.C. is not required on pain of nullity. Hence, the party who receives only a two days' notice can demand further delay and if he does not he cannot complain of the irregularity. The view of the land provided for by Art. 913 M.C. is only for the case where the arbitrators do not sufficiently know it. When they do the view may be dispensed with. The arbitrators are not obliged to have their award served. The certificate they deposit in the municipal office suffices to bring it to the knowledge of the parties. No particular form is prescribed by law for the award. It is sufficient if the certificate deposited announces the amount fixed by the arbitrators to represent the value of the expropriated land. The provisions of Art. 16 M.C. applies to expropriations as well as to other municipal proceedings. Therefore, the person who claims that he is damnified can only complain of the omission of formalities which have caused him a substantial injustice, proof of which lies on him.

Jacques v. Village of Contrecœur, Q.R. 32 S.C. 460 (Ct. Rev.).

—Colonization road — Indemnity.] — The possessory action lies against those who shelter themselves behind orders of public authority, e.g., contractors and inspectors of works directed by the Minister of Colonization to open a colonization road under the provisions of Arts. 1715 et seq. R. S.Q. The provisions of s. 1718 R.S.Q. that "the lands on which colonization roads are traced and laid out become the property of the Crown and when the work is situated in a township no indemnity is payable for the ground" is subordinate to Art. 407 C.C. and does not relieve the minister and his representatives from the necessity to expropriate in the manner prescribed by law. The owner expropriated can be deprived only by an express enactment of the guarantee against illegality given to him by the formalities of expropriation and the indemnity to which he is entitled extends beyond the value of the lands.

Gagnon v. Marquis, Q.R. 36 S.C. 406.

—City lease of mud flats—Covenant to pay for buildings and erections—Piling and filling in—Damages.]—On expropriation under 63 Viet. c. 59 of lands under lease, containing a covenant to pay at the end of the term for "any buildings or erections for manufacturing purposes" which should or might then be on the demised premises:—Held, that damages should be assessed for the value at the time of expropriation of all piling and filling in intended for and forming a necessary part of the foundation of such buildings.

Sleeth v. City of Saint John, 39 N.B. R. 56.

— Expropriation by municipality — Misdescription of lot—Rectification.]—The description of an immovable as "part of cadastral number 160" instead of "number 174," and as being the property of the Montreal Gas. Co., instead of the Canadian Pacific Railway Co., in a roll for collection prepared under authority of the Act 62 Viet. c. 58, s. 450 (Que.), is not a clerical error, omission or defect in form which the Superior Court or a Judge thereof can, at his discretion, permit to be rectified under the provisions of s. 457 of said Act. Especially so when more than three years have elapsed since the roll was deposited and brought into force and the conditions on which the real owner would be called upon to contest are not such as existed when it was prepared.

City of Montreal v. Canadian Pacific Railway Co., Q.R. 18 K.B. 294.

—Lowering grade—Right of owner of abutting property to take arbitration proceedings.]—The owner of property abutting on a street, the grade of which has been lowered by the corporation, is entitled to arbitration for determining whether his property has been injuriously affected.

The Bishop of New Westminster v. City of Vancouver, 14 B.C.R. 136.

—Appeal—Insufficient indemnity.]—As a rule an appeal from an award of arbitrators based on the insufficiency or excess of the indemnity will not be granted. But it will be when the evidence is clearly in favour of the appellant or when misconduct, partiality or prevarication on the part of expert witness is apparent. The municipal valuation of lands is only for municipal purposes and in view of the municipal revenue; it does not represent the real or selling value. Municipal titles or valuations cannot and should not, as a rule, be taken as a guide in valuing property expropriated especially as to part only of an immovable.

Canadian Northern Quebec Ry. Co. v. Frenette, 10 Que. P.R. 318.

—Omission to indicate proprietors of land expropriated.]—The omission by valuators appointed for the purposes of an expropriation under the municipal code, to indicate, in their award, the proprietors of lands taken for a first front road on a lot, or reserved for a public road, does not make it void, and, if no substantial injustice arises (Art. 16 M.C.), will not avail as a ground of nullity against the expropriation proceedings.

King's Asbestos Mines v. Township of Thetford South, 17 K.B. Que. 567.

— Passing of title — By-law — Registry.]—The adoption of a by-law, under R.S.L.C. c. 24, ordering the expropriation of land for municipal purposes does not operate as a conveyance of the property; it is only by the payment of the indemnity and delivery of the receipt to the secretary-treasurer that the legal title passes to the municipal corporation. Where two parties revendicate immovable property under different titles not coming from a common auteur the priority of registry of one does not strengthen his case as against the other.

Price Bros. & Co. v. Tremblay, Q.R. 18 K.B. 375.

EXTORTION.

Extorting money by accusing a person of an offence—Admissibility of documents.]—On the trial of a charge for extorting money by threatening to accuse of an offence a letter written to a third party by the person threatened at the time of the threats and at the instigation of the accused, but not read by him, is not admissible in evidence as part of the res gestæ or otherwise. A summons issued by a justice of the peace citing the accused to appear and answer a criminal charge is a "document containing an accusation" within the meaning of s. 406 (c) of the Criminal Code, 1892. A summons issued as above need not have been issued at the instigation of the informant with the intent aforesaid, but the offence is complete if the summons is used by a third person for the purpose of extortion. A charge that A.B. "did unlawfully abuse a mare, the property of C.D., contrary to the Statutes of Canada, s. 512," is sufficiently stated.

The King v. Cornell, 6 Terr. L.R. 101; 8 Can. Cr. Cas. 416.

—Usury.]—See that title.

EXTRADITION.

Misappropriation by agent—"Grand larceny"—Ex parte affidavits and depositions.]—1. In extradition proceedings charging "grand larceny" committed in

the United States and disclosing fraudulent appropriation by a trustee and agent, the Canadian Court may assume that "grand larceny" is a species of larceny within the extradition treaty. 2. Section 686 of the Criminal Code is substantially complied with in extradition proceedings where the Commissioner at the close of the case for the prosecution calls upon counsel for the accused for his defence, whereupon the argument was proceeded with, without specifically asking the accused if he wished to call any witnesses. 3. Affidavits may be received in extradition proceedings under section 16 of the Extradition Act in the discretion of the Commissioner, but where the oral evidence alone does not justify a committal, the prisoner will be discharged if the ex parte affidavits and depositions from the foreign state tending to show the commission of the crime are not supplemented by the documentary proof which the circumstances demand and are defective in not disclosing the source of information as to the conduct of the accused after receiving the money in question which was relied upon to establish a fraudulent appropriation thereof.

Re Moore, 16 Can. Cr. Cas. 264, 20 Man. R. 41.

—Evidence to justify — Offence under both foreign and Canadian law.]—(1) The duty of an extradition Judge in hearing an information for an extraditable offence is to order extradition if the evidence adduced, in the absence of contradiction, is such that a magistrate holding a preliminary enquiry in a similar case should commit for trial. (2) Semble, the extradition Judge must be satisfied that the offence disclosed in the information is criminal both under Canadian law and under the law of the demanding country and that it is within the extradition treaty.

Re Latimer, 10 Can. Cr. Cas. 244.

—Requisition from foreign government — Extradition treaty with Russia.] — When, under the terms of an extradition treaty with a foreign government, as in the case of the treaty with Russia, printed in the Canada Gazette, for 1887, at p. 1918, Art. VIII. and IX., a requisiton from that government for the surrender of a fugitive is provided for as preliminary to any proceedings for the arrest of the fugitive, any such proceedings taken without such requisition having been made are entirely unauthorized, and the fugitive, even after he has been committed for extradition by a Judge of this Court, should be discharged upon habeas corpus. Ss. 3 and 10 of our Extradition Act, R.S.C. 1906, c. 155, distinctly provide that nothing in the Act which is inconsistent with any of the terms of an extradition treaty shall have effect to contravene the treaty. Re Lazier, 3 Can. Cr. Cas. 167, 26 A.R. 260, distinguished on the ground that there was no corresponding provision in the extradition treaty with the United States.

Re Federenko (No. 2), 47 C.L.J. 114 (Robson, J.).

—Extradition — Murder — Russia—Treaty —Political character of crime.]—At a village in Russia, one F. shot and killed a watchman, in circumstances which, according to the law of Canada, would make the act murder. F. fled; a man of the same name was arrested in Manitoba, and his extradition to Russia to answer a charge of murder was sought:—Held, that the prisoner's identity with F. was sufficiently established by the evidence. 2. That the crime of the accused was not committed in the furtherance of a political object, within the meaning of the Treaty with Russia of the 24th November, 1886. The accused was a member of a political society whose object was to alter the form of government and to do away with private ownership of property—a society by which revolutionary outrages had been perpetrated. In the district where the crime was committed, martial law had been proclaimed, and was in force. F. was in charge of the watchman on his way to the village administrative office, having been asked to give an account of himself, because he was a stranger in the village, when he shot the officer. The crime would, in Russia, be called a political crime and be tried by a special tribunal. But that did not make it a crime of a political character within the meaning of the Treaty. Extradition ordered.

Re Federenko, 15 W.L.R. 369 (Man.).

[Prisoner subsequently released on habeas corpus under decision not yet reported.]

Contempt of foreign divorce judgment—Parent stealing his own child—Evidence of foreign law—Onus—Criminal Code, s. 284.]—The prisoner and his wife were absolutely divorced in the State of Illinois, U.S., where they were domiciled, by a decree which gave the custody of their child, five years of age, to the wife, with permission to the prisoner to take it out in the day time, returning it the same day. The prisoner having thus obtained the child, carried it away to Canada:—Held, on extradition proceedings, that "child-stealing" is an extraditable offence, and the evidence taken before the extradition commissioner showing this to be a case of child-stealing under s. 284 of the Criminal Code, 55-56 Vict. c. 29 (D.), was sufficient to warrant the extradition of the prisoner in the absence of evidence of foreign law, as the Court would assume the crimes to be identical in the two countries. In re Murphy (1894-5), 26 O.R. 163; 23 A.R. 386, followed. Section 234 of the Criminal Code does not exclude

the case of a father and child. A crime does not become any the less a crime because it also happens to be a contempt of Court, as in this case. Held, also, that the prisoner's contention that he had acted in good faith because he had been advised that the divorce decree, having been obtained collusively, was a nullity, would be proper matter of defence on the trial, but could not be dealt with by the magistrate, who had before him the foreign decree and the wife's oath that she did not collude.

Rex. v. Watts, 3 O.L.R. 368, 5 Can. Cr. Cas. 246.

—Bail—Appeal—Single Judge.]—An application to a single Judge of the Court of Appeal to admit to bail a person committed for extradition, pending an appeal to that Court, was refused by him on the grounds, (1) That it did not appear that the applicant was in actual custody, and (2) it was doubtful if a single Judge of such Court had power to make the order, a matter of bail not being regarded as incidental to the appeal, and so capable of being dealt with by a single Judge under s. 54 of the Judicature Act. Quære, as to the propriety of granting bail in extradition proceedings otherwise than de die in diem, pending the hearing of a motion for habeas corpus on an appeal.

Re Watts, 3 O.L.R. 279, 5 Can. Cr. Cas. 538.

—Foreign warrant—Proof of—Proof of warrant being in force — Return — Discharge.]—A warrant under the Extradition Act (R.S.C. 1886, c. 142, s. 6) for the apprehension of a fugitive was issued upon duly authenticated copies (1) of an indictment found by a grand jury in a foreign country charging the accused with an extradictable offence, (2) of a bench warrant issued upon the said indictment, accompanied by a copy of a return thereto by the sheriff dated 10th April to the effect that he could not find the accused and believed that he was without the jurisdiction, and (3) of depositions of witnesses tending to show that the accused was guilty of the offence charged. On the hearing, the proceedings above mentioned were put in as evidence subject to objection, and the said sheriff gave evidence that the accused, whom he identified, had been in custody from about the 1st May until the sittings of the Court at which he was indicted, and that he was at that sittings discharged from his custody.—Held, 1. That, in order to give jurisdiction to a Judge to issue such a warrant, either a foreign warrant of arrest must be proved or an information or complaint must be laid before the Judge at or before the time of the issue of the warrant. 2. That, in case of a foreign warrant, it must be shown to be outstanding and in full force, and that the evidence failed to establish this. Semble, that in case of a foreign warrant, the original must be produced. The accused was therefore discharged.

In re Bongard, 5 Terr. L.R. 10 (Scott, J.), 6 Can. Cr. Cas. 74.

—Right of extradition commissioner to issue warrant for arrest—Jurisdiction of Judge of Superior Court over extradition commissioner—Certiorari—Right of foreign country to intervene.]—(1) Foreign sovereigns and states have the right to appear and intervene in cases before the Courts of the Province of Quebec. (2) A commissioner of extradition, acting under the authority of the Extradition Act, has equal authority with a Judge of the Superior Court; and it is only when, assuming to act as a commissioner, he does something which is ultra vires of his powers, or otherwise acts illegally, that Superior Courts, or Judges thereof, become seized with revisory, amendatory or appellate powers over his acts. (3) When a prisoner, whose extradition is sought, has been brought before a Judge of the Superior Court on a writ of habeas corpus, issued before the committal of the accused and before the conclusion of the enquiry before the commissioner, the powers of the Judge are limited to determining whether the commissioner has jurisdiction to make the enquiry, i.e., whether he is legally seized of the case; when, however, the writ of habeas corpus was issued after the committal of the accused, the Judge has the power to review the case against him. (4) The jurisdiction of an Extradition Judge or commissioner, extends over the whole province for which he has been appointed; he may therefore order a prisoner to be brought before him from any part of the province in which he has been arrested. (5) A Judge of the Superior Court before whom a prisoner, whose extradition is sought, has been brought on a writ of habeas corpus, has absolute control over him until he has passed from the hands of such Judge; and until then no other Judge has the right to interfere in the matter by habeas corpus or otherwise

Re Greene and Gaynor, 22 Que. S.C. 91 (Andrews, J.).

See Re Gaynor and Greene, 9 Can. Cr. Cas. 240, 255, 486, 496, and 10 Can. Cr. Cas. 21.

— Habeas corpus — Authority to arrest—Description of offence.]—(1) The issue of a writ of habeas corpus in a matter of extradition by order of a Judge, who afterwards rescinded it, does not prevent the issue of another writ and does not constitute chose jugée when (a) there are fresh

charges in the petition on which the second writ was issued; (b) the petitioner abandoned his first writ before judgment and set out such abandonment in his second petition; (c) the second writ was not addressed to the same gaoler as the first and was executed in another district. (2) The petitioner may lawfully abandon proceedings on a writ of habeas corpus at any time before judgment therein, and if notwithstanding such abandonment judgment is rendered it will be chose jugée and cannot be set up against a second writ. (3) After the issue of a writ of habeas corpus in an extradition case the Judge seized of the proceedings thereon may cause an auxiliary writ of certiorari to be issued addressed to the extradition commissioner who issued the warrant requiring him to return the whoe record including the complaint or information and the documents relating thereto. (4) In dealing with the merits of the habeas corpus the Judge, after the return of the record, under certiorari has been made, is not restricted to examination of the warrant of arrest in order to ascertain if the commissioner had jurisdiction, but may go behind it and examine the grounds on which it issued. (5) An extradition commissioner has jurisdiction to proceed to extradition only if his warrant, as well as the documents on which he issued it, are legal and contain the legal description of an offence provided for by treaty. (6) In an extradition case the date of the commission of the offence is an essential element in describing it, and if the warrant does not mention such date it is defective. (7) The warrant, the information and the other documents relating thereto should make it clearly appear that the offence charged is provided for by extradition treaties. (8) The extradition commissioner cannot, in his warrant, make an alteration as to the offence charged by the information so as to make it fall within the provisions of the treaty.

Ex parte Gaynor, Q.R. 22 S.C. 190 (Sup. Ct.).

See Re Gaynor and Greene, 9 Can. Cr. Cas. 205, 240, 255, 486, 496, and 10 Can. Cr. Cas. 21.

—Bail pending extradition enquiry.] — A county Judge, exercising the powers of an extradition Judge under the Extradition Act, has no power to bail the accused pending the enquiry before him.

Re Stern, 7 Can. Cr. Cas. 191.

—Bail pending extradition enquiry—Delay to bring evidence for prosecution.]—(1) An extradition commissioner should not, under ordinary circumstances, admit the accused person to bail pending the reasonably delay required by the prosecution to bring witnesses from the foreign country to prove the alleged offence. (2) A petition for a writ of habeas corpus may be refused if the Court is satisfied that the writ would, if issued, be quashed upon the petitioner's own showing.

United States v. Weiss, 8 Can. Cr. Cas. 62 (Hall, J.).

—Recovery of stolen property—Evidence —Inference—"Money, valuable security or other property."]—Upon a motion for the discharge of a prisoner committed for extradition no evidence can be considered except that upon which the prisoner stands committed, and into the weight of that evidence or even its sufficiency to sustain the charge no inquiry can be made. The fact of the silence of a person accused of receiving stolen property upon hearing statements made as to his alleged guilt by the person who stole the property is admissible in evidence as leading to the inference of his guilty knowledge. Having regard to the interpretation clauses of the Extradition Act, R.S. C. 1886, c. 142, crimes referred to in the "extradition arrangement" of 1890 between Great Britain and the United States come within the Act. The words "other property" used in that arrangement as to the crime of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained" must be construed as relating only to things of the same type as "money" or "valuable security" and a prisoner accused of receiving a stolen pair of shoes was discharged from custody.

Re Cohen, 8 O.L.R. 143, 8 Can. Cr. Cas. 251 (Anglin, J.).

—Forgery — Uttering forged document—Letter of introduction—Intent—Criminal Code, ss. 422, 424.]—There was evidence that the prisoner handed to a young woman in charge of an office of the Western Union Telegraph Company a letter purporting to be signed by a vice-president of that company, in these words: "To any employee, Western Union Telegraph Company: This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favours shown him will be duly appreciated by the corporation and myself." The vice-president whose name was used did not himself sign it, nor authorize any one else to sign it for him, nor was he aware of it. There was evidence that the prisoner shortly afterwards gained the affections of the young woman, and proposed, under the name of J. O. Goelet, to marry her, although he had a wife living. There was no evidence that any person named J. O. Goelet existed. There was no evidence to show that the prisoner had himself written any part of the document:

—Held, that the facts were sufficient to make out a prima facie case that the prisoner presented the document with the intention that the young woman should believe and act upon it as genuine, to her own prejudice, within the meaning of s. 422 of the Criminal Code; and therefore a prima facie case of uttering a forged document, within the meaning of s. 424; and an order for extradition was right. The language used in s. 422 is intended to extend to cases which would not have come within any former common law or statutory definition of forgery in force in Canada.

Re Abeel, 7 O.L.R .327, 8 Can. Cr. Cas. 189 (Street, J.).

—Larceny—False pretences.]—In extradition proceedings the Judge is to find (1) whether there is prima facie evidence of the commission by the accused of an offence, which if committed in Canada would be an indictable offence by the law of Canada; and, if it be so found, then (2) whether there is prima facie evidence that the offence is one of the crimes described in the extradition arrangement with the foreign country seeking extradition. "Grand larceny in the second degree" is an extradition crime under the extradition arrangement between Great Britain and the United States of 1889-90.

Re F. H. Martin (No. 1), 2 Terr. L.R. 301 (Richardson, J.); 8 Can. Cr. Cas. 326.

—Larceny—False pretences—Form of warrant.]—"Obtaining money or property by false pretences" is an extradition crime within the meaning of the extradition Act, and the extradition arrangement between Great Britain and the United States of America. A warrant of committal under the Extradition Act which recited the Judge's determination that the prisoner should be surrendered in pursuance of the Act "on the ground of his being accused of grand larceny in the second degree within the jurisdiction of the State of Minnesota," was held sufficient.

Re F. H. Martin (No. 2), 2 Terr. L.R 304; 8 Can. Cr. Cas. 326.

—Participation in larceny—Overt act in conspiracy to defraud—Effect of proceeding with charge of conspiracy in the foreign country—Remand pending inquiry before extradition Judge.]—(1) Conspiracy to defraud is in itself not an extradictable offence between Canada and the United States, but extradition will lie as for a separate crime in respect of any overt act of a conspiracy which constitutes one of the crimes mentioned in the extradition arrangement. (2) The extraditable offence of larceny or participation in larceny is charged sufficiently in an information laid on instituting extradition proceedings therefor, if, following a charge of conspiracy to defraud between the accused and another person and an embezzlement and theft by such person in pursuance thereof, the information alleges that the accused "did participate in the said offence of embezzlement and theft. (3) Where extradition is sought upon a charge of participation in a theft alleged to have been committed with respect to property of the government of the demanding country, and the demanding country produces, in support of the extradition charge, an indictment found in that country upon a charge of conspiracy wherein acts of theft are charged as overt acts of the conspiracy, the demanding country is not thereby estopped from treating such overt acts as independent acts of larceny for the purposes of extradition. (4) Where a prisoner is brought before an extradition Judge in pursuance of a warrant of arrest, and charged with an extraditable offence, he may be remanded for the purpose of affording the prosecution an opportunity of adducing evidence. (5) A return to a writ of habeas corpus issued pending such remand is good if it discloses an information duly laid before an extradition Judge having jurisdiction over the subject matter of the inquiry, the appearance of the accused before such Judge and a warrant under the hand and seal of such Judge remanding him into custody until the same fixed for proceeding with the hearing. (6) Semble, the omission to show in a warrant of remand that the alleged offence was subsequent to the extradition convention which had no retroactive application, is not a ground for holding the detention to be invalid. Ex parte Greene and Gaynor (No. 2), 7 Can. Cr. Cas. 389, reversed.

United States v. Gaynor; Re Gaynor and Greene (No. 3), (P.C.), 9 Can. Cr. Cas. 205.

— Jurisdiction of extradition commissioners—Legislative power.]—(1) That part of section 5 of the Canadian Extradition Act which purports to empower the Federal Government to appoint extradition commissioners to act judicially in extradition matters within the limits of one province, is within the legislative powers of the Dominion, and does not contravene the exclusive power conferred on provincial legislatures respecting the "constitution, maintenance and organization of provincial Courts." (2) A writ of prohibition will not lie to determine the title of a de facto judicial officer, the appropriate proceeding for determining the title to a public office being that of quo warranto.

Ex parte Gaynor and Greene (No. 4), (Que.), 9 Can. Cr. Cas. 240.

—Appeal from refusal of writ of prohibition—Stay of proceedings—Discretion — Habeas corpus—Bail pending extradition enquiry.]— (1) The Court of King's Bench, sitting at Quebec, will not grant a stay of proceedings pending an appeal taken in the Montreal district to the Court of King's Bench (appeal side) upon the refusal of a writ of prohibition, unless special and serious grounds are shown therefor. (2) In the province of Quebec, habeas corpus must be applied for in the judicial district in which the prisoner is incarcerated, and, in the absence from the Montreal district of the Judges of the Court of King's Bench during the term sittings in Quebec, habeas corpus applications cannot be heard in Quebec in respect of prisoners in the Montreal district, but must be brought before a Judge of the Superior Court. (3) Semble, an extradition commissioner has a discretion to admit to bail pending the extradition enquiry the person charged before him; but, if it is proved that the accused is a fugitive from the foreign country demanding him, that fact will have weight, with the other circumstances, against the application. (4) Per Lacoste, C.J.:—A Judge of the Court of King's Bench of the province of Quebec has no jurisdiction while sitting at Quebec City to entertain an application for bail, under Cr. Code s. 602, of a prisoner in gaol at Montreal, which is in a separate judicial district.

Re Gaynor and Greene (No. 5), (Que.), 9 Can. Cr. Cas. 255.

—Appointment of extradition commissioners—Legislative power—Federal Court.]— (1) That part of section 5 of the Canadian Extradition Act which purports to empower the Federal Government to appoint Extradition Commissioners to act judicially in extradition matters is within the legislative powers of the Dominion Parliament. (2) Assuming that an extradition commissioner so appointed is a "court," that Court is a Federal one and not an inferior tribunal under the supervision of a provincial superior Court, and Article 1003 C.P. (Que.), authorizing writs of prohibition is not applicable to it. (3) The Canadian Extradition Act of 1886 remains in force under the Imperial Order-in-Council of 1888, notwithstanding the addition to the statute in 1889 by the Parliament of Canada of a new section relating to fugitives charged with non-extraditable offences. 52 Vict. (Can.) c. 36.

Re Gaynor and Greene (No. 6), (Que.), 9 Can. Cr. Cas. 486.

—Surrender only after the decision of "the Court" remanding—Jurisdiction of Judge in chambers.]—It is not essential that a writ of habeas corpus under section 16 of the Extradition Act should be returnable in Court, and it is sufficient that the writ is returnable before a Judge sitting in chambers, if the latter practice is authorized under the general law in force in the province.

Re Gaynor and Greene (No. 8), (Que.), 9 Can. Cr. Cas. 496.

—Extradition—Bail after committment—Jurisdiction of a superior Court.] — A Judge of a superior Court may grant bail after committment by an extradition commissioner, but the power should not be exercised except under exceptional circumstances, such as the life of a fugitive being endangered by his close confinement.

Re Gaynor and Greene (No. 9), (Que.), 9 Can. Cr. Cas. 542.

—Larceny—Authentication of foreign depositions—State officers—Copy of information in foreign state—Confession of accused.]—(1) The clerk of a state Court of criminal jurisdiction in one of the States of the United States of America is an "officer of the foreign State" within the meaning of the Canadian Extradition Act, s. 10 (2a) for the purpose of certifying the information laid in that Court for the extraditable offence; and a copy of the information so certified under the seal of his Court, is duly authenticated for the purposes of the Extradition Act if certified by the Governor of the State and the "Secretary of State" of that State under the State seal and accompanied by the certificate of the Secretary of State of the United States under his official seal verifying such State seal and by the certificate of the British Embassy verifying the latter certificate. (2) The State attorney for the county in which the charge was laid is an "officer of the foreign State" within the meaning of the Extradition Act, s. 10 (2a) for the purpose of authenticating an original deposition of a witness taken in that county to be used as evidence in obtaining the extradition; and such authentication may be made by the deposition of such State attorney duly certified by the State and Federal authorities. (3) A charge of "grand larceny" is within the extradition arrangement with the United States as a species of "larceny." (4) Unless the evidence before the extradition Judge of an alleged confession by the accused was clearly inadmissible, another Judge, hearing the case upon a habeas corpus after committal, should not discharge the prisoner upon the ground of its inadmissibility. (5) Semble, where a witness called to prove a confession alleged to have been

made by the accused, purports to give a complete account of the interview, and no suspicious circumstances are brought out pointing to any threat or inducement relating thereto, the evidence should not be rejected although the witness was not asked whether any threat or inducement had been held out.

Re Lewis, (N.W.T.), 9 Can. Cr. Cas. 233.

—Offences against State and colonial laws — Child-stealing.]—(1) Extradition lies from Canada to the State of New York for an offence named in the extradition treaties between Great Britain and the United States, although such offence is not against a federal law of the United States, if by the laws both of Canada and of the demanding State the offence charged is criminal and within the list of crimes specified in the treaties. (2) Where a divorce decree of a Court of competent jurisdiction in the United States has awarded the custody of a child to the father as against the mother, and the mother thereafter removes and conceals the child for the purpose of evading the decree, a prima facie case for extradition is thereby made out against the mother upon a charge of child-stealing. (3) Semble, the offence of child-stealing under the Criminal Code, s. 284, may be complete against the child's mother, although the father, to whom the child's custody has been awarded, has never had any actual separate possession of the child.

Re Lorenz, 9 Can. Cr. Cas. 158, 7 Que. P.R. 101.

—Perjury — Self-imposed oath—Warrant of committal—Jurisdiction of extradition commissioner — Description of offence — Particulars.]—(1) Perjury is an extradition crime within the meaning of the treaty and the Act. (2) Where the alleged crime is perjury, it is sufficient if the oath was administered in compliance with the formalities of the demanding country. (3) A warrant of committal remanding a prisoner for extradition is sufficient if it states the offence for which he is committed. (4) Such warrant, issued by an extradition commissioner under the authority conferred by the Extradition Act, is valid if issued in the form prescribed by the Act. (5) The ordinary technicalities of criminal procedure are applicable to proceedings in extradition to only a limited extent. (6) Where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way. (7) Where the demanding country is one of the States of the United States of America, it is sufficient if the imputed crime be a crime according to the law of that State, although not an offence against the general laws of the United States. In re Winsor (1865), 6 B. & S. 522, commented upon. (8) One test of determining whether the evidence is such as would justify the committal of the accused for trial if the crime had been committed in Canada is to conceive the accused pursuing the conduct in question in this country, and then to transplant along with him his environment, including, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting the law supplying the definition of the crime which is charged.

Re George D. Collins, 11 B.C.R. 436 (Duff, J.).

Re Collins (Nos. 1, 2, and 3), 10 Can. Cr. Cas. 70, 73, 80.

—Order of committal — Duty of commissioner — Copies of depositions.]—(1) The order of committal for the extradition of fugitives is sufficient if made in the form given in the schedule to the Extradition Act, section 20 of which declares expressly that a committal so made is to be deemed valid. As a consequence, it need not state that the charges laid have been inquired into, that they relate to extradition crimes, that prima facie proof of guilt has been made, nor provide specifically for the discharge or surrender of the prisoner. (2) The commissioner for extradition, in dealing with the information and evidence in the case, is governed by the same rules as the magistrate before whom a preliminary investigation in respect of an indictable offence is held; he issues his warrant for committal upon evidence that would justify the magistrate in committing for trial, and as the latter may commit for an offence or offences different from those for which the accused was arrested, so also a variance between the charge in the information and the crime or crimes (whether one or more is of no consequence) stated in the committal as the ground for extradition, provided they are extraditable, is immaterial. (3) Participation in fraud by an agent, participation in embezzlement, and the receiving of moneys knowing the same to have been fraudulently obtained, are extradictable crimes. (4) Copies of the depositions of witnesses taken by means of stenography in the Courts of New York, duly certified and authenticated by the competent officers of such Courts, though not read over to, nor signed by the witnesses, constitute legal evidence of the facts therein. (5) The Judge to whom application is made for habeas corpus on behalf of the fugitive committed for surrender, has no power to review the decision of the ex-

tradition commissioner as to the sufficiency of the evidence adduced before him.

Greene v. Vallée, 14 Que. K.B. 261 (Ouimet, J.).

[And see Re Gaynor and Greene, 9 Can. Cr. Cas. 205 (P.C.).]

—Prohibition — Appeal — Jurisdiction.] —The refusal by a Judge of the Superior Court to grant a summons in a matter of prohibition is a judgment and an appeal therefrom lies to the Court of King's Bench. (2) The powers of the Superior Court as to superintending and reforming proceedings in the Courts and by the Judges and persons mentioned in Art. 50 C.P.Q., do not extend to Dominion Courts for administering the laws relating to extradition for criminal offences and prohibition does not lie in respect to such Courts or its officers. (3) The Parliament of Canada has power to establish Courts and authorize the appointment of officers to administer the extradition laws.

Gaynor v. Lafontaine, Q.R. 14 K.B. 99. [See also 36 Can. S.C.R. 247].

—Extradition — Habeas corpus — Re-arrest for same offence after discharge—Res judicata—Affidavit on information and belief.]—On an application for a habeas corpus on the grounds: (1) That the prisoner was arrested a second time for the same offence after his release on a habeas corpus; (2) That the matter was res judicata; (3) That the complaint against him was on information and belief only; (4) That no evidence was received by the Judge, and (5) That neither information and complaint nor the warrant was transmitted to the Minister of Justice:—Held, that, although the prisoner had been discharged from custody on the ground that there was no proper evidence of the commission of the alleged offence or identifying the alleged forged document, he could be re-arrested when further and new evidence had been discovered and was forthcoming to supply the deficiencies, and that the doctrine of res judicata or of former jeopardy or of autrefois acquit was inapplicable to such an enquiry. The Habeas Corpus Act, 31 Charles II. c. 2, s. 6, does not apply to extradition proceedings:—Held, that an affidavit upon which the arrest was made being on information and belief was sufficient. Held, also, that the other objections should not be investigated on appeal as the enquiry was still pending and was to be prosecuted before the extradition Judge. Quære, whether the Divisional Court would have acted as on an appeal if objection had been taken to its jurisdiction.

Re Harsha, 11 O.L.R. 457, 10 Can. Cr. Cas. 433 (D.C.).

—Evidence of commission of offence—Irregularities in proceedings before extradition Judge—Discharge of prisoner—Fresh proceedings.]—The prisoner was committed by a Judge for extradition to a foreign state for the offence of forging tickets of admission to an entertainment. The evidence before the Judge consisted of a certified copy of the indictment of the prisoner in the foreign state, the information of a police detective taken before the Judge himself, and five depositions or affidavits sworn in the foreign state, consisting in great part merely of hearsay statements made by other persons to the deponents, not in the presence of the prisoner. These depositions proved some relevant facts, and raised a strong suspicion against the prisoner of having forged something, of having committed an offence which, if committed in Canada, would be forgery at common law, as well as under the Criminal Code, ss. 419, 421, 423; but neither a genuine ticket nor one of those with the forging of which the prisoner was charged was produced with any of the depositions, nor produced or identified before the extradition Judge:—Held, Meredith, J.A., dissenting, that there was no proper evidence of the commission of the alleged offence; and the prisoner was entitled to his discharge upon habeas corpus. Semble, per Osler, J.A., that there were grave irregularities in the proceedings before the extradition Judge; his warrant for the apprehension of the accused was issued without any information or complaint taken in this country, or a foreign warrant duly authenticated, having been before him; the prisoner was arrested on the strength of a telegram, and the depositions on which he was committed were not forthcoming pending their authentication until the day upon which the order was made remanding him for extradition; and s. 6 (2) of the Extradition Act could not have been complied with. Semble, also, that there was nothing to prevent fresh proceedings being taken against the prisoner upon his discharge. Semble, also, that, in the present state of the authorities, an extradition Judge should require proof that the crime is an extradition crime as well by the laws of the demanding state as by our own.

Re Harsha (No. 2), 11 O.L.R. 494, 11 Can. Cr. Cas. 62. [An appeal taken to the Privy Council was dismissed.]

—Evidence in support of charge — Ex parte affidavits—Fraud by an agent.]—(1) The omission to mark a writ of habeas corpus in the manner prescribed in s. 3, c. 95, C.S.L.C., is not a ground of objection that can be taken by the party prosecuting the prisoner or opposing his discharge, more particularly after the merits of the cause of detention have

been inquired into. The formality is one required for the instruction of the sheriff, gaoler or officer detaining the prisoner. (2) Affidavits taken ex parte in the manner provided in section 10 of the Extradition Act, R.S.C., c. 142, are admissible as evidence in support of the charge for which the extradition of a fugitive is sought. (3) The sufficiency of such evidence is a matter for the judicial discretion of the extradition commissioner and his decision thereon is not subject to review in habeas corpus proceedings. (4) the expression "fraud by an agent" in section 4 of Article 1 of the Extradition Treaty between Great Britain and the United States (Convention of 1889-90) is not confined to agents who misapply trust moneys, but is of general purport and extends to servants or employees of the Government, such as appraisers of imported goods subject to customs' duties.

Browne v. United States of America, 30 Que. S.C. 363 (Taschereau, J.).

—Extraditable crimes—Conspiracy to defraud—Fraud by an agent.] — (1) The offence or crime of conspiracy to defraud is not an extraditable crime under the Extradition Treaty between Great Britain and the United States. (2) Evidence of a conviction in the United States of conspiracy to defraud and consisting of copies of an indictment for that offence, of a verdict of guilty and of the sentence to fine and imprisonment in consequence, affords no grounds for a committal for extradition on a charge of fraud by an agent, even though overt acts of fraud by the prisoner as an agent be set out in the indictment, in conformity with the rules of criminal procedure in the United States.

United States v. Browne; Ex parte Browne, 16 Que. K.B. 10, 11 Can. Cr. Cas. 161 (Lavergne, J.).

—Embezzlement—Depositions taken in demanding country—Proof of foreign law—British-Russian treaty.]—(1) A committal for extradition on a charge of embezzlement is not justified on evidence only of errors or irregularities in bookkeeping in books kept by the accused for his employers, such evidence alone not being sufficient to establish a prima facie case of theft or conversion of money.

Re Kalke, 13 Can. Cr. Cas. 253.

—Bribery—Retroactive legislation.]—The prisoner who was the assistant city engineer of a city in the State of Ohio, U.S., with the supervision over certain of the streets which were being improved by a firm of contractors, accepted from the firm the sum of $50 for the purpose of influencing him in his work of supervision: —Held, that the offence did not amount to bribery at common law, where it could only be predicated of a reward given to a Judge or other person concerned in the public administration of justice; but that it constituted bribery both under the laws of the State of Ohio, as well as under subsection (c) of section 161 of the Criminal Code, R.S.C. 1906, c. 146. The crime of bribery was not included in the list of offences contained in the extradition treaty of 1889, nor in that of 1890, but by Art. 1 of the treaty of 1907, it was added to such list, and was by Art. 2 to be considered as an integral part thereof, and as if the original list of crimes had comprised the additional crimes specified in Art. 1. The offence here was committed before the coming into force of the treaty of 1907. Held, that Art. 2 had a retroactive effect, and notwithstanding that the offence was committed before the coming into force of the treaty of 1907, the offence of bribery was to be treated as if originally in the list of offences contained in the treaty of 1889, and therefore came within the treaty and that the prisoner was extraditable.

In re Cannon, 17 O.L.R. 352, 14 Can. Cr. Cas. 186.

—Evidence—Prima facie case—Accessory]—The accused was arrested at the instigation of the United States authorities charged with having procured an unlawful operation to be performed upon a woman. In support of the charge a deposition of the woman was presented which set out that she was seduced by the accused and become pregnant; that he had taken her to St. Paul to have an operation performed; that he took her to a physician who made an examination of her; that afterwards the accused left St. Paul, and after his departure an operation was performed by the physician and a miscarriage resulted:—Held, that as the deposition did not set out that the operation which was to be performed and which the accused took the complainant to St. Paul to have performed was the unlawful operation which was performed, and as there was no evidence to connect him with the unlawful operation, he must be discharged.

Re McCready, 2 Sask. R. 46, 14 Can. Cr. Cas. 481.

—Arrest on telegram—Re-arrest on warrant after release.]—(1) An information in extradition may be based upon telegraphic information and belief thereof if the grounds of belief are sufficiently stated and satisfy the extradition Judge that a warrant of arrest should issue. (2) Where an arrest has been illegally made without warrant for an extraditable offence and the prisoner is then released, he may be immediately re-arrested upon an

extradition warrant of arrest upon the same charge. (3) It is no objection to an extradition warrant that two offences of a cognate character are stated therein.

The King v. Rutland; Ex parte Kalke, 14 Can. Cr. Cas. 22.

—Practice when evidence taken in shorthand.]—Under s. 13 of the Extradition Act, R.S.C. 1906, c. 155, which provide that the Judge before whom the fugitive is brought should hear the case in the same manner as nearly as may be as if the fugitive was brought before a justice charged with an indictable offence, the proceedings are regulated by ss. 682-686 of the Criminal Code and under s. 683, if the evidence is taken in shorthand, it is imperative that the transcript be signed by the Judge and be accompanied by an affidavit of the stenographer that it is a true report of the evidence before there can be a committal of the accused for extradition, and, if these be lacking, the prisoner is entitled to his discharge on habeas corpus, although there would be nothing to prevent fresh proceedings being taken against him.

Re Royston, 18 Man. R. 539, 15 Can. Cr. Cas. 96.

EXTRA-PROVINCIAL COMPANY.

See COMPANY.

FACTORIES ACT.

Master and servant — Negligence.] — Employing a girl under eighteen years of age to work between the fixed and traversing parts of a self-acting machine while it is in motion, in breach of the provisions of s. 14 of the Ontario Factories Act, R.S.O. 1897, c. 256, is in itself sufficient to render the master prima facie liable in damages for an accident which happens in the course of such employment, and negligence on his part directly conducing to the accident need not be shown. Roberts v. Taylor (1899), 31 O.R. 10, overruled. Judgment of Street, J., 1 O.L.R. 18, reversed.

Fahey v. Jephcott, 2 O.L.R. 449.

—Employer's liability.]—

See MASTER AND SERVANT.

—Factories Act — "Owner."]—Held, that a store occupied by merchant tailors, the rear part being used as a tailoring department and the front as a retail sale department, fourteen persons being employed in the former, is a "factory" as defined by s. 2, sub-s. (i) (c), of the Ontario Factories Act, R.S.O. 1897, c. 256, and the amendments thereto. Under s. 15, as amended by 4 Edw. VII. c. 26, s. 3, which provides that the "owner" of every factory shall provide a sufficient number of privies, etc., the owner of the building is plainly intended, who may or may not be also the employer.

Rex ex rel. Burke v. Ferguson, 13 O.L.R. 479 (Falconbridge, C.J.B.).

—Industrial establishment — Transfer of control — Liability for accidents.] — The owner of an industrial establishment who transfers the right to operate it, for which purpose the transferee takes charge and control of it and hires the workmen, is not responsible for accidents through defective implements. There cannot be invoked against him the obligations created by the Industrial Establishment Act of Quebec to maintain the premises and apparatus in the best condition possible for the security of workmen. These are imposed only on the person who maintains the establishment and not on an owner who transfers to another, by lease, assignment or otherwise, the operation and, therefore, the care and control of it.

Julieu v. Dupré, Q.R. 35 S.C. 412.

FALSE ARREST.

False arrest in civil proceedings—Want of malice—Set-off.]—Where T. Co., by a regular process issued out of a Court of competent jurisdiction, caused the arrest of McD. for debt in a civil proceeding, which debt had been paid before action commenced:—Held, in the absence of malice, no action would lie against T. Co. for false arrest. Ss. 117 and 118 of the Supreme Court Act, C.S. 1903, c. 111, enable defendant to set-off a claim for unliquidated damages in the same way as an ordinary debt but only in cases where the law of set-off is applicable. Therefore, where the plaintiff's claim was for unliquidated damages, held, defendant could not plead a set-off.

McDonough v. Telegraph Publishing Co., 39 N.B.R. 515.

—Offence against city by-law—Arrest by peace officer without warrant.]—The defendant was a police constable in a city; without a warrant he arrested the plaintiff for a breach of a by-law of the city, and the plaintiff brought this action for assault and false imprisonment:—Held, that the direction to the jury that the defendant had a right without a warrant to arrest the plaintiff if he found him committing a breach of a city by-law, was erroneous; and a verdict for the defendant founded thereon was set aside. The power of a constable to make arrests without warrant depends either on the common law or on statute. At common law he may arrest a person whom he finds committing a felony, misdemeanour, or breach of the peace, or whom on reasonable grounds he suspects of having committed a felony; and

by the Criminal Code, s. 648, he may arrest any person whom he finds committing a criminal offence. But neither at common law nor by statute is there any authority for arresting a person without warrant found committing a breach of a city by-law. S. 35 of the Criminal Code protects a constable only in cases in which he is authorized to make an arrest. Held, also, that, there being nothing in the by-law which authorized the defendant to arrest the plaintiff, the defendant was not acting under its provisions, and was not protected by s. 404 of the City Act. Held, also, per Lamont, J., that the direction given to the jury that the plaintiff, while the conviction against him remained unreversed, was estopped from setting up that he was not guilty of that offence, was right. Per Lamont, J., also, that the provincial legislature had power to authorize arrest without a warrant for breach of a provincial statute; and, as that power had not been exercised, the right to arrest did not exist.

Plested v. McLeod, 15 W.L.R. 533 (Sask.).

—Constable arresting without warrant — Offence not committed in constable's presence.]—

Desjardins v. City of Montreal, 4 E.L.R. 329 (Que.).

—Liability of person preferring charge—Charge not criminal—Chinese Immigration Act.]—A number of persons of Chinese origin, who were suspected of attempting to enter Canada without payment of the head tax, in contravention of the provisions of the Chinese Immigration Act, R.S.C., c. 95, were arrested by a constable without a warrant, and were detained for a time in a lock-up. This was done at the instance of defendant, a preventive officer, who was acting under instructions received from the collector of customs. Subsequently there was an information made by defendant and a warrant issued, and a preliminary investigation held, as the result of which the plaintiff and seven other persons were committed for trial. He elected to be tried before the Judge of the County Court, and was convicted and sentenced to pay a fine of $100, which was paid. The conviction was afterwards set aside, on a case stated for the opinion of this Court, and the return of the fine ordered. Plaintiff, thereupon, brought an action claiming damages for false imprisonment, in connection with his detention without a warrant, and the trial Judge awarded him, as part of such damages, the sum of $100 paid as a fine under the judgment in the County Court, and the sum of $16 additional for legal and other expenses:—Held, that while defendant might be responsible in damages for the detention up to the time of the issue of the warrant he was not responsible after that in the absence of evidence of direct interference on his part; also, that he was not liable in respect to the fine which never reached him, and that his appeal, to that extent, must be allowed with costs. That the additional amount of $16 allowed plaintiff for damages was not unreasonable under the circumstances, and, with respect to that amount, the appeal must be dismissed with costs, costs to be set-off.

Cheng Fun v. Campbell, 44 N.S.R. 51.

—Action against justice of the peace—Notice — Pleading insufficiency — Probable cause.]—In an action against justices of the peace for false imprisonment the defendant at the trial applied to amend by pleading not guilty by statute:—Held (following Gesman v. City of Regina, 1 Sask. L.R. 39), that such an amendment should not be allowed at this stage. The defendants then claimed to have the right to avail themselves of the statutes in question without pleading same; particularly as to no notice of action being given, the notice which had been given being, it was claimed, defective. Held, that this could not be allowed and in any event the defendants not having pleaded that the notice was defective could not attack the same. In an action for false imprisonment against two justices of the peace it appeared that a dispute was pending as to the ownership of a certain building, to the knowledge of the defendant Tedford. The plaintiff having attempted to remove this building the other claimant laid an information before the defendant Tedford charging the plaintiff with entering on the premises of the claimant and attempting to remove a house. It also appeared that before acting on the information Tedford was notified by the plaintiff that he owned the house in question and there were other circumstances to his knowledge from which he might reasonably believe the plaintiff's claim to be well founded. He was also advised by a police officer that the dispute was not within his jurisdiction; but notwithstanding he issued a warrant for the arrest of the plaintiff who was brought before the two defendants in custody and after various irregular proceedings was committed to gaol to stand his trial, being released by the agent of the Attorney-General as soon as possible, but not until he had been subjected to all the indignities attendant on arrest and imprisonment. There was no evidence that the defendant Hossie was aware of the circumstances set out. In an action for false imprisonment:—Held, that in an action for malicious prosecution the existence or non-existence of probable cause must be determined by the Court although the facts from which the Judge is to draw the inferences are matters for the jury, except where the facts are not in dispute when the Judge decides such matters himself. 2. That upon the facts set out and undisputed there was no evidence of reasonable and probable cause justifying the action of the defendant Tedford to go to the jury.

Baker v. Tedford, 2 Sask. R. 307.

—**False arrest—Notice of action—Acts of police officers—Liability of corporation.**]—The action to recover damages for being illegally arrested and charged with a criminal offence is not subject to the prior notice to be given within fifteen days after the commission of the Act complained of, provided for by Art. 536 of the charter of the City of Montreal (62 Vict. c. 58 amended by 7 Edw. VII. c. 63, s. 45). Though a city municipality is not responsible for the acts of its police officers in arresting or laying a charge against those whom they suspect of criminal offences, since they are not then acting as its agents, but as those of the Crown, yet if it defends an action brought against it for recovery of damages in consequence of such acts on the ground that the police officers acted without malice and with probable cause, it makes itself liable for the acts complained of and, failing to establish such defence, must submit to a judgment for the damages suffered.

Huchette v. City of Montreal, Q.R. 37 S.C. 344 (Sup. Ct.).

—**Notice of action—Particulars.**]—In an action for damages for false arrest against the City of Montreal it is not necessary to give previous notice thereof. If, in defending an action for damages, the defendant sets up contributory negligence by the plaintiff, and in support thereof cites certain statements in the declaration, he cannot be compelled to give particulars other than those contained in such statements.

Dupuis v. City of Montreal, 11 Que. P.R. 183.

Responsibility of city for act of policeman—1654 C.C.]—The city of Sherbrooke is responsible for the damages caused by an arrest made without reasonable or probable cause by a policeman in the employ of, and wearing the uniform provided by the city. The fact that, at the time the arrest was made, the policeman had been relieved and was off duty, is no defence to the action.—(Rosseau v. Town of Levis, 14 Q.L.R. 376, and Corporation of Quebec & Oliver, 15 R.L.Q. 319, distinguished.)

Bourget v. City of Sherbrooke, Q.R. 27 S.C. 78.

—**Termination of prosecution.**]—In an action for damages for false arrest, it is not necessary to allege in the declaration that the prosecution has been terminated or that the plaintiff has been acquitted.

McDowell v. U. S. Thread Co., 7 Que. P. R. 326 (Charbonneau, J.).

—**Liability of town for acts of police officer—By-law—Respondeat superior — Ratification.**] — A municipal corporation can not be made to answer in damages for the unlawful acts of one of its police officers while attempting to perform a public duty. The plaintiff, who was temporarily in the town of C., collecting subscriptions for a newspaper published in the city of S., was arrested by a police officer of the town for a breach of one of its by-laws, which required all persons, who were not ratepayers of the town or non-residents of the county of N., to pay a license fee before engaging in any calling, occupation or employment in the said town. The arrest was made by the officer without any warrant, and the plaintiff was only released upon his paying to the town treasurer the fee demanded, which was retained. In an action for false imprisonment against the town for the alleged unlawful arrest by the police officer, it was held, following McCleave v. The City of Moncton (35 N.B.R. 296 and 32 S.C.R. 106), that, assuming the arrest to have been unlawful, the doctrine of the respondeat superior did not apply, and the town was not liable. Held, further, that the fact that the police officer, in making the arrest, was endeavouring to enforce a by-law of the town made for revenue purposes only was not sufficient to take this case out of the rule laid down in the McCleave case; and that the payment of the license fee to the town treasurer, and its retention by him, in the absence of any evidence of knowledge on the part of the town of the circumstances surrounding such payment and retention, was no proof of any intention on the part of the town to ratify the acts of the police officer.

Woodforde v. Town of Chatham, 37 N.B. R. 21.

—**Arrest without warrant—Verbal charge—Probable cause — Liability for tort.**]—(1) A constable or peace officer, in a case of homicide, is justified, upon the verbal charge of the daughter of the deceased, in arresting, without a warrant, a party found in his bed, at his home, a short distance away, whose blood-stained hands and clothes lend colour to the charge. (2) The officer, and the city, in whose police service he is employed, incur no liability for false imprisonment, through the arrest and detention of the party as aforesaid.

Hubbard v. City of Montreal, 28 Que. S. C. 221 (Dunlop, J.).

—**Action against justice—Want of jurisdiction — Malice.**] — In an action for false imprisonment where the justice who issued the warrant acted wholly without jurisdiction, proof of malice or want of probable cause is unnecessary. A complaint in writing under oath for a search warrant under which a warrant was issued, and goods named therein were found in the possession of the accused, will not justify arrest without any further or other complaint. The expense to which a party complaining may have been put by an illegal arrest is a proper element of damage.

Melanson v. Lavigne, 37 N.B.R. 539.

—**Damages—Allegations of probable cause.**]—Reasonable and probable cause being a

good defence to an action for false and malicious arrest, paragraphs containing allegations explanatory of this reasonable and probable cause will not be struck out as irrelevant.

Hawk v. City of Montreal, 9 Que. P.R. 144.

—Habeas corpus — Discharge of prisoner—Condition of not bringing action against magistrate.]—Where a prisoner is entitled to his discharge, under a writ of habeas corpus, by reason of no offence being disclosed in the material under which he was committed, such discharge cannot be made conditional on no action being brought against the magistrate or other person in respect of the conviction, or anything done thereunder.

Rex v. Lowery, 15 O.L.R. 182, 13 Can. Cr. Cas. 105.

—False arrest and imprisonment — Action against police officer.]—Two persons having died under circumstances suggesting murder, suspicion was directed against two Chinamen, one of whom was arrested, but the other could not be found. The police made search diligently for some time, but could obtain no trace of the suspected man. Believing that he was being harboured by his fellow-countrymen in the city and that if a general search was made they would conceal him, it was determined to visit every Chinese resort in the city and take the occupants to the police station keeping them there until the search was completed and so ascertain if the man for whom they were searching was in the city. This plan was carried out, a man being stationed at each entrance to the various buildings, and a search made and the occupants removed in a conveyance accompanied by an officer and placed in charge of another officer at the station, and not permitted to depart until all places had been visited. The police had no warrant authorizing a search, nor had they any strong reason for suspecting any particular person of harbouring the suspected man. Actions were brought by some of the Chinamen against the officers for false arrest and imprisonment. The defendants pleaded that they had not detained the plaintiffs and also "not guilty by statute," under which it was proposed to plead want of notice of action:—Held, that the right violated by false imprisonment is freedom of locomotion and the gist of the offence is a restraint whereby the party complaining is hindered and prevented from going where he pleases and therefore as the evidence showed that the plaintiffs were prevented from going where they pleased they must be held to have been imprisoned. (2) That as the police officers had no warrant nor any reasonable ground of belief that the plaintiffs were harbouring a fugitive from justice they could not be said to be acting in pursuance of any statute or discharge of their duty, and were not therefore entitled to notice of action.

Mack Sing v. Smith, 1 Sask. R. 454.

—False imprisonment—Pleading—Not guilty by statute — Amendment by pleading—Claiming benefit of statute without pleading—Action against justice of the peace — Notice of—Sufficiency — Pleading insufficiency—Probable cause as a defence—Malice.]—In an action against justices of the peace for false imprisonment the defendant at the trial applied to amend by pleading not guilty by statute:—Held (following Gesman v. City of Regina, 1 Sask. L.R. 39), that such an amendment should not be allowed at this stage. The defendants then claimed to have the right to avail themselves of the statutes in question without pleading same; particularly as to no notice of action being given, the notice which had been given being, it was claimed, defective:—Held, that this could not be allowed and in any event the defendants not having pleaded that the notice was defective could not attack the same. In an action for false imprisonment against two justices of the peace it appeared that a dispute was pending as to the ownership of a certain building, to the knowledge of the defendant Tedford. The plaintiff having attempted to remove this building the other claimant laid an information before the defendant. Tedford charging the plaintiff with entering on the premises of the claimant and attempting to remove a house. It also appeared that before acting on the information Tedford was notified by the plaintiff that he owned the house in question and there were other circumstances to his knowledge from which he might reasonably believe the plaintiff's claim to be well founded. He was also advised by a police officer that the dispute was not within his jurisdiction; but notwithstanding he issued a warrant for the arrest of the plaintiff who was brought before the two defendants in custody and after various irregular proceedings was committed to gaol to stand his trial, being released by the agent of the Attorney-General as soon as possible but not until he had been subjected to all the indignities attendant on arrest and imprisonment. There was no evidence that the defendant Hossie was aware of the circumstances set out. In an action for false imprisonment. Held, that in an action for malicious prosecution the existence or non-existence of probable cause must be determined by the Court although the facts from which the Judge is to draw the inferences are matters for the jury, except where the facts are not in dispute when the Judge decides such matters himself. (2) That upon the facts set out and undisputed there was no evidence of reasonable and probable cause justifying the action of the defendant Tedford to go to the jury.

Baker v. Tedford, 2 Sask. R. 307.

—Warrant of arrest—Delay in issue — Convict out on bail—Commencement of term of imprisonment.]—On the 17th January, 1907, the plaintiff was convicted by the police magistrate for the town of North Toronto as for a second offence of having sold intoxicating liquor without a license contrary to the provisions of the Liquor License Act, and was adjudged to be imprisoned therefor for four months. He was allowed to go at large, upon his own recognizance to appear when called upon, until the 28th March, when he was arrested by M., a constable of the town of North Toronto, under a warrant of commitment issued by the magistrate (without notice to the plaintiff) on the 27th March, and delivered to the keeper of the gaol, who was thereby directed to receive the plaintiff and keep him in custory for four months. On the 28th June, 1907, the plaintiff was discharged (Rex v. Robinson, 12 Can. Cr. Cas. 447, 14 O.L.R. 519), on the ground that the term of his imprisonment had expired on the 17th May, 1907. This action was brought against M. and the town corporation for trespass and false imprisonment. A notice of action was served on the 18th September, 1907, the cause of action stated being the assault and false imprisonment of the plaintiff from the 17th May until his discharge:—Held, that, if s. 3 of the Prisons and Reformatories Act, R.S.C. 1906, c. 148, did not apply to a commitment on summary conviction for an offence against an Ontario Act, the term of imprisonment under the conviction would not commence until the plaintiff's arrest or his lodgment in gaol; but, if the enactment did apply, the plaintiff was in fact out on bail—whether regularly and properly or not—from the date of the sentence till the 28th March, and, by the very terms of the section, the intermediate period was not to be reckoned as part of the term of imprisonment. The imprisonment was, therefore, lawful, and the action failed. Rex v. Robinson (1907), 14 O.L.R. 519, 12 Can. Cr. Cas. 447, overruled. The King v. Taylor (1906), 12 Can. Cr. Cas. 244, approved. M. was not the servant or agent of the town corporation in executing the warrant, and there was no ground for making the corporation a party.

Robinson v. Morris, 19 O.L.R. 633.

—Remoteness of damages for false arrest.]—A party suing in damages for false arrest may allege that neither the defendant, who was the complainant, nor the company of which he is the manager, was the proprietor of the goods alleged to have been stolen. But he cannot allege that his mind was impaired by the serious illness of his mother, when learning his arrest, these damages being too remote.

Fournier v. Shier, 10 Que. P.R. 381.

Protection of justices—Plaintiff's innocence of the charge—By what evidence determined—Con. Stat., N.B., c. 90, s. 11.]—By Con. Stat., c. 90, s. 11, it is enacted that, "where the plaintiff shall be entitled to recover in any action against a justice he shall not have a verdict for any damages beyond two cents, or any costs of suit, if it shall be proved that he was guilty of the offence of which he was convicted, etc." In an action of false imprisonment brought against a magistrate, who without jurisdiction had committed to prison the plaintiff for making default in the payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge:—Held, that the evidence was properly received and that the plaintiff, in order to prove his innocence, was not confined to such evidence as had been given before the magistrate on the trial of the information.

Labelle v. McMillan, 34 N.B.R. 488.

—Invalid warrant—Indemnity resolution by municipal corporation — Ultra vires—Constable—R.S.O. 1897, c. 88, ss. 1 (2), 13, 14—Cr. Code, ss. 975, 976, 980.]—The plaintiffs on the information of the defendant, a constable, and another constable were summoned before a magistrate charged with wilfully damaging a spring of water on a highway, but did not attend, and in their absence were convicted and jointly fined. A question having been raised as to the regularity of the proceedings, the magistrate hesitated about issuing a warrant until the defendants, the township council, passed a resolution indemnifying him against costs, which they did. The warrant, directed "To all or any constables," etc., was issued, following the form of the conviction, and handed to the defendant constable and another constable, who between them arrested the plaintiffs, who were imprisoned until the fine and costs were paid. In an action against the township council and one of the constables for maliciously enforcing an illegal warrant:—Held, that the defendant constable had acted as such in the execution of the warrant, and was entitled, although he had laid the information, to the protection extended by law to public officers of the peace, that the warrant being bad on its face, he was by virtue of s. 21 of the Code exempt from all criminal responsibility, and was protected from a civil action by virtue of R.S.O. 1897, c. 88, ss. 1 (2), 13 and 14, and ss. 975, 976 and 980 of the Code; the action not having been brought within six months, and no notice of action having been given. Ex parte McCleave (1900), 35 N.B.R. 100, distinguished. Held, also, that there was no proof of knowledge on the part of the council that either the conviction or warrant was illegal or that they were acting other than bona fide for the protection of the spring, and no evidence of malice; that even assuming knowledge by the council of the invalidity of the conviction and warrant, the

resolution was ultra vires, and they were not bound to make good any costs or damages in consequence of the resolution. McSorley v. The Mayor, etc., of the City of St. John (1881), 6 S.C.R. 531, distinguished. Judgment of the County Court of the County of Perth affirmed.

Gaul v. Township of Ellice, 3 O.L.R. 438, 6 Can. Cr. Cas. 15.

—Justice of the peace—Action against for causing plaintiff's arrest under warrant — Question of jurisdiction—Defective notice.] —Plaintiff caused to be served upon defendant, a justice of the peace, notice of action claiming damages for maliciously, and without reasonable and probable cause, causing plaintiff to be arrested and confined in the common gaol under a warrant issued in a civil action, brought and tried before defendant, in which one C. was plaintiff and the present plaintiff defendant, said warrant having been issued without authority, and after the debt for which said suit was brought, and said warrant issued, was paid and satisfied to the satisfaction of the plaintiff, by giving new securities therefor. Plaintiff's statement of claim was framed on the theory that the justice had jurisdiction, but that he acted maliciously, and without reasonable and probable cause. There was no count or paragraph against the justice founded on want or excess of jurisdiction. Per Graham, E.J., Meagher, J., concurring:—Held, that it was not necessary, under the circumstances, to consider whether the justice had exceeded his jurisdiction or not. Held, also, the warrant having been properly issued, and the only question being whether or not it could be enforced after the debt was paid, that this question was not covered by the notice, and that the action must be dismissed. R.S.N.S. c. 101, s. 12. Per Weatherbe, J. —Held, that the plaintiff could not succeed, the jury having found that defendant acted in good faith, and that he had reasonable and probable cause for directing the arrest of plaintiff, and that he was not actuated by malice. Quære, whether, after the warrant was issued, plaintiff could adjust the debt by giving new securities. Per Ritchie, J.—Held, that plaintiff could not succeed, the notice of action being defective. Quære, whether plaintiff could not have succeeded if trespass had been alleged.

Hennessey v. Farquhar, 35 N.S.R. 22.

And see MALICIOUS PROSECUTION.

FALSA DEMONSTRATIO.

Description in deed.]—

See LANDLORD AND TENANT.

(Brantford Electric Co. v. Brantford Starch Works, 3 O.L.R. 118 (C.A.).

FALSE IMPRISONMENT.

See FALSE ARREST.

FALSE NEWS.

Spreading false news—False placard as to foreigners not desired as settlers in Canada.] — The publication of a placard stating that settlers from the United States are not wanted in Canada is an injury to the public interest and under s. 136 of the Revised Criminal Code the person wilfully and knowingly publishing such false statement is properly convicted of spreading false news.

The King v. Hoaglin, 12 Can. Cr. Cas. 226.

FALSE PRETENCES.

Charge of false pretences—Cross-examination of defence witness—Asking witness if accused had served term in gaol.] —1. Where the defence has offered no character evidence, notwithstanding which the Crown asks a defence witness whether the accused had not been in gaol for a year in a foreign city, which the witness neither affirmed nor denied, there is a mistrial because of the suggestion implied in the question of the Crown counsel upon a fact not relevant to the issues but likely to prejudice the accused with the jury. 2. Under such circumstances the jury should be discharged before verdict and the case traversed to the next sittings when a new panel of jurors would be available. 3. It was not admissible for the Crown to give evidence of a prior conviction unless the defence offered evidence of good character.

The King v. Atlas, 16 Can. Cr. Cas. 35 (Ont.).

And see PRETENCES.

Obtaining goods by false pretences — Representation of fact.]—A conviction for obtaining goods unlawfully, and by false pretences, cannot be supported (a) where the prosecutor is not induced and does not intend to part with his right of property in the goods, but merely with the possession of them; (b) Where there is no representation as to a present or past matter of fact. Where the defendant hired a bicycle, of the value of $20, representing that he wished to use it to go to L., for the purpose of visiting his sister, and, instead of returning the bicycle, sold it to C.:—Held, that evidence which showed these facts was not sufficient to support a conviction for having "unlawfully, and by false pretences, obtained from L. one bicycle, of the value of $20."

Rex v. Nowe, 36 N.S.R. 531, 8 Can. Cr. Cas. 441.

FAMILY COUNCIL.

Appeal from the decision of the prothonotary—Direct action.] — The revision of the decision of the prothonotary as provided by Art. 1310 C.P., can only be based on the record on which his judgment was founded: if collateral or supplementary evidence is needed to show that the proceedings were null, a direct action should be instituted.

Charette v. Rousseau, 9 Que. P.R. 395.

And see INTERDICTION.

FATAL ACCIDENTS ACT.

See LORD CAMPBELL'S ACT.

FENCES.

Obligation to keep cattle from trespassing —Possession as against trespasser.] — The provision in s. 4 of the Boundary Lines Act, R.S.M. c. 12, viz.: "Each of the parties occupying adjoining tracts of land shall make, keep up and repair a just proportion of the division or line fence on the line dividing such tracts and equally on either side thereof," does not supersede the common law liability of an owner of cattle for all their trespasses except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up; and such owner will be liable for the trespasses committed by his cattle unless it is shown that the complainant was bound to keep up and repair the particular part of the fence through which the cattle entered. The common law rule is not displaced by a joint liability to keep up fences. The injured crops were raised by plaintiff who was in possession, but another person had a half interest in the crop:—Held, that sole possession by plaintiff was sufficient to support an action of trespass, and it was not necessary to make the co-owner a party, or to obtain any release from him.

Star v. Rookesby (1711), 1 Sask. 335; Graham v. Peat (1801), 1 East 246.

Garrioch v. McKay, 13 Man. R. 404.

And see BOUNDARY.

FERRIES.

Ferries Act (Can.)—Application.]—The Ferries Act, R.S.C. 1906, c. 108, does not apply to a ferry running between points in the same province.

Ex parte Savoy, 39 N.B.R. 591.

Implied invitation to alight—Dangerous space between ferry and wharf—Damages—Husband and wife.]—

Collins v. City of St. John, 2 E.L.R. 490 (N.B.).

Grant of ferry—Breach of — Subsequent lease to railway companies — Damages.]— Under the provisions of R.S.C. c. 97 and amendments, the Governor in Council duly issued to the suppliant a ferry license within certain limits over the Ottawa River between the cities of Ottawa and Hull. Subsequently the Crown leased certain property to two railway companies to be used for the construction of approaches to the Interprovincial bridge across the said river between the said cities, and also granted permission to the Ottawa Electric Railway Company to extend its tracks over certain property belonging to the Dominion Government on the Hull side of the river, to enable the latter company to make closer connection with the Hull Electric Company. The suppliant claimed that the construction of the said approaches interfered with the operation of his ferry, and enabled the said company to divert traffic from his ferry, and constituted a breach of his ferry grant for which the Crown was liable:—Held, that the granting of the said leases and permission did not constitute a breach of any contract arising out of the grant or license of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. Windsor & Annapolis Railway Co. v. The Queen (10 S.C.R. 335; 11 App. Cas. 607), and Hopkins v. The Great Northern Railway Co. (2 Q.B.D. 224) referred to. Semble, that if the said leases and permission prejudiced the rights acquired by the suppliant under his ferry license, he would be entitled to a writ of seire facias to repeal them.

Thomas George Brigham v. The Queen, 6 Can. Ex. R. 414, affirmed 30 Can. S.C.R. 620.

—British North America Act—Jura regalia —Public harbours.]—The right to create and license a ferry, having been one of the jura regalia, or royalties which belonged to the several provinces at the Union, continued to belong to them after Confederation, as declared by s. 109 of the B.N.A. Act, notwithstanding s. 91, sub-s. 13, giving the Dominion legislative power in relation to ferries; and therefore a lease of a ferry between the town of Sault Ste. Marie in the Province of Ontario, and the town of Sault Ste. Marie in the State of Michigan, U.S.A., granted by the Dominion Government, was declared to be invalid:—Held, also, that even if the St. Mary's River at the point in question were a public harbour, yet this would not give the Dominion Government any right to grant any exclusive right over it, such as the ferry in question. Held, however, that the St. Mary's River at the point in question is not a public harbour. Something more is necessary to convert an open river front into a public harbour, within the meaning of

s. 108 of the B.N.A. Act, than the erection along it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods. Held, also, that the existence of improvements belonging to the Dominion Government in the river bed in front of the town of Sault Ste. Marie afforded no reason for the entire control of the ferry across the river being held to be in the Dominion Government, though the Dominion Parliament or Government have undoubtedly a right to make laws or rules with regard to the ferry in question, or other ferries, for the purpose of regulating them and of preventing them from interfering with public harbours and river improvements of the Dominion. The Dominion statute incorporating the Algoma Central and Hudson Bay Railway Company, authorizes it for the purposes of its undertaking to acquire and run steam and other vessels for cargo and passengers upon any navigable water which its railway may connect with. Held, that under the very large and general words of this clause the railway company was not bound to restrict the passengers and cargo transported by its vessels to persons and goods intended to be carried on its railway line. Semble, also, that on proper construction of the Dominion Act respecting ferries, R.S.C. c. 97, s. 11, any vessel which is regularly entered or cleared by the officers of His Majesty's customs at any port in Canada, may convey passengers and goods for hire and profit, notwithstanding that an exclusive right of ferry has been granted within the limits within which it does so.

Perry v. Clergue, 5 O.L.R. 357 (Street, J.).

—Interprovincial and international ferries —Establishment or creation — License — Franchise — Exclusive right.]—C. 97, R.S. C "An Act respecting ferries," as amended by 51 Vict. c. 23 is intra vires of the Parliament of Canada. The Parliament of Canada has authority to, or to authorize the Governor-General in Council to, establish or create ferries between a province and any British or foreign country or between two provinces. The Governor-General in council, if authorized by Parliament, may confer, by license or otherwise, an exclusive right to any such ferry.

Re International and Interprovincial Ferries, 36 Can. S.C.R. 206.

FINE.

See CRIMINAL LAW; SUMMARY CONVICTION; LIQUOR LAWS.

FIRE INSURANCE.

See INSURANCE.

FIRE LAWS.

Prairie fires ordinance—"Permitting fire to escape."]—Plaintiff's buildings and other property were destroyed by a prairie fire alleged to have spread from the ashes of a stack of straw burned by the defendant. The evidence showed that before the stack was fired a guard of about 40 yards in width was burned around it, and there was also a fire guard three furrows in width about 300 yards to the west. The prairie fire did not occur until four days later, on which a high wind was blowing and indications pointed to the remains of the straw stack as the origin of the fire:—Held, that in view of the climatic conditions prevailing in the province, a man bringing fire upon his land must exercise the greatest caution, and under those conditions precautions must be taken to prevent the fire spreading until such time as it is absolutely extinguished, and the defendant, having failed to take such care, was liable to the plaintiff in damages. That if a person does not properly watch a fire started by him and see that it does not get away, and it escapes, he thereby "permits" it to escape within the meaning of s. 2 of the Prairie Fire Ordinance (c. 87, C.O. 1898).

Roberts v. Morrow, 2 Sask. R. 15.

Prairie Fires Ordinance — Burden of proof.]—In an action for damages for permitting a fire to escape from the defendant's lands, contrary to the provisions of the Prairie Fire Ordinance, the plaintiffs alleged that the fire had been set or caused to be set by the defendant. It was proven that the defendant had a fire on his property the day previous to the damage being done, and the plaintiffs' witnesses swore that they saw smoke on the defendant's premises the following morning. The defendant and his witnesses swore that no fire whatever was on the defendant's premises during the morning of the day the fire escaped and did damage, and the Judge in his judgment stated that he was "entirely satisfied of the truthfulness, indeed of the candour" of the defendant and his witnesses; and the Judge, attempting to reconcile the inconsistencies, conjectured that the smoke seen by the plaintiffs' witnesses came from embers of fire which the defendant had on his premises the day before, the trial Judge dismissing the action as no negligence was proven on the part of the defendant:—Held, per Sifton, C.J., and Harvey, J., that a finding of fact must be based on something more than mere conjecture; and the trial Judge having found that the witnesses for the defence were to be believed, their evidence should be accepted, and there being no evidence not inconsistent with their evidence from which it could be reasonably inferred that the defendant had caused the fire, the plaintiff's action must fail.

Clark v. Ward, 13 W.L.R. 83, 2 Alta. R. 459, affirming 2 Alta. R. 101.

Bush Fire Act—Fire caused by sparks from engine—Conviction.]—
R. v. Hawthorne, 5 W.L.R. 279 (B.C.).

—Setting out fire—Injury to adjoining property—Prairie Fires Ordinance—"Let" or "permit"—Abstaining from action.]—
Macartney v. Miller, 2 W.L.R. 87 (Terr.).

— Damage to property by fire spreading from neighbour's land—Fire kindled for purposes of husbandry—Effect of—Precautions—Fire-guard.]—
Clark v. Ward, 9 W.L.R. 657 (Alta.).

Setting out on defendant's land—Escape to plaintiff's land—"Permitting" escape.] —In an action for damages for loss sustained by the burning of the plaintiff's pasture on the 4th May, 1909, by a fire set out by the defendant on his land, which escaped to the plaintiff's adjoining land, through the negligence of the defendant's servants:—Held, on the evidence, that the fire which consumed the plaintiff's pasture had its origin in the fire set out by the defendant. Held, also, that the defendant did not, in setting out the fire, observe the precautions required by ss. 4 and 6 of the Prairie Fires Ordinance. The statute requires that the fire shall be "guarded" during the whole period of its continuance by 3 adult persons. The defendant's servants took a load of straw on a waggon to the north-west corner of the defendant's land, and scattered some of the straw on the ground and then set fire to it. There being a very strong wind from the west or north-west, this fire was driven eastward. The defendant's servants, instead of following up this fire and guarding it, let it go, while they continued to spread straw and fire it along the whole west side of the defendant's stubble, with the result that the fire which they first started was soon more than half a mile distant from them, burning with great fury. The requirement of the statute as to guarding by 3 adult persons means that they shall stand guard over it so as to prevent its escape—that is, accompany it so as to be on hand to extinguish it in case it should leave the defendant's land. The defendant, therefore, was guilty of permitting a fire in charge of his servants to pass from his own land, within the meaning of s. 2 of the Ordinance, and was liable for the damage caused by such fire. McCartney v. Miller, 2 W.L.R. 87, followed. Held, also, that, apart from non-compliance with the statute, the defendant was guilty of negligence in setting out the fire on a day on which the wind was blowing so strongly as the evidence shows it was blowing on the 4th May. Kennerman v. Canadian Northern R. W. Co., 13 W.L.R. 191, followed. Damages assessed for the loss of the pasture and for extra expense incurred in taking care of the plaintiff's cattle.
Armour v. Marshall, 15 W.L.R. 173 (Sask.).

—Threshing—Escape of sparks from engine.]—The defendants were threshing for the plaintiffs upon the plaintiffs' farm, when the wind changed and increased in velocity, and sparks, escaping from the defendants' engine, set fire to the plaintiffs' buildings, hay, and grain:—Held, that the defendants were liable for the plaintiffs' loss, by reason of their (the defendants') negligence in continuing to thresh after the change in the direction and velocity of the wind, which obviously endangered the plaintiffs' property. Held, also, upon the evidence, that the plaintiffs were not guilty of contributory negligence. Damages assessed for injury to buildings and destruction of hay and grain.
Spratt v. Dial, 15 W.L.R. 185 (Man.).

—Fire—Negligent setting out—"Permitting" to pass from defendant's land.]—Held, upon the evidence, that the plaintiff's property was destroyed by fire which originated from a fire set out on the defendant's land; and that the defendant, within the meaning of s. 2 (b) of the Prairie Fires Ordinance, "permitted the fire to pass from his land; he took no proper precautions to prevent its escape; the fireguard ploughed by the defendant, being only about 6 feet wide, was insufficient; the fire should not have been set out when it was, as the wind was too high; and this was negligence. McCartney v. Miller, 2 W.L.R. 87, followed. M., who set out the fire on the defendant's land, was employed by the defendant to do farm work, and he had to do anything the defendant told him to do:—Held, that M. was the defendant's servant, that he was acting in the course of his employment, and that the defendant was liable for M.'s negligence.
Owen v. Dingwall, 14 W.L.R. 730.

—Prairie Fire Ordinance—Letting, permitting and allowing fire to run.]—On contradictory evidence it was found that the defendant, by dropping a lighted cigar in dry grass on his own land on a dry, windy day, set a fire, which escaped to the plaintiff's land, doing considerable damage. This was not done deliberately, but carelessly and thoughtlessly. In an action for damages:—Held, that on the facts the defendant was guilty of gross negligence, and by starting a fire in such a way he "permitted" it to pass from his land within the meaning of the Ordinance, and was liable in damages.
Moseley v. Ketchum, 3 Sask. R. 29.

—Prairie Fire Ordinance—Negligence.]—Under sub-ss. a, b and c of s. 2 of the Prairie Fire Ordinance, liability is negatived if the person kindling the fire has not been guilty of negligence, and each of the

words "let," "permit," and "allow," occurring in sub-ss. a, b and c, respectively, of s. 2, involve the inference that the person alleged to "let," "permit" or "allow" had the power to prevent.

Clark v. Ward, 2 Alta. R. 101.

FISHERIES.

Protection of fisheries—"Trap-net"—License.]—

Chandler v. Webber, 8 E.L.R. 241.

Revenue tax — Canners — Tackle furnished fishermen.] — Where canners furnish fishermen with fishing apparatus, but there is no agreement binding the fishermen to sell their catch to the canners, the latter are not liable for the revenue tax in respect of such fishermen.

Campbell v. United Canneries, 8 B.C.R. 113 (McColl, C.J.).

—Provincial foreshore limits—Dominion license for exclusive right invalid—Federal regulations of fisheries—"Trap net" defined.] —(1) A fishing net having the usual accessories of a trap net, except that it has not a twine floor or bottom, is none the less a "trap net" within the meaning of the Fisheries Act (Can.). (2) The Dominion Government has no authority to demand a license fee from fishermen for the exclusive right to set nets or traps within certain limits of Provincial foreshore waters, and sub-s. 7 of s. 14 of the Fisheries Act, R.S. C. 1886, c. 95, is consequently ultra vires. (3) The Dominion Fishery officers have the right to regulate the kinds of nets and traps to be used in the Provincial foreshores and to control the manner of fishing, but without compelling the payment of a license fee. (4) A special statutory provision would be necessary to authorize the imposition by the Dominion of a license fee upon fishermen operating in Provincial waters if imposed under the federal power of so raising a revenue for the general purposes of Canada.

The King v. Chandler, 6 Can. Cr. Cas. 308 (Forbes, Co.J.).

Illegal fishing—Boundary line—Evidence of vessel's position.]—An American vessel was seized by a Canadian cruiser for alleged fishing on the Canadian side of Lake Erie. The Crown brought an action to have her declared forfeited. The local Judge in Admiralty held upon the evidence that the vessel was on the American side, and not in Canadian waters, and ordered her restored to her owners. The Supreme Court reversed this judgment and condemned the vessel:—Held, on further appeal by the owners to the Privy Council, that the judgment of the Supreme Court, R. v. "Kitty D.," 34 Can. S.C.R. 673, must be reversed and the judgment of the local Judge restored.

The "Kitty D." v. R., 22 Times L.R. 101.

—"Person not domiciled in the province"—Right of riparian owner to fish.] — The words "any person not domiciled in the province," in s. 3, s. 2248 R.S.Q. 1909, do not include, nor apply to, persons not domiciled in the province who are riparian proprietors therein. Hence, any such persons have the right to fish with rod and line, or with line, in the waters of the province opposite their property, without having to procure the special license mentioned in the section.

Belisle v. Mowat, 20 Que. K.B. 66.

—Unlawful canning of lobsters—Imprisonment in default of fine—No price distress—Costs of conveyance to gaol—Evidence of unreasonableness of amount.]—

Rex v. Berrigan, 2 E.L.R. 88 (N.S.).

—Fish illegally caught—Innocent purchaser—Offence of having fish in possession.]—

R. v. Butterfield, 4 W.L.R. 537 (B.C.).

—Foreign fishing vessel—Violation of Customs Fisheries Protection Act—Evidence—Position of vessel—Accuracy of observations—Finding of fact—Forfeiture.]—

Rex v. The "Francis Cutting," 9 W.L.R. 402.

—Charter of Saint John—Boundary of city at low water mark—Right of city to fishery beyond low water mark.]—By its charter the City of Saint John is granted "all the lands and waters thereto adjoining or running in, by or through the same" within defined boundaries, including a course at low water mark; "as well the land as the water, and the land covered with water within said boundaries." The fisheries between high and low water mark of the harbour are declared by the charter to be for the sole use of the inhabitants, but by Act of Assembly they are directed to be annually sold by the city:—Held, that where the city is bounded by low water mark it has not a title to sell the right of fishing beyond such mark, though within the harbour.

City of Saint John v. Wilson, 2 N.B. Eq. 398.

— Fisheries Act (R. S. C. c. 95) — Illegal fishing — Indefinite complaint.]—Evidence that a person was seen on the river in a canoe between ten and eleven o'clock at night with the appliances commonly used in illegal salmon fishing is, in the absence of any explanation of the situation and where the charge is not denied on oath, sufficient to justify a conviction for illegal fishing under the Fisheries Act. A complaint charging the accused with having been engaged in illegal fishing in contravention of the Fisheries Act is too indefin-

ite to support a conviction for illegal fishing under the Act. Imprisonment may be adjudged under the Act for default in payment of a penalty imposed without awarding a distress.

The King v. Fraser; Ex parte Dixon, 36 N.B.R. 109.

—Exclusive right to fish in provincial waters—Dominion legislation authorizing — Grant of, ultra vires.]—Plaintiff and defendant obtained from the Marine and Fisheries Department of Canada, under the provisions of the Fisheries Act, R.S.C. c. 95, s. 4, special fishery licenses authorizing them to use trap-nets having leaders of 10 fathoms for the purpose of taking deep sea fish other than salmon, in the public waters of St. Margaret's Bay, in the Province of Nova Scotia, at points named. By the general fishery regulations of Nova Scotia, it is provided that no net shall be set within 110 fathoms (one-eighth of a mile) of any weir, trap or net of any kind, under penalty provided by the Act. In an action by plaintiff claiming damages for an invasion of his rights by defendant in setting his net within the prohibited distance:—Held, allowing defendant's appeal and dismissing plaintiff's action with costs, that the Act, so far as it empowered the granting of exclusive rights of fishery over provincial property, was ultra vires. Attorney-General of Canada v. the Attorney-General of Ontario (1898) A.C. 701, followed. Semble (per Graham, E.J., Fraser, J., concurring. The fact that plaintiff had a leader of 25 fathoms length attached to his trap, whereas he had only paid license fees in respect to one of 10 fathoms, was not an illegality relevant to plaintiff's case, and was too remote to prevent recovery of damages.

Young v. Harnish, 37 N.S.R. 213.

—Canada Fisheries Act — Conviction — Penalty and costs — Authority of minister of marine to remit—Recovery of costs where penalty remitted.]—S. 18 of The Fisheries Act, as amended by the Act of 1898, enacts: "Except as herein otherwise provided, every one who violates any provision of this Act or of the regulations under it shall be liable to a penalty not exceeding $100 and costs, and in default of payment, to imprisonment for a term not exceeding three months; and any fishery officer or justice of the peace may grant a warrant of distress for such penalty and costs." R. was convicted under this section and fined $20 and costs. Both fine and costs were remitted under sub-s. 6 of s. 18 which provides that "Persons aggrieved by any such conviction may appeal by petition to the minister of marine and fisheries who may remit penalties and restore forfeitures under this Act." G., the prosecutor, applied to the convicting magistrate for a warrant of distress for the costs, claiming the minister of fisheries and marine had no power to remit the costs. The magistrate refused to issue the warrant, and a mandamus was moved for. Held, per Tuck, C.J., Hanington and McLeod, JJ., that the minister had no power to remit the costs, and, it was the duty of the magistrate to issue the warrant of distress for their recovery, and that the mandamus should go. Per Barker and Gregory, JJ., that, the penalty having been remitted, the magistrate had no power to proceed to collect the costs, or, at all events, his right was so doubtful that the Court, in the exercise of its discretion, should refuse the mandamus. Per Landry, J., that as in the section in question the term "penalties" included the costs as well as the fine, the writ ought not to issue.

Ex parte Gilbert, 36 N.B.R. 492.

—Bed of the sea below low water mark—Right of property in—Foreshore leases for fishing purposes.—Held, that the provisions of s. 41 of the Land Act, B.C., as enacted in 1901, do not confer on the Chief Commissioner of Lands and Works authority to grant leases of the bed of the sea in territorial waters.

Capital City Canning and Packing Company v. Anglo-British Columbia Packing Co., 11 B.C.R. 333 (Duff, J.).

—Foreign vessel fishing within three-mile limit—Capture outside limit — Continuous pursuit.] — The American schooner North was discovered by the Dominion Government steamer Kestrel, hove-to engaged in halibut fishing in Quatsino Sound, Vancouver Island, and within the three-mile limit. She had at the time all her fishing boats out, but on observing the approach of the Kestrel some four or five miles off, but also within the three-mile limit, the schooner picked up two of her dories and stood out to sea. The Kestrel made pursuit, deviating slightly from her course in such pursuit to pick up one of the schooner's fishing boats with its crew, and overhauled and seized the schooner about one and three-quarter miles outside the three-mile limit. At the time of seizure there were freshly-caught halibut lying about on the schooner's decks:—Held, that the pursuit having been begun within the three-mile limit, and having been continuous, the seizure was lawful. The stopping to pick up the fishing boat and its crew, as evidence of the offence committed by the schooner, was not a break in the continuity of the pursuit.

The King v. The Ship North, 11 B.C.R. 473, 11 Can. Exch. R. 141.

—Canadian waters — Three-mile zone — Fishing by foreign vessels—Legislative jurisdiction — Seizure on high seas — Pursuit beyond territorial limit—International law.] Under the provisions of the British North America Act, 1867, s. 91, sub-s. 12, the Parliament of Canada has exclusive jurisdiction to legislate with respect to fisheries within the three-mile zone off the sea coasts of Can-

ada. A foreign vessel found violating the fishery laws of Canada within three marine miles off the sea coasts of the Dominion may be immediately pursued beyond the three-mile zone and lawfully seized on the high seas. Girouard, J., dissenting. The judgment appealed from (11 B.C. Rep. 473) was affirmed.

The Ship North v. The King, 37 Can. S.C.R. 385.

—Grant from the Crown—Claim of grantee to exclusive right to fish from the foreshore—Construction.]—The appellant, as grantee of the lands in suit from the French king "with all the fishing and hunting and other rights and privileges which the vendor had or might have as seignior, or along its frontage on the seashore," claimed the exclusive right to fish salmon from the foreshore along their boundary:—Held, that, on the true construction of the grant, the claim could not be sustained. The above clause was ineffectual to pass the exclusive use of the foreshore so far as fishing is concerned.

Cabot v. Attorney-General of Quebec, [1907] A.C. 511, 16 Que. K.B. 468, affirming Cabot v. Carbery, 15 Que. K.B. 124.

—Fishery bounty — Fisherman required to serve three months on fishing vessel.] — To entitle a fishing vessel to bounty under the regulations of December 10th, 1897, the fishermen employed on board of her must serve the full time of three months on such vessel during the season; service for such time partly on one vessel and partly on another will not suffice.

Snow v. The King, 11 Can. Ex. R. 164.

—Illegal sealing—Evidence of offence—Onus—Failure to make entries in official log—Seizure by United States revenue cutter.]—Defendant schooner was on the 29th of May boarded by an American revenue cutter in pursuance of the Behring Sea Award Act, 1894, within the prohibited area defined in the Act. She then had among the seal skins on board six skins of freshly killed seals, which the master contended had been killed before the close season commenced (1st of May), and outside the prohibited zone, viz.: on the 27th of April:—Held, on the evidence, that the skins were taken during the close season.

The King v. The Carlotta G. Cox, 13 B.C. R. 460, 11 Can. Exch. R. 312.

—Ownership between high and low water mark—Digging clams.] — Plaintiff claimed damages from defendants for the conversion of a dory, its oars, and a quantity of clams. Defendants paid a sum of money into Court in respect to the dory and oars, but counterclaimed for the clams which they claimed were dug upon flats of which they were owners from high to low water mark:—Held, dismissing defendants' appeal, and affirming the judgment of the trial Judge that the digging of the clams in question was done in the exercise of a public right of fishery and that defendant's ownership of the flats was subject to such right.

Donnelly v. Vroom, 42 N.S.R. 327, affirming 40 N.S.R. 585.

FIXTURES.

Conditional sale—Windmill and appurtenances—Machinery attached to freehold by purchaser under contract for sale—Cancellation by vendor.]—Defendant sold certain land to one P. under contract for sale upon deferred payments, and B. went into possession. While so in possession he purchased from plaintiff a windmill, pump, tank, piping and a sawmill for the operation of which shafting was attached to the windmill. This machinery was not paid for, but was sold upon terms that the property therein should not pass until paid for. The machinery was set up on the land, being affixed by bolts to posts set into the soil and fastened there, and could not be used unless so fastened. The defendant cancelled P.'s contract for purchase of the land and took possession. The plaintiff demanded delivery of the windmill and appurtenances and the defendant refused, whereupon the plaintiffs brought action for detention:—Held, that the windmill in question having apparently been intended to be a permanent improvement and to enhance the value of the premises, and being affixed thereto, became part of the freehold, and while the contract whereby the property therein was to remain in the plaintiff until payment would be enforceable as against P., it was not enforceable as against the owner of the freehold in possession after P.'s contract had been cancelled. 2. That the sawmill being part of the windmill, also went with the land.

Cockshutt Plow Co. v. McLoughry, 2 Sask. R. 259.

Fixture — Intention of parties.]—Whether an article not annexed to or fastened to the freehold is a fixture is entirely a matter of intention.

Russell v. Nesbitt, 3 Terr. L.R. 437.

—Small building not attached to freehold—Consent of owner of freehold to sale of building — Right of purchaser to remove building—License.]—

Thompson v. Thompson, 2 E.L.R. 401 (N.S.).

—Vendor and purchaser—Improvements not to be removed until after payment of purchase money—Sub-purchaser — Notice of covenant—Buildings placed on land by sub-purchaser—Fixtures—Injunction.]—

Graves v. James, 9 W.L.R. 220 (Alta.).

—Wooden building erected by tenant on lot leased to him—Right to remove—Injury to freehold.]—

Bing Kee v. Yick Chong, 10 W.L.R. 110 (B.C.).

—Machinery attached by bolts and screws —Mortgage of "land and premises," "buildings, fixtures."]—By two separate instruments, at different dates, plaintiff obtained mortgages on certain "land and premises, including all buildings, fixtures," etc., such land and premises comprising a sawmill, built on mud sills, spiked to piles. The mill having been seized for debt, the plaintiff claimed the plant and machinery under his mortgage as part of the freehold. The plant was in general affixed to the structure by heavy bolts going through the beams or sills, and apparently could have been removed by unscrewing without injury to the building:—Held, that the method of attachment of the machinery adopted showed that it was the intention that the machinery was to be, and in fact did become a part of the mill building, which was itself part of the land; and, further, that the form of the mortgages showed that it was the intention that the mortgagee should take under them certain rights in the fixed plant in addition to his rights as grantee of the land.

Kilpatrick v. Stone, 15 B.C.R. 158.

—Immovables—Title to buildings—Hypothec.]—Buildings can be acquired by deed sous seing prive as property distinct from that of the subjacent soil. In such case, if a hypothec is placed on a cadastral lot, without excepting the buildings, by the owner of the land alone, the owner of the buildings under a sale sous seing prive not registered has a right of action for radiation of the hypothec against the creditor who has registered his title. A building erected on another's land becomes the immovable property of the person erecting it under the suspensive condition that the owner of the land will not decide for the accession. Proceedings for radiation of a hypothec should be taken against the creditor or those who were qualified to agree to it without making the debtor who constituted it a party.

Reed v. Belavance, Q.R. 19 K.B. 369, affirming 36 S.C. 392.

—Buildings placed on leased land—Onus of proof.]—In a dispute as to the degree and object of the annexation of buildings erected upon leased land by the tenant in occupation under the lease, the onus of showing that in the circumstances in which they were placed upon the land there was an intention that they should become part of the freehold lies upon the party who asserts that they have ceased to be chattels.

Bing Kee v. Yick Chong, 43 Can. S.C.R. 334.

Mortgage—Plant and machinery.] — A mortgage of an electro-plating factory "together with all the plant and machinery at present in use in the factory" does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage. Judgment of Ferguson, J., 1 O.L.R. 229, reversed.

McCosh v. Barton, 2 O.L.R. 77 (C.A.).

—Vendor and purchaser — Shop fittings — Gas and electric light fittings.]—Shop fittings, consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light fittings, consisting of chandeliers, which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood:—Held, that these articles became part of the land and passed by a conveyance of it to the defendants. Bain v. Brand (1876), 1 App. Cas. 762, Holland v. Hodgson (1872), L.R. 7 C.P. 328, Hobson v. Gorringe, [1897] 1 Ch. 182, Haggert v. Town of Brampton (1897, 28 S. C.R. 174, and Argles v. McMath (1895), 26 O.R. 224, 248, followed.

Judgment of MacMahon, J., affirmed.

Stack v. T. Eaton Co., 4 O.L.R. 335.

—Tenant's fixtures.]—

See Landlord and Tenant.

—Conditional sale — Revendication — Intervention.]—1. In order that movable property placed on real property for a permanency and incorporated therewith, should become immovable by destination, the ownership as well of the movable as the immovable upon which the former is placed must be vested in the same person. 2. Movable property which, had it been owned by the proprietor of the real estate upon which it was placed, would have been immovable by destination, may, even after a sheriff's sale of the immovable while the movable property was so attached to it, be revendicated by its owner. 3. The title to such movable property preserved under a suspensive conditional sale providing that the ownership shall not pass until full and final payment of the price, and that the property shall not become immovable until that time, and with a stipulation that any monies paid on account shall be imputed as rent, is, without registration, a valid and sufficient title.

Leonard v. Willard, 23 Que. S.C. 482 (Lynch, J.).

—Machinery.]—

See Execution.

—Trade fixtures attached to realty—Right of removal.]—

See Mining.

—Machinery leased to company — Annexation to freehold — Rights of lessor against mortgagee.—Certain articles of machinery were leased by the plaintiff for one year to a manufacturing company, and placed upon the company's premises. There was no agreement for purchase. Previous to this the company had mortgaged to the defendant their lands, including these premises, with all the plant and machinery thereon or which should be brought thereon during the continuance of the mortgage. The plaintiff's articles of machinery were in some degree attached to the buildings in which they were placed, but all could be detached at a trifling cost, without doing substantial damage to the inheritance:—Held, upon the evidence, that the articles were so annexed to the freehold as prima facie to constitute them, as between the company and the defendant, fixtures; and, the defendant not being a party to the agreement between the plaintiff and the company, that agreement, though it was merely one of hiring, and not the usual hire-purchase agreement, afforded no evidence to alter the prima facie character of the annexed property; and the plaintiff was not entitled to the articles as against the defendant. Hobson v. Gorringe, [1897] 1 Ch. 182, and Reynolds v. Ashby, [1903] 1 K.B. 87, [1904] A. C. 466, applied and followed.

Seeley v. Caldwell, 18 O.L.R. 472.

—Conditional sale of chattels—Lien note.]—If a purchaser of a chattel such as a furnace annexes it to land in such a manner that it would ordinarily become a part of the realty, it cannot be deemed to remain a chattel because of an agreement between the purchaser and the vendor that, until paid for, the property in it should remain in the vendor and that in case of default of payment, the vendor might detach it and take it away. Such an agreement merely confers a license to enter on the land and sever what is no longer a chattel so as to make it again a chattel and to remove it, and a purchaser of the realty without notice of the agreement is not bound by it, nor can the vendor of the chattel recover possession of it or damages for its conversion from him. Hobson v. Gorringe, [1897] 1 Ch. 182, and Reynolds v. Ashby, [1904] A.C. 466, followed. Waterous v. Henry, [1884] 2 M.R. 169, and Vulcan Iron v. Rapid City, [1894] 9 M.R. 577, overruled.

Andrews v. Brown, 19 Man. R. 4.

FORCIBLE ENTRY.

Forcible entry of dwelling house—Apprehension of breach of peace—Absence of actual force.]—(1) Forcible entry of a dwelling house may consist of an entry made with such threats and show of force as would, if resisted, cause a breach of the peace, although no actual force was used.

(2) On a charge of forcible entry, evidence relating to the title of the occupant is not admissible; and a statement in the cross-examination of the accused denying that he had previously stated that he had sold the land to complainant is not one "relative to the subject matter of the case" (Revised Evidence Act, s. 11, formerly Cr. Code, s. 701), but as to a collateral matter, and evidence to contradict his denial was improperly received in reply.

The King v. Walker, 12 Can. Cr. Cas. 197, 6 Terr. L.R. 276.

FORECLOSURE.

See MORTGAGE.

FOREIGN COMMISSION.

See EVIDENCE.

FOREIGN COMPANY.

See COMPANY, IV.

FOREIGN JUDGMENT.

Action on foreign judgment—Original consideration — Ontario Judicature Act — Promoter of company — Loan to — Personal liability.] — Under the Ontario Judicature Act, as before it, the declaration in an action on a foreign judgment may include counts claiming to recover on the original consideration. A promoter of a joint stock company borrowed money for the purposes of the company, giving his own note as security. The lender was informed at the time of the manner in which the loan was to be, and was, applied:—Held, that as the company did not exist at the time of the loan it could not be the principal debtor nor the borrower a mere guarantor. The latter was, therefore, primarily liable for repayment of the loan. Judgment of the Court of Appeal, Bugbee v. Clergue, 27 Ont. App. 96, affirmed.

Clergue v. Humphrey, 31 Can. S.C.R. 66.

Foreign judgment—Action on—Defence—Jurisdiction—Domicile.] — In an action upon a judgment for the recovery of money obtained by the plaintiff in 1908 in the Supreme Court of British Columbia the defence was that that Court had no jurisdiction in respect of the subject-matter of the action in which the judgment was obtained, as the defendants were not at any time resident or domiciled in British Columbia, and they did not appear or consent to jurisdiction; that the cause of action did not arise in British Columbia; and that the ac-

tion was barred by the Statute of Limitations in force in Ontario, where the defendants resided. The plaintiff first recovered judgment in British Columbia in 1889, and the judgment of 1908 was upon the same cause of action, for money lent:—Held, that the plaintiff was in no better position than if the action was upon the judgment recovered in 1889 or upon the original cause of action; the binding effect of the judgment sued upon depended on the rules of international law; and, the defendants not having been domiciled or resident in British Columbia when served with the writ of summons, the judgment must be treated as a nullity.

Brennan v. Cameron, 1 O.W.N. 430 (D.C.).

— Title to a movable — Exemplification of judgment.]—In law a judgment of a foreign Court of competent jurisdiction, pronouncing as to the ownership or title of a moveable, is conclusive against all persons. So a foreign judgment declaring an opposant proprietor of a number of shares of a company seized upon the defendant makes proof prima facie of such title, if the validity of such judgment is not attacked and the competency of the Court to pronounce it is not questioned.

Carsley v. Humphrey, 12 Que. P.R. 133.

—Action on—Statute of Limitations — Absence of defendant beyond the seas.]—

United States Saving & Loan Co. v. Rutledge, 2 W.L.R. 471 (Y.T.).

—Action on—Defence that judgment recovered in respect of gambling transactions—Stock speculations.]—

Hickey v. Le Gresley, 4 W.L.R. 46 (Man.).

—Action on—Defence—Want of jurisdiction in foreign Court—Residence of defendant—Judgment in absentia.]—

McLory v. Stanning, 7 W.L.R. 701 (Man.).

—Constitutional law—Resident of one province sued in another—Jurisdiction—B.N.A. Act, s. 92.]—No province can pass laws to operate outside its own territory; and no tribunal established by a province can extend its process beyond the province so as to subject persons or property elsewhere to its decisions; and consequently a judgment obtained in one province by service of process out of the jurisdiction against a domiciled resident of another province, who has not in any way attorned to the jurisdiction, has no extra territorial validity, even though regularly obtained under the procedure of the former province. Aliter, where the rule or judgment of such other province has been obtained upon the non-resident's own application.

Deacon v. Chadwick, 1 O.L.R. 346.

—Warrant of attorney—Confession—Jurisdiction.]—The general rule is that a judgment valid by the laws and practice of the state where it is rendered or confessed may be sued upon as a ground of action in any other state. A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the Court whereby competence is acquired to deal with the matter submitted:—Held, that a judgment recovered in the State of Pennsylvania, after the defendant had ceased to reside in that State, upon a warrant of attorney in favour of any attorney of a Court of Record, executed while the defendant was a resident of the State, was valid, and that the Courts there had jurisdiction to deal with the matter, and over the person of the defendant.

Ritter v. Fairfield, 32 O.R. 350.

—Proof of — Exemplification — Judgment founded on void contract.]—A default judgment obtained in a foreign jurisdiction, though liable to be set aside, so long as it stands, is "final and conclusive" within the meaning of that expression as applied to foreign judgments, and consequently it may be sued on in this province. In an action on a foreign judgment the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous such as being founded on an ex facie void contract. The province may create a company with power to undertake extra-territorial contracts of carriage and so it is not ultra vires of a company incorporated in British Columbia to contract to carry goods from British Columbia to a point in the Yukon Territory. Per Martin, J.:—An exemplification of judgment under the seal of the Court in which the judgment was pronounced is equivalent to the original judgment exemplified, and notice under the Evidence Act of intention to produce it in evidence is unnecessary.

Boyle v. Victoria Yukon Trading Co., 9 B.C.R. 13.

—Particulars—Exception to form — Arts. 123, 174, 211 C.C.P.]—A defendant sued on a foreign judgment cannot, by exception to the form, demand that the plaintiff be compelled to furnish to him and specify the causes of action in the suit on which the judgment was given, seeing that it was stated in the certificate of the prothonotary of the foreign Court that the account had been personally served on the defendant with the writ in the action.

Smith v. Beaubien, 4 Que. P.R. 473 (Sup. Ct.).

—Declaratory judgment — Simple contract creditor — Preliminary relief — Statute of Limitations.] — A creditor under a Quebec judgment asked a declaration that the judgment debtor was beneficial owner of a certain claim against the Dominion Government:—Held, that, being in this Province in the position of a simple contract creditor

only, he was not entitled to such preliminary relief, for the same reasons which debar a simple contract creditor from taking garnishee proceedings or proceedings for equitable execution; and also because the claim being one against the government no consequential relief was or could be asked. Held, also, that being more than six years old, the judgment, being in this Province merely a simple contract debt, would under ordinary circumstances have become barred, yet since the judgment debtor was not at the time of their recovery, nor had been since, in this Province, the plaintiff's remedy on it was saved by R.S.O. 197, vol. III., c. 324, s. 40.

Stewart v. Guibord, 6 O.L.R. 262, (D.C.).

—Lis pendens — Judgment in another province.]—See LIS PENDENS.

—Action on — Defence of merits under — Pleading.]—The declaration charged that the defendant was indebted to the plaintiff in $326, by virtue of a judgment recovered in the Superior Court of the district of M. in the province of Q. Plea, that the defendant was not personally served with the first process in the suit within the jurisdiction of the Court where the said judgment was obtained, and that the defendant was never indebted to the plaintiff in the claim on which the judgment was obtained. Replication that the contract on which the judgment was recovered was made at M. within the jurisdiction of the Superior Court of the district of M.; that the said Court had jurisdiction of the subject matter of the said suit, and the said judgment was regularly obtained according to the practice of the said Court, and that the sum mentioned in the said judgment and ordered to be paid is justly and truly due and payable by the defendant to the plaintiff. Demurrer to the replication, and notice of objection to the plea:—Held, that the plea as a defence that the enforcement of the judgment by this Court was contrary to natural justice was bad, as it did not negative the existence of all facts which, if proved, would render the judgment enforceable. That it was not sufficient to enable the defendant to go into the merits of the original cause of action under Con. Stat. N.B. c. 48, as it did not set out the cause of action. That the replication was bad, as it did not join issue on the conclusion of the plea "never indebted," and merely reiterated in another form the right to enforce the judgment.

Shearer v. McLean, 36 N.B.R. 284.

—Proving identity of defendant.]—In an action on a foreign judgment, identity of name of the debtor, combined with the fact that he pleads in confession and avoidance is sufficient to constitute a prima facie case of identity.

Stephens v. Olsen (N.W.T.), 1 W.L.R. 572, (Scott, J.).

—Pleading defences that had been set up in the original action.]—The defences that may be set up in an action in Manitoba on a foreign judgment by virtue of sub-s. (1) of s. 38 of the King's Bench Act, R.S.M. 1902, c. 40, are not limited to such as might have been, but were not, pleaded in the original action, but include such as were actually pleaded there, subject to the power of the Court or a Judge to strike them out on the ground of embarrassment or delay. In answer to the plaintiff's application to strike out such defences, the defendant set up by affidavit that he had fully intended to defend the Cape Breton suit, but that, owing to misunderstandings, he was unable to be present when it came on for trial and that, as a result, judgment went against him by default. Held, that the defences should not be struck out on the ground of embarrassment or delay, and, being allowed by the statute, must be allowed to stand. Gault v. McNabb, (1884) 1 M.R. 35, distinguished on the ground that, in that case, the defences sought to be raised in this Court had been set up in the original action and had been fully gone into at the trial and finally decided in favour of the plaintiff, and therefore, when pleaded in this Court, had probably been struck out on the ground of embarrassment and delay. Meyers v. Prittie, (1884) 1 M.R. 27, not followed. British Linen Co. v. McEwan, (1892) 8 M.R 99, discussed.

Hickey v. Legresley, 15 Man. R. 304 (Richards and Perdue, JJ.).

—Proof of — Seal — Certificate.]—A document purporting to be a transcript of the judgment roll of the Circuit Court for Walworth County, South Dakota, was tendered in evidence. The seal affixed was engraved "Clerk of the Circuit Court, Sixth Judicial District, South Dakota, Walworth County"; the certificate appended under the hand of the clerk of the Court stated, "I have hereunto set my hand and affixed the seal of the said Court:"—Held, that the certificate, signed by the officer who would ordinarily have the custody of the seal of the Court was prima facie proof that the seal was that of the Court; and that the judgment purported to be under the seal of the Court as required by section 10 of the Canada Evidence Act.

Beebe v. Tanner, 6 Terr. L.R. 13.

—Judgment of Quebec Court—Company not domiciled or resident in Quebec.]—In an action brought in a County Court in the Province of Ontario upon a judgment recovered in a circuit Court in the Province of Quebec, against an incorporated company, who, at the time the Quebec action was begun, had no office or agent in the Province of Quebec:—Held, that the Act of the Legislature of the Province of Canada, 22 Viet. c. 5, s. 58, is not now in force, and Court v. Scott (1881), 32 C.P. 148, is no longer applicable; the binding effect of

the judgment sued on depended upon the rules of international law; and the defendant company not having been domiciled or resident in Quebec when served with a writ of summons, the judgment there obtained must be treated in the Courts of Ontario as a nullity.

Vézina v. Will H. Newsome Co., 14 O.L.R. 658.

—**For alimony.**]—See HUSBAND AND WIFE.

—**Foreign Court, jurisdiction of—Judgment obtained in an undefended action for statute-barred claim.**]—Judgment was given against defendant in Ontario in January, 1906, on a claim arising out of a promissory note signed in that Province in 1898. The action was undefended, although defendant was duly served in British Columbia. He left Ontario in 1899 for Winnipeg and afterwards came to British Columbia, where he has since resided. Plaintiff sued in British Columbia on this judgment, and at the trial evidence was given of a payment made after the British Columbia action had been commenced:—Held, by the Full Court, following Sirdar Gurdyal Singh v. Rajah of Faridkote (1894), A. C. 670, that defendant had acquired a British Columbia domicile, and was not subject to the Ontario Courts. Held, also, following Bateman v. Pinder (1842), 11 L.J.Q.B. 281, that the payment made could not operate to defeat a plea of the Statute of Limitations; and that it was a mere conditional offer of compromise which was declined.

Walsh v. Herman, 13 B.C.R. 314.

—**Foreign judgment—Proof of—Exemplification.**]—On the trial of an action upon a foreign judgment the plaintiff, without giving any notice under the Canada Evidence Act, s. 19, tendered in evidence a copy of the judgment sued on certified under the hand of the clerk and by the seal of the Court in which it was recovered, and this was received subject to objection. The defendant adduced no evidence and judgment was reserved. The trial Judge held that the document was improperly admitted, no notice having been given, but adjourned the case to give the plaintiff an opportunity of proving his judgment:—Held, that the copy of judgment tendered was not an exemplification and notice of intention to use it should have been given under s. 19 of the Canada Evidence Act before it could be admitted, in spite of the provisions of s. 11 of Imp. Stat. 14 and 15 Vict. c. 99, to which the Canada Evidence Act is not repugnant, but only adds a condition. Held, further, that the trial Judge properly exercised his discretion in giving the plaintiff a further opportunity to prove his judgment by adjourning the trial. Held, further, that the similarity of the name of the defendant in this action and that of the defendant named in the foreign judgment taken with the present defendant's pleas in confession and avoidance was sufficient prima facie evidence of the identity of the two defendants. After the adjournment of the trial the plaintiff had secured an order for the examination of the defendant for discovery. Held, that the trial having been commenced and adjourned the plaintiff was not entitled to examine the defendant for discovery.

Stevens v. Olson, 6 Terr. L.R. 106.

—**Jurisdiction of foreign Court — Citizenship.**]—In an action to enforce a personal judgment obtained in a State Court of the State of Dakota, where it appeared that the defendant had been born in the State of Wisconsin, had been living, at the time of the judgment, and for many years previously, in the North-West Territories, and had not appeared in the Dakota Court or submitted to its jurisdiction:—Held, that the defendant was not bound by the judgment, although the covenant sued upon had been executed in Dakota, when defendant was resident there.

Dakota Lumber Co. v. Rinderknecht, 6 Terr. L.R. 210.

—**Preliminary objection—Want of jurisdiction.**]—The plaintiffs had recovered a judgment in Ontario against W. J. McGrath & Co.—a firm name for one W. J. Magrath. They brought an action in Alberta on this judgment, naming W. J. McGrath & Co. as the defendants. The writ was served on W. J. Magrath, a resident of Alberta. W. J. Magrath entered an appearance. On notice to strike out appearance, and enter summary judgment, under J. A. Rule 103, an affidavit stating that "the defendant is justly and truly indebted to the plaintiffs in the sum of $—— upon a certain judgment recovered by the plaintiffs against the defendants in the High Court of Justice for Ontario on the 8th day of October, 1904," although not stating that this is the judgment sued upon, or in any way referring to the statement of claim:—Held, **a sufficient verification of the cause of action.** Held, that under Rule 37, sub-s. 2, a person having carried on business in the name of a firm, elsewhere than in Alberta, may be sued in Alberta in such firm name, and it is no answer that the defendant has long since ceased to use such firm name, and has never carried on business within this jurisdiction under such firm name. An objection going to the jurisdiction of the Court or Judge is not waived by appearance, or by the defendant's filing affidavits and appearing to oppose a motion for summary judgment.

Mills v. McGrath, 1 Alta. R. 32.

—**Action on—Judgment recovered in England against defendants in Ontario—Jurisdiction.**]—Under Order XI., Rule 1 (e), of

the English rules of the Supreme Court, 1883, which corresponds substantially with Rule 162 (e) of the Ontario Consolidated Rules of 1897, providing that service out of the jurisdiction of a writ of summons may be ordered whenever the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, it is not necessary, in order to confer jurisdiction, to show that the whole of the contract is to be performed within the jurisdiction; it is sufficient if there is a breach of that part of it, if any, which is to be performed there; but the action must be based on such a breach, and the jurisdiction of the home Court is not attracted in respect of a breach of that part of the contract which is to be performed abroad, by reason of a breach of another part of it which is to be performed within the jurisdiction. The plaintiff, living in England, brought an action in England against the defendants, an incorporated company, doing business in Ontario, for damages for breach of contract to deliver certain goods. By the terms of the contract the delivery was to be at the port of shipment in America, and payment was to be made on receipt of and in exchange for shipping documents in England:—Held, that the breach upon which the action was based took place at the American port, and the defendants, not having been subject to the English Court, either by residence or by submission in the contract, there was no jurisdiction in that Court under Order XI. to summon the defendants to appear before it, or to entertain the action; and the judgment obtained in England in that action (the defendants not appearing), however effectual it might be in England, not having been moved against there, was of no avail to support an action upon it in Ontario. Held, however, that the original cause of action had not merged in the judgment; and the plaintiff was entitled to succeed upon an alternative claim thereupon, made in the action brought in Ontario. The trial Judge held both cases of action to be proved, and the plaintiff elected to take judgment in respect of the claim based upon the English judgment. Held, that the plaintiff was not so bound by his election that he was prevented from having judgment upon the alternative claim when he was held by the Court of Appeal, upon the defendants' appeal, not entitled to succeed upon the English judgment. Held, also, that an order was properly made at the trial adding as plaintiffs the personal representatives of the original plaintiff, who died after the commencement of the action, and that the action was properly constituted.

Moritz v. Canada Wood Specialty Co., 17 O.L.R. 53, affirmed; Canada Wood Co. v. Moritz, 42 Can. S.C.R. 237.

—Defence that judgment obtained by fraud on foreign Court.]—The plaintiffs brought an action against the defendants, an Ontario corporation, in the Province of Quebec, to recover money alleged to be due from them for services rendered. The defendants appeared in the Quebec action and defended on the merits and judgment went against them. The plaintiffs having brought an action in Ontario on the Quebec judgment, and moved before the Master in Chambers for speedy judgment under Rule 603, the defendants opposed the motion upon affidavit that the Quebec judgment was recovered by fraud and deception practised upon the Court by the plaintiffs, and that they the defendants, had a good defence to the action upon the merits:—Held, affirming the orders of the Master in Chambers and Britton, J., and reversing the decision of the Divisional Court, that the motion for judgment must be dismissed, and that in an action founded upon a foreign judgment the defendant is at liberty to plead, and prove if he can, that the judgment was recovered by fraud and deception practised upon the Court. Codd v. Delap, 92 L.T. 510, followed. Per Moss, C.J.O., Osler and Garrow, JJ.A.:—There is no conflict between the above decision and the judgment of the Court of Appeal in Woodruff v. McLennan, 14 A.R. 242, as that case turned upon a different state of facts and did not call in question the principle of the decision of the English Court of Appeal in Abouloff v. Oppenheimer, 10 Q.B.D. 295. Per Moss, C.J.O., and Osler, J.A.:—A decision of the highest Court of this province, while it remains unreversed by a tribunal having appellate jurisdiction over it, ought not to be set aside or ignored, simply because other Courts, not possessing appellate jurisdiction over it, and themselves subject to reversal by higher Courts, have subsequently expressed views that may appear to be not in harmony with the decision. Trimble v. Hill, 5 App. Cas. 342, referred to.

Jacobs v. Beaver, 17 O.L.R. 496.

—Foreign judgment — Defendant not in jurisdiction of Court — Sale of goods — False representations.]—Defendants ordered certain butter making machines from plaintiff on the representation that with these machines butter could be made from milk fresh from the cow. On receiving the machines they found that they would not make butter as represented and immediately returned them. The representation in question was made by the plaintiff's agent who did not give evidence, but it did not appear that he had any ground for believing the representations to be true. In fact the plaintiff's own literature showed the representations to be untrue. The plaintiff recovered judgment in the Supreme Court of Alberta for the price of the goods, the defendants not being residents in Alberta and not appearing and now sued upon the foreign judgment or alternatively for goods

sold and delivered:—Held, that the representation being untrue and the agent having no ground for believing it to be true the Court could infer that it was fraudulently made and the defendants were therefore entitled to rescind the contract and return the goods. (2) (Following Gurdyal Singh v. Rajah of Faridkote (1894), A.C. 670), the defendants not being residents of or domiciled in Alberta and not having appeared in the action there the plaintiff could not now recover upon the foreign judgment recovered by default.

McCullough v. Defehr, 2 Sask. R. 303.

FOREIGN LAW.

Conflict of laws — Onus of establishing foreign law.]—The onus of establishing that a rule of law on a given subject different from that in force in this province, prevails in a foreign country is upon the party who relies on it. In default of proof of its existence, the law of this province will be applied.

Gogo v. Kouri, 29 Que. S.C. 47 (C.R.).

FORGERY.

Forged bank note—Having in possession—Counterfeit token of value.]—Although the taking possession of or using a counterfeit token of value is an offence under Code s. 480, if such counterfeit be also a forged bank note the prosecution may be under Code s. 430 for the offence of having a forged bank note in possession knowing it to be forged.

The King v. Tutty (N.S.), 9 Can. Cr. Cas. 544.

—Ratification — Estoppel.]—See BILLS AND NOTES.

Merchants Bank v. Lucas, (1890), 1 S.C. Cas. 275.

—Banker's liability on paying forged cheques.]—See BANKING.

—Corroborative evidence — Several forged endorsements.]—Where a prisoner is charged with forgery, by writing three false signatures, as indorsements, on the back of a promissory note, and each of the parties whose signature is thus made to appear, swears that it is not his and is a forgery, there is the corroborative evidence required by Article 684, Criminal Code to make good a conviction.

Houle v. The King, 15 Que. K.B. 170, 12 Can. Cr. Cas. 56.

—Defence — Forgery — Conflicting evidence—Onus.]—

Hebert v. Morel, 2 W.L.R. 18 (Man.).

—Production of forged document.]—The basis of a charge being false pretence, and that false pretence being contained in a written document, unless a foundation be laid for secondary evidence to make out a prima facie case, the document itself must be produced.

Re Johnston, 13 B.C.R. 209, 12 Can. Cr. Cas. 559.

FORMER CONVICTION.

Autrefois convict—Proof of plea.]—(1) A conviction upon a summary trial by two justices under Code ss. 782 and 783 for keeping a disorderly house at a specified address from the 3rd day of May to the 3rd day of November is a bar under a plea of autrefois convict, to a conviction under Code s. 198, upon a speedy trial for the like offence charged for 3rd day of November only. (2) Where the name of the accused, the place of the offence and the character of the offence are the same in the certificate of conviction produced in proof of a plea of autrefois convict and in the charge then being tried, it will be presumed that the accused is the party named in such certificate without parol evidence of identity.

The King v. Clark (N.S.), 9 Can. Cr. Cas. 125.

And see CRIMINAL LAW; LIQUOR LAW.

FORMER JUDGMENT.

See RES JUDICATA.

FORTUNE TELLING.

See PRETENCES.

FRAUD.

—On sale of goods.]—See SALE OF GOODS.

—Criminal.]—See PRETENCES; FALSE PRETENCES; THEFT.

—Fraudulent conveyance.]—See FRAUDULENT TRANSFER; BANKRUPTCY.

—Of broker or agent.]—See BROKER; SALE.

—On sale of lands.]—See SALE OF LANDS.

FRAUDULENT TRANSFER.

Conveyance — Fraud — Stat. 13 Eliz.]—On February 10th, 1908, the plaintiff D. commenced an action at law against the defendant M., a verdict was given for D. and judgment was signed for $764.58 on June 5th, 1908, which judgment still remains unsatisfied. On May 20th, 1908, M. conveyed certain real estate which he owned in Charlotte County to his son A. M. for the consideration of $900, taking in part

payment a mortgage for $500, accompanied by a promissory note for a like amount. A. M. performed work for his father M. and on May 20th, 1908, the latter was indebted to him in the sum of $400, which with the mortgage for $500 made up the sum of $900, the consideration for which M.'s property was conveyed to A. M. M. was not insolvent at the time he made the conveyance to his son A. M. The only creditors he had besides his son were the plaintiff, and his solicitor to whom he owed a small amount for professional services rendered in connection with D.'s suit against him:—Held, that the conveyance would not be set aside and the bill must be dismissed, as the evidence showed that the sale was made bona fide for a valuable consideration with the intent to pass the property, and in such a case it was immaterial whether or not there was an intention to defeat or defraud a creditor.

Dyer v. McGuire, 4 N.B. Eq. 203.

Voluntary conveyance—Ex post facto consideration — Subsequent purchaser.]—The defendant N. made a contract with the plaintiff to sell to the plaintiff an equity of redemption in land which N. had a year earlier conveyed to his brother-in-law, the defendant P., in trust for the maintenance of N.'s infant children. P. had taken the children about 8 months before the conveyance, and had been maintaining them. The action was for specific performance of the contract and to have P. declared a bare trustee for N. It was contended that the conveyance to P. was voluntary under 27 Eliz. c. 4:—Held, that the conveyance was not voluntary in its inception; and, even if it were, there was an ex post facto consideration sufficient to support it.

Eggertson v. Nicastro, 15 W.L.R. 106 (Man.).

—Fraudulent conveyance — Husband to wife.]—On the 29th January, 1896, J. mortgaged land to his wife to secure $3,750, and on the 23rd March, 1907, he transferred his interest in the land to her. This transfer was made without consideration, and solely at the suggestion of J., who said that he told his wife that there was then about $7,000 due on the mortgage, and the property was of about that value. The wife knew nothing of the transaction, and could not remember whether her husband spoke to her about it before he made the transfer. At the date of the transfer J. was indebted to the plaintiffs in a large sum, and was in insolvent circumstances. The plaintiffs, having obtained judgment against J., sought, in an action against him and his wife, a declaration that the transfer was void as against them and J.'s other creditors, and also asked that the transfer should be set aside and the registration thereof vacated:—Held, on the evidence, that, at the date of the transfer, J. believed that the property was worth more than the amount due upon the mortgage, and that his sole object in making the transfer was to put his interest in the property beyond the reach of his creditors; and, therefore, the transfer should be declared void as against the plaintiffs; but the plaintiffs were not entitled to a judgment setting the transfer aside or vacating its registration. With the above declaration the plaintiffs would be in a position to proceed to realize under execution upon their judgment, and a purchaser at a sale under the execution would be entitled to be registered as owner, subject to the mortgage to the wife.

Union Bank v. Johnson, 13 W.L.R. 519.

—Fraudulent conveyance—Proceedings to set aside.]—1. A motion under Rules 742 or 743 of the King's Bench Act for an order to set aside an alleged fraudulent conveyance of land, and for the sale of the land to realize the amount of a registered judgment, is not an interlocutory motion within the meaning of Rule 507, and affidavits grounded merely on information and belief are not sufficient to support such motion. 2. The only proper evidence of the registration of a certificate of judgment is a certified copy of it; Massey Harris v. Warener, (1897) 12 M.R. 48, followed. 3. Where the debt for which a judgment was recovered was incurred more than a year after the gift from the debtor to his wife complained of, and it was not shown that the property conveyed constituted the whole or even a substantial part of the property owned by the debtor at the time, the conveyance should not be held to be fraudulent.

Canada Supply Co. v. Robb, 20 Man. R. 33.

—Fraudulent conveyance—Statute of Elizabeth—Intent.]—Defendant McDonald being indebted to the plaintiffs and others, conveyed a farm to his co-defendants, his wife and father-in-law, for an expressed consideration of $4,000.00 to be paid in cash, notes, and by the proceeds of a loan. The evidence as to payment was contradictory, but the weight of evidence seemed to show that $1,400.00 was paid. Beyond contradictory evidence between the defendants as to the mode of payment there was no evidence of fraud:—Held, that no actual and express intent to defraud or delay creditors being shown in both parties, the transfer, being for valuable consideration, ought not to be set aside.

Manitoba Brewing & Malting Co. v. McDonald, 2 Sask. R. 223.

—Transfer made fraudulently—Injunction to prevent further transfer.]—The Court will not, at the instance of a creditor who is not a judgment creditor, interfere by injunction to prevent a transfer of property by a debtor, but where the debtor has

fraudulently transferred property, the Court will enjoin further transfers until the creditor can obtain judgment in his action to impeach conveyance.

Fairchild v. Elmslie, 2 Alta. R. 115.

—Motion for judgment before defence—Sufficiency of evidence.]—In an action to set aside a bill of sale as being fraudulent on motion for judgment pursuant to leave granted under R. 326, the plaintiff relied on the transcript of the evidence of the defendants given in an interpleader proceeding before a District Court Judge, in which proceeding the District Court Judge had expressed the opinion that the bill of sale was fraudulent:—Held, that the opinion of the District Court Judge should not be considered on this application, and in the absence of a direct admission of fraud in the defendants' evidence the case should not be summarily disposed of.

Varley v. Duvall, 2 Alta. R. 329.

—Sale by father to daughter—Presumption of fraud.]—No presumption of fraud attaches to a sale of immovables by a father to his daughter if he is possessed of movables which can be taken under execution and his creditors can have the sale set aside for fraud only by proving that the vendor was insolvent at the time to the knowledge of the purchaser. The plaintiff who seeks rescission, for fraud, of a contract executed several years previously must prove that it only came to his knowledge during the year preceding the institution of his action.

Deslaudes v. Saint-Jacques, Q.R. 19 K.B. 289.

Fraudulent conveyance—Purchase of land by debtor in name of another—Evidence—Presumption.]—The plaintiff claimed a declaration that a certain piece of land purchased from the Dominion Government in the name of the defendant J. was the property of his brother, the defendant R., and should be sold to realize the plaintiff's registered judgment against R. At the time of the purchase in 1888 R. was indebted to the plaintiff in a sum of over $1,800 and to another person for over $4,000, and it was shown that J. had never paid anything on the land either for purchase money or taxes and never received anything by way of rents or profits; also that the money for the first instalment had been advanced by another brother, that R. had paid the rest of the purchase money from the proceeds of the land, of which he had always enjoyed the use and occupation, and that the Crown patent for the property was issued to J. in 1892 without his having applied for it. The defendants at their examination for discovery before the trial swore that the whole transaction was bona fide and that R. was J.'s agent throughout in respect of the property, but R. was not called as a witness for the defence. J., also, in a letter to R. written in 1899, had referred to the property as "your land":—Held, that the proper conclusion upon the whole evidence was that the land was really R.'s property and had been purchased and held in J.'s name for the purpose of preventing creditors from realizing out of it, and that the plaintiff was entitled to the relief asked for. Semble, that when a defendant who is in Court does not give evidence to support his case, the Judge is entitled to make every reasonable presumption against him. Barker v. Furlong, [1891] 2 Ch. 172, per Romer, J., at p. 184, approved.

Miller v. McQuaig, 13 Man. R. 220.

—Fraudulent preference—Secret benefit — Bribery — Promissory note — Illegal consideration.]—A secret arrangement whereby the provisions of the Code of Civil Procedure respecting equal distribution of the assets of insolvents are defeated and advantage given to a particular unsecured creditor is a fraud upon the general body of creditors notwithstanding that the agreement for the additional payment may be made by a third person who has no direct interest in the insolvent's business. A promissory note given to secure the amount of the preference payable under such an agreement for a payment to an inspector of an insolvent estate to influence his consent to an arrangement which is not for the general benefit of the creditors is a bribe which is, in itself, sufficient reason to adjudge the transaction, to induce which it was given, corrupt, fraudulent and void. La Banque Jacques Cartier v. Brigham, 16 Que. S.C. 113, reversed.

Brigham v. La Banque Jacques Cartier, 30 Can. S.C.R. 429.

—Voluntary conveyance of land—13 Eliz., c. 5 (Imp.)—Solvent vendor—Action by mortgagee.]—A voluntary conveyance of land is void under 13 Eliz., c. 5 (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made if it results in denuding him of all his property and so rendering him insolvent thereafter. A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realizing his security. Judgment of the Supreme Court of British Columbia (7 B.C.R. 189), reversed.

Sun Life Assurance Company v. Elliott, 31 Can. S.C.R. 91.

—Action to set aside transfer—Compromise obtained by fraud.]—The plaintiff in this action sought to set aside a transfer of land which the defendant had obtained from him by the exercise of what the Judge held to have been both fraud and undue influence, but the defendant contended that the plaintiff had, after the commencement of the action, compromised and settled it by signing an agreement. The alleged ratification as well as the original transfer was

held to have been obtained by fraud and undue influence and this is additional evidence of the original fraud. The transfer was set aside with costs.

Atkinson v. Borland, 14 Man. R. 205 (Bain, J.).

—Contract — Avoidance of — Art. 1040 C. C.]—Inasmuch as an action by a creditor to set aside a contract for fraud must, under Art. 1040 C.C. be brought within one year from the time of his obtaining a knowledge of such contract, and inasmuch as the article above cited is prohibitory in its terms and denies absolutely the right of action unless exercised within the year, it is essential whenever the fact does not appear by the dates of the contract attacked and of the institution of the suit or proceeding, that the party seeking the avoidance of the contract should allege and prove that he only obtained knowledge thereof within the year preceding the institution of his suit or proceeding. Where not pleaded, the objection based on the omission of such allegation may be raised at any stage of the case.

Gagnon v. Dunbar, 20 Que. S.C. 515 (Doherty, J.).

—Fraudulent conveyance — Validated by assignment for valuable consideration — Giving time — Right to priority — Future support not sufficient to support deed.]—In 1877, C. made a conveyance, by way of mortgage, to H. The conveyance was made without consideration, and in fraud of creditors, and was voidable as against creditors and subsequent purchasers for valuable consideration. In 1896, H., at the request of C., assigned the mortgage so made to W., who was a creditor of C., and pressing for payment:—Held, that the mortgage, although fraudulently made in the first instance, was validated by the assignment to W., for valuable consideration. Held, that the giving of time by W. to C., in connection with the antecedent indebtedness, was sufficient consideration to support the assignment. Held, nevertheless, that the validating of the mortgage would not affect the right to priority of the party claiming under a second mortgage made by C. previously to the assignment to W. Held, also, following McNeil v. McPhee, 31 N.S. R. 140, that a deed made by C., the sole consideration for which was the future support of the maker and his wife by the grantee, was not founded upon valid consideration within the Statute of Elizabeth.

Conrad v. Corkum, 35 N.S.R. 288.

—Mortgage — Pretended sale under power —Fraud — Sale by trustee — Acts of parties to fraud — Damage.]—On appeal from the judgment, reported 2 O.L.R. 134:—Held, that the defendant D. was not personally liable, as he committed no wrong in taking the assignment of the plaintiff's mortgage, and the sale by him under the power of sale therein wrought no change in the plaintiff's rights, as H., the purchaser, became merely trustee for R., the mortgagee, and in his hands the property was redeemable, unaffected by the sale. But held, that the defendant H. was personally liable, as well as the defendant R., for the damage caused by the subsequent sale by him, as he was possessed of the legal title and had the legal power and control, and it was his sale and his act that prejudiced the plaintiff. Judgment of Meredith, C.J.C.P., varied.

Smith v. Hunt, 4 O.L.R. 653 (C.A.).

—Misrepresentation as to principal consideration of contract.]—The defendant, by falsely stating to the plaintiffs that he had obtained a lease of a similar mica property from another property for $30 per ton on the mica extracted, which statement he supported by producing a pretended copy of the lease in his own writing, induced them to lease their mica property to him on the same terms. The plaintiffs would not have agreed to the lease but for the deceit practiced:—Held (reversing the judgment of the Superior Court, Loranger, J.)—The representation that defendant had obtained a lease of a similar property for $30 per ton, being a principal consideration for entering into the contract, the plaintiffs were entitled, under Articles 992 and 993 C.C., to obtain its resiliation. Barnard v. Reindeau, 31 Can. S.C.R., p. 234, followed.

Doucet v. Clerex, 23 Que. S.C. 107 (C.R.).

—Fraudulent conveyance — Exemptions — Lien of registered judgment as against land —Declaration of right without order for sale.] — This action was brought to have it declared that a certain parcel of land conveyed by the debtor to her son before the recovery of the plaintiff's judgment, in reality belonged to the debtor, and that the son held the land only as trustee for the mother, and had no interest in it, and that the judgment formed a lien or charge on the land, and asked that the land be sold to satisfy the judgment. Defendants admitted that the land was the mother's and that the son had no interest in it and that the conveyance had been made solely because the mother thought she might thereby prevent the sale of the land to realize the plaintiff's claim, but they set up and proved that it was her actual residence and home, and claimed that as it did not exceed $1,500 in value it was exempt from the proceedings, by virtue of R.M.S. 1902, c. 91, s. 9. It was urged on behalf of the plaintiff that the conveyance was fraudulent and void as against him, and that the debtor had by conveying the land to her son deprived herself of the benefit of the exemption, according to Roberts v. Hartley, 14 M. R 284, and Merchants' Bank v. McKenzie, 13 M.R. 19:—Held, that the plaintiff was

entitled to a declaration that the land was the property of the debtor, so that, if the exemption should at any time lapse, the judgment might be enforced against the land, but was not entitled to a present sale of the land to realize his judgment. Roberts v. Hartley distinguished on the ground that there both the grantor and grantee united in asserting the reality of the transfer and no trust in favour of the grantor was alleged or proved by him. The right given by the Judgments Act to a debtor to claim exemption in respect of his actual residence is clear and positive and applies to his interest in the property so long as he continues to occupy it, whether that interest is legal or only equitable; and if the debtor, having an absolute interest, converts it into an equitable one, but still continues to hold and reside on the land, the exemption is not lost. Even if the debtor's object in making the conveyance was to obtain a protection which the law had already conferred on him, he does not thereby lose the right given him by the statute, as the placing of the property in the name of a trustee for him would not injure the present rights of the creditor as long as the trusteeship is admitted.

Logan v. Rea, 40 C.L.J. 44 (Perdue, J.).

—Exhibition prizes—Horse racing—Classification — Fraudulent entry — Ontario statute respecting.]—(1) The Ontario statute respecting the fraudulent entry of horses at exhibitions is one regulating the rights between individuals by preventing unfair competition, and is intra vires of the Provincial Legislature. (2) The statute applies whether or not the horse entered at the exhibition had a previous "record" of speed or not, and a classification of the horses by their age is within the Act.

Collins v. Horning, 6 Can. Cr. Cas. 514 (Snider, Co.J.).

—Setting aside deed — Notorious insolvency —Parties.] — 1. Notorious insolvency of a debtor is not sufficient for the setting aside of a deed made by him if neither he nor the third person with whom he contracted were aware of it. (2) A deed made in fraud of creditors of the person who executed it cannot be set aside unless all the parties to the deed have been made parties to the action. (3) Want of consideration for a deed of sale is evidence of simulation and a ground of nullity.

Connolly v. Baie des Chaleurs Ry. Co., 5 Que. P.R. 383.

—Fraudulent conveyance — Exemptions — Lien of registered judgment — Taking proceedings under, while debtor in occupation.] —1. The registration of a certificate of judgment, under ss. 196 and 19 7of The County Courts Act, R.S.M., c. 33, as amended by 55 Vict. c. 7, s. 5, binds and charges the land of the judgment debtor, though it may be his actual residence or home, and the creditor may take proceedings to realize whenever the defendant ceases to be entitled to claim the property as his exemption. Frost v. Driver, 10 M.R. 319, followed. (2) When a debtor has absolutely conveyed all his interest in the land on which he resides by a conveyance valid and binding on him, even when set aside by the Court as against creditors, the claim that the land is an exemption of his under s. 12 of The Judgments Act, R.S.M., c. 80, can no longer be maintained. (3) Under such circumstances, when the debtor has made a conveyance of his home, which is fraudulent against creditors under 13 Eliz., c. 5, the creditor is entitled to an immediate order for sale of the property to realize the amount of the judgment and costs. Taylor v. Cummings (1897), 27 S.C.R. 592, distinguished.

Roberts v. Hartley, 14 Man. R. 284 (Killam, C.J., Bain and Richards, JJ.).

—Fraudulent conveyance — Stat. 13 Eliz., c. 5—Interim injunction—Deposit in government savings bank—Injunction to prevent withdrawal.]—A conveyance by an insolvent debtor in good faith and for valuable consideration, though made with intent to defeat creditors to the knowledge of the purchaser, is not void under the Statute 13 Eliz., c. 5. An interim injunction granted restraining the transfer of land by the grantee in a suit by a judgment creditor of the grantor impeaching the conveyance as fraudulent under the Statute 13 Eliz., c. 5. Application refused of a judgment creditor for an injunction order restraining the wife of the debtor from withdrawing money on deposit in her name in the Government savings bank alleged to belong to the husband, there being no mode of enforcing the order as against the Crown.

White v. Hamm, 2 N.B. Eq. 575.

Moneys advanced to wife—Unjust preference — Supposed right to dower—Payment to obtain bar.]—In 1906 the plaintiff recovered judgment against the defendant J. C. for $525 and costs. The defendant J. C. disposed of his farm and chattels to H., almost immediately after the trial of the action in which the judgment was recovered for $2,400 over and above the mortgages upon the farm, and $993 for the chattels, leaving J. C. without property except the purchase-money. An action against J. C. and H. to set aside the sales was dismissed. The defendant E. C., the wife of J. C., joined in the deed to H. to bar her dower, and E. C. received from H. part of the purchase-price, three notes of $200 each and one of $100. The plaintiff brought this action against J. C. and E. C., alleging that E. C. received notes for $700 from H., that this was done to defeat the plaintiff, and was in pursuance of a corrupt compact, and that E. C. gave no consideration for the notes; the prayer was that the notes should be

applied to meet the plaintiff's claim. The trial Judge found that E. C. advanced to her husband, in 1902 or 1903, $300; that she toiled hard upon the farm; that all parties believed that she had dower in the farm (although the mortgages were created before her marriage to J. C.); and that she positively refused to sign the deed to H. unless her claims were recognized; and that the making of notes for $700 by H. to E. C. was in reality a payment to her of $400 for barring her dower and a payment by J. C., through H., of $300 which he owed his wife; that, of the $300, $200 was not an unjust preference, as it went to relieve a mortgage on the land, leaving $100 which might be impeached under R.S.O. 1897, c. 147, s. 2 (2); but this action was not framed on the ground of fraudulent or unjust preference; and an amendment was refused:—Held, by a Divisional Court, on appeal, that an amendment was properly refused, but the judgment in this action should be without prejudice to a new action: — Held, also, following Forrest v. Laycock, 18 Gr. 611, that where a wife in good faith claims to be entitled to dower, and refuses to join in a conveyance without a reasonable compensation being made to her, a payment made to her by the purchaser to induce her to join in the conveyance is valid against the creditors of the husband. Judgment of Boyd, C., 1 O.W.N. 121, affirmed.

McDonald v. Curran, 1 O.W.N. 389 (D.C.).

—Fraudulent sale of land subject to equity of redemption — "Privilege."]—A charge was laid against the defendant under s. 421 of the Criminal Code, "for that he did, knowing of the existence of an unregistered privilege, being an equity of redemption in favour of J. W. in" certain land, "fraudulently make a sale of the same with intent to defraud:"—Held, by the Court, that the acts of the defendant, as stated in the evidence, did not constitute any offence within the meaning of s. 421. Per Meredith, J.A., that an equity of redemption is not embraced within any of the words, "sale, grant, mortgage, hypothec, privilege, or incumbrance." in s. 421. Per Magee, J. A., that, upon the evidence, there had not in fact, at the time the prosecution was instituted, been any sale by the defendant.

The King v. McDevitt, 22 O.L.R. 490, 17 Can. Cr. Cas.

— Possession — Conveyance — Trust.]—

Lovitt v. Sweeney, 7 E.L.R. 391 (N.S.).

— Conveyance to creditor — Agreement to pay debts.]—

Langley v. Marshall, 7 E.L.R. 401 (N.S.).

—Judgment — Fraudulent conveyance — Stat. 13 Eliz. c. 5.]—

Gray v. Ayles, 3 E.L.R. 487 (N.B.).

Husband and wife — Fraudulent assignment — Parties.] — Where an action was brought by an execution creditor to set aside as fraudulent a deed of assignment of a homestead from the execution debtor to his wife, and also the patent issued thereon by the Crown, and the wife was made the sole defendant:—Held, hesitante, that in default of appearance, (1) Notice to the Crown was not necessary; (2) The husband was not a necessary party.

Gillies v. Kaake, 3 Terr. L.R. 152.

—Preferring or defeating creditors.]—

And see BANKRUPTCY.

—Lease — Bona fides — Intent of parties— Defrauding creditors — Setting aside.] — Held, that a lease, although made for valuable consideration and bona fide as between the parties to it, was, nevertheless, void as against creditors, there having been in both parties an intent to delay and defraud creditors, which intent gave rise to the lease.

Stewart v. Bank of Ottawa, 3 Terr. L.R. 447.

—Lease — Fraud—Statute of Elizabeth.]—An intention to defeat creditors is not of itself sufficient to avoid a deed, but such intention must be the causa causans for making the deed.

Stevens v. McArthur, 6 Terr. L.R. 461.

—Summary application by judgment creditor to declare property conveyed by judgment debtor liable to execution — Evidence — Partnership.]—

Carbonneau v. Letourman, 2 W.L.R. 493 (Y.T.).

— Husband and wife — Defeating creditors of husband — Declaration of trust.]—

Merilees v. Cox, 5 W.L.R. 38 (Man.).

—Purchase of land by judgment debtor— Transfer by vendor to wife of judgment debtor — Intent to defraud creditors — Declaratory judgment — Wife trustee for husband.]—

Merchants Bank of Canada v. Hoover, 5 W.L.R. 516 (N.W.T.).

—Properties purchased by trader and conveyance made to wife—Embarking in hazardous business — Intent to defeat creditors.]—

Revillon v. Derome, 7 W.L.R. 53 (Alta.).

—Action by judgment creditor of grantor, to set aside—Security for debt—Intent to defeat other creditors — Fraud — Preference.]—

Christie v. Schroeder, 8 W.L.R 757 (Man.)

—Transfer of land procured by fraud—Resale and transfer by fraudulent grantee — Action to set aside transfers—Badges of fraud.]—

Swanson v. Getsman, 8 W.L.R. 762 (Sask.).

—Transfer of promissory notes by husband to wife—Scheme to defeat creditors.]—
Shaw v. Dennison, 10 W.L.R. 304 (Man.).

—Action by execution creditors of grantor to set aside—Land represented by execution debtor as liable to execution—Subsequent claim of exemption as homestead—Transfer to wife—Estoppel.]—
Codville Co. v. Haygarth, 10 W.L.R. 35 (Sask.).

—Fraudulent conveyance—Stat. 13 Eliz., c. 5.]—A son living on a farm owned by his mother, worth about $700, and who had worked on it without wages, and had contributed his earnings from other work to the support of herself and family, refused to continue the arrangement. A conveyance of the farm was thereupon made to him for $500, his contributions from his earnings being placed at $300, and the balance being paid by cash and a horse. At the time the mother was indebted to the plaintiff in the sum of $131.00:—Held, that the conveyance was not fraudulent under Statute 13 Eliz., c. 5.

Smith v. Wright, 2 N.B. Eq. 528.

—Misrepresentation inducing contract—Security for debt—Husband and wife—Parent and child.]—C., a man without means, and W., a rich money lender, were engaged together in stock speculations, W. advancing money to C. at a high rate of interest in the course of such business. C. being eventually heavily in the other's debt it was agreed between them that if he could procure the signatures of his wife and daughter, each of whom had property of her own, as security, W. would give him a further advance of $1,000. Though unwilling at first the wife and daughter were induced by misrepresentation to sign notes in favour of C. for sums aggregating over $7,000, which were delivered to W. Neither of the makers had independent advice: — Held, reversing the judgment of the Ontario Court of Appeal (Taschereau, C.J., dissenting), that though the daughter was twenty-three years old she was still subject to the dominion and influence of her father and the contract made by her without independent advice was not binding. Held, also, Taschereau, C.J., and Killam, J., dissenting, that his wife was also subject to influence by C. and entitled to independent advice and she was, therefore, not liable on the note she signed. Held, per Sedgewick, J., that the evidence produced disclosed that the transaction was a conspiracy between C. and W. to procure the signatures of the notes and that the wife of C. was deceived as to his financial position and the purpose for which the notes were required, therefore the plaintiff could not recover.

Cox v. Adams, 35 Can. S.C.R. 393.

—Homestead exemption.]—Where there is an exemption from seizure under execution of the debtor's homestead not exceeding 160 acres (C.O. c. 27), a conveyance of the same by the debtor to his wife will not be set aside at the suit of an execution creditor. The statute 13 Elizabeth only extends to assignments of such property as is liable to be taken in execution, and this property was not available to creditors up to the very time of the execution of the transfer and could not be afterward.

Meunier v. Doray (N.W.T.), 2 W.L.R. 231.

—Vente a remere — Fraud on creditors.]—A sale à réméré (with right of redemption), which leaves the vendor no effects save such right of redemption with which to pay his creditors, is a contract causing prejudice to the creditors which may, therefore, be set aside as made in fraud of their rights:—The fact that the purchaser furnished the vendor with money to pay a portion of his debts showed that he was aware of the vendor having creditors and that he acted in fraud of their rights.

Laflamme v. Fortier, Q.R. 27 S.C. 96 (Ct. Rev.).

—Action to annul deed made in fraud of creditor.]—1. Action to annul acts done by a debtor in fraud of his creditors' rights must, as regards third persons, be taken within the year from the date when the creditor had knowledge thereof. 2. All parties to the deed sought to be annulled, must be made parties to the suit.

Smith v. Bouffard, 25 Que. S.C. 448 (Rochon, J.).

—Customers of former employer — Action —Scope of employment—Joint tort feasors.]—The plaintiff company were the publishers of a Christmas annual, and had for years been selling it at a considerable profit, the defendant T. being in their employ as a salesman or agent, and as such had visited customers and sold the annual to them. T. left their employment and entered that of the defendant company, who decided to issue a similar annual, and sent T. out as a salesman. He went to some of the customers of the plaintiffs and by untrue representations, amongst others that "the defendant company had taken over that part of the plaintiffs' business, and that the plaintiffs were going out of that branch of business," sold annuals to those customers to the detriment of the plaintiffs' business and to the profit of the defendant company, who accepted and filled the orders and collected the price. On the answers to the questions put to the jury, the trial Judge gave judgment against T. for the damages found, and granted an injunction against him and dismissed the action as against the defendant company. Held, that T. was acting within the scope of his employment in seeking to procure orders, and that the defendant company having availed itself of his acts, was liable for the representations made by him. Held, also, that

the action was not one of slander but an action on the case for false and malicious statements made in reference to the plaintiffs' business, and resulting in loss to the plaintiff, and that the defendant company, although incorporated, was liable. Held, also, that the true measure of a master's liability is the same as if the act had been committed by himself, and the fact that the defendant company had made no profit out of the transaction made no difference as to the amount of the damages against them. Although if one of two joint tort feasors be sued and judgment recovered against him, that is a bar to further action against the two, here the action was brought against both and judgment obtained against one and a motion for judgment was made against the other:—Held, that both the company and the agent T. were liable. The jury, in answer to a question in which they were asked in effect whether T. in uttering the words he did, was acting within the scope of his employment by the company for their benefit, answered "No":—Held, that the finding could not be sustained, and there being no reason to suppose that new light could be thrown on the case by a new trial, and the Court having before it all the materials necessary for determining the question in dispute, under Con. Rule 615, judgment was directed to be entered against both the defendants.

Sheppard Publishing Company, v. Press Publishing Company, 10 O.L.R. 243, D.C.

—Solicitor—Fraudulent preference to, pending litigation—Summary jurisdiction.]—

See SOLICITOR AND CLIENT.

—Collection Act — R.S. (1900), c. 182, s. 28 —Rights of assignee as against sheriff levying under execution.] — The assignment made by a debtor under the provisions of the Collection Act, R.S. (1900), c. 182, s. 28, is to be regarded as part of the legal process provided by the statute to enable the creditor to enforce payment of his debt, and essentially differs from, and is in no way analogous to a voluntary assignment, and is not subject to the provisions of the Bills of Sale Act requiring an affidavit of bona fides or other requirements of the Act. The assignee in such case does not take his rights under the assignor, so as to be bound or affected by his fraudulent act, but as a judgment creditor enforcing his statutable remedy, and he may in that capacity attack any previous fraudulent conveyance made by his assignor. The assignment so obtained confers upon the judgment creditor an absolute title to the property assigned in trust to satisfy his judgment, and, in the next place, to hold the balance for the benefit of those beneficially entitled thereto. An assignee under the Act, who has taken possession under his assignment, is entitled to recover against the sheriff levying under executions placed in his hands subsequently to the date of the assignment.

Farlinger v. Ingraham, 38 N.S.R. 467.

—Fraudulent transfer—Action to set aside — Conspiracy — Damages.] — In an action by creditors to set aside as fraudulent and void a conveyance of land and a bill of sale made by an insolvent debtor to his sister-in-law, there was judgment for the plaintiffs at the trial, but on appeal by the defendants, the Court of Appeal, deeming the evidence unsatisfactory, ordered a new trial upon payment by the defendant grantee of the costs of the former trial and of the appeal, notwithstanding the danger which attends the opening up of a case after the attention of the parties has been directed to the defects in their proofs. A brother of the debtor was made a defendant, as well as the debtor and his grantee, it being alleged by the plaintiffs, who sued on behalf of themselves and all creditors, that all the defendants entered into a conspiracy to defeat and defraud the creditors:—Held, that the plaintiffs could not succeed upon the conspiracy claim, for they could show no special damage accruing to them, and could not recover damages on behalf of a class. And that claim failing, there was no ground for making the debtor's brother a party, and he could not be ordered to pay costs, but the plaintiffs should pay his costs.

Canada Carriage Co. v. Lea, 11 O.L.R. 171 (C.A.).

— Fraudulent conveyance — Settlement of plaintiff's debt — Addition of new creditor as co-plaintiff.]—Where a creditor, who has brought an action on behalf of himself and other creditors to vacate a transfer of property, has before judgment received payment of his debt, but not of his costs, the Court will not sanction the addition of another creditor as a co-plaintiff, but will allow the controversy to be settled as between the plaintiff and the defendants, leaving the creditor seking to intervene to begin an independent action.

Driffill v. Ough, 13 O.L.R. 8 (Boyd, C.).

—Interpleader — Crops raised by claimant on land alleged to have been transferred by defendant fraudulently.]—The sheriff seized crops grown on property of the claimant, son of the defendant. Part of the property was the defendant's homestead transferred to the claimant, and part was the property of defendant's wife, leased by him verbally to the claimant, under authority from the wife. The claimant purchased the seed grain, hired and paid for the help, and paid for twine and harvesting. The defendant did a small amount of work on the farm:—Held, that the question of bona fides of the transfer from father to son did not materially affect the ownership of the crops; that on the evidence the claimant was entitled

to the crops. Kilbride v. Cameron, 7 U.C.C. P. 373, followed.

Massey-Harris v. Moore, 6 Terr. L.R. 75.

—Fraudulent transfer — Interpleader — Garnishee proceedings — Husband and wife —Exemptions.] — In an interpleader issue between the wife of the execution debtor and the execution creditors in which the question was whether the goods seized by the sheriff were then the property of the wife as against the execution creditors, the trial Judge found, and the Court en banc sustained his finding, that the goods or their purchase price being in reality the property of the husband, had been fraudulently transferred by the husband to the wife, and therefore were the property of the execution creditors against the wife:—Held, Wetmore, J., dissenting, that notwithstanding the decision of the Supreme Court of Canada in Donohoe v. Hull, 24 S.C.R. 683, evidence of fraud as affecting the question of property was admissible on the issue. Per Richardson and McGuire, JJ., the decision of the Supreme Court of Canada in Donohoe v. Hull, 24 S.C.R. 683, was not applicable; it was not intended or contemplated to apply where, as in an interpleader issue, the question is whether or not a sale or transfer of goods is a mere sham or device to defeat execution creditors. Per Scott, J.—The decision of the Supreme Court of Canada in Donohoe v. Hull, 24 S.C.R. 683, extended only to proceedings by way of attachment of debts, in which, in order to enable the judgment creditor to succeed, it must appear that a debt exists for which the judgment debtor might have brought an action against the garnishee.

West v. Ames Holden & Co., 3 Terr. L.R. 17.

—Judgment — Procurement by fraud and Perjury — Right to attack in subsequent action — Fraudulent assignment — Action to set aside — Res judicata.]—When it can be shown that a judgment, whether foreign or domestic, has been obtained by fraud, it cannot be held binding upon the party against whom the fraud has been practised; and such fraud may be shown although it may involve a reconsideration of the very facts upon which the former judgment was recovered, and although it may consist in the presentation to the Court of evidence that the judgment impeached was obtained by perjured evidence to which the Court upon the first trial gave credit. There is no distinction between the fraud which consists in presenting perjured evidence to the Court, and that which is collateral to the merits of the case. In an action to set aside as fraudulent and void an assignment of salary by one defendant to the other, the defendants pleaded res judicata, upon which the plaintiff joined issue. At the trial the defendants proved a judgment of a Division Court, in a garnishee proceeding, to which the plaintiff and defendants were parties, and in which the validity of the same assignment was the question for determination. The trial Judge found that by suppressing material facts and by giving evidence that was wilfully false, the claimant in the Division Court proceeding, who was one of the defendants in the action, procured from the Judge in the Division Court an adjudication that the assignment was valid:—Held, that the plaintiff was not entitled to impeach the judgment in the Division Court, though he had not directly attacked it, as he should have done by amendment when res judicata was pleaded; and, upon the evidence, that the assignment was fraudulent and void. Abouloff v. Oppenheimer (1882)), 10 Q.B.D. 295, and Vadala v. Lawes (1890), 25 Q.B.D. 310, followed. Woodruff v. McLennan (1887), 14 A.R. 242, and Hilton v. Guyot (1895), 159 U.S. 113, not followed. Judgment of Anglin, J., reversed.

Johnston v. Barkley, 10 O.L.R. 724 (D. C.).

—Fraudulent conveyance — Statute of Limitations — Registration of certificate of County Court judgment.]—(1) An instrument in the form usually called a lien note is not a negotiable promissory note: Bank of Hamilton v. Gillies (1899), 12 M.R. 495, and the right of action upon it is barred by the Statute of Limitations in six years from the due date of it without adding any days of grace. (2) A voluntary conveyance of land cannot be successfully attacked under the Statute 13 Eliz. c. 5, on the basis of a debt due at the time of the conveyance but barred by lapse of time before the commencement of the action to attack. Struthers v. Glennie (1888), 14 O.R. 726, followed. (3) A voluntary conveyance of land, if meant to be absolute as between the parties, so that the grantee holds it free of trust for the grantor, leaves no interest in him which can be affected by the registration of a certificate of a subsequently-recovered County Court judgment against the grantor. A debt of the grantor, though owing at the time of the making of such voluntary conveyance, became afterwards barred by the Statute of Limitations, before the creditor sued the grantor upon it. The grantor neglected to plead that statute and judgment was recovered against him:—Held, that, as against the grantee, such judgment does not relate back to the original debt so as to form the basis for an action under 13 Eliz. c. 5. The grantee, having once gained the right to plead the Statute of Limitations in such last-named action, cannot be deprived of that right by the act or omission of the grantor.

Keddy v. Morden, 15 Man. R. 629 (Richards, J.).

—Fraudulent conveyance — Stat. 13 Eliz. c. 5 — Consideration.] — In 1891, E. S., a farmer, deceased, agreed with two of his sons, in consideration of their remaining on

the farm and supporting him and their mother, and paying to their two sisters $1,000 each, that the farm and his personal property should be theirs. The farm consisted of adjoining pieces of land, each worth about $3,200. Subsequently the sons paid about $3,000 in paying off balances of purchase money due on the farm, paid $2,000 to the sisters, and supported the father and mother. On July 19, 1899, the father, in performance of the agreement, conveyed the farm to the sons for an expressed consideration of one dollar. At that time he was not in debt, but he was surety with others for loans amounting to $14,000 to a company, of which he and they were directors, the last loan being for $3,000, and made June 7, 1899. On May 3, 1901, the company went into liquidation, and the amount for which the directors were sureties was paid by them, except E. S. In a suit by them to set aside the conveyance as fraudulent and void under the statute 13 Eliz. c. 5:—Held, that the bill should be dismissed.

Baird v. Shipp, 3 N.B. Eq. 258.

—**Parent and child—Conveyance of farm by father to daughters — Agreement for maintenance.**]—A farmer, 77 years old, conveyed his farm to two of his daughters, subject to a charge for the maintenance of himself and his wife and of a money payment to another daughter. The evidence showed that he understood what he was doing and approved of it afterwards till his death, four years later. This action was brought by one of his sons, after his death, to set aside the conveyance to the defendants, the two daughters:—Held, that the transaction was a righteous one, and that the conveyance, being executed voluntarily and deliberately, with knowledge of its nature and effect, should not be set aside; the advice of an independent solicitor or other person was not a sine quâ non, it appearing that the transaction was not promoted or obtained by undue influence, and was in itself a reasonable one, having regard to all the circumstances.

Empey v. Fick, 13 O.L.R. 178 (D.C.).

(See next case.)

—**Conveyance of farm by father to daughters — Agreement for maintenance — Action to set aside transaction — Understanding and capacity of grantor.**]—The decision of a Divisional Court, 13 O.L.R. 178, dismissing an action by one of the heirs at law of the grantor to set aside a conveyance of a farm by a father to his daughters, for undue influence, improvidence, etc., was affirmed, the majority of the Court of Appeal agreeing with the reasons given by the Court below. Per Meredith, J.A.—If the transaction had been attacked by the grantor in his lifetime, it would have been set aside; it was not so attacked, but rather confirmed; and (per Riddell, J., also) no one representing or claiming under the grantor could successfully attack it. Per Riddell, J.—Since the Devolution of Estates Act, the right of the heir at law to sue to set aside a transaction of this kind is not higher than the right of a residuary legatee to sue in respect of personal property; the plaintiff had no right to bring the action at all until the expiration of the period of the three years fixed by 2 Edw. VII. c. 17, s. 3, amending R.S.O. 1897, c. 127, s. 13; and the fact that the personal representative was made a defendant did not assist the plaintiff.

Empey v. Fick, 15 O.L.R. 19 (C.A.).

—**Fraudulent conveyance — Marriage settlement — Bona fides — Suspicious circumstances.**] — On the 31st October, 1906,, the plaintiff obtained a verdict for $1,000 damages against the defendant G.H.W. in an action for breach of promise of marriage; there was an appeal, which was dismissed by consent on the 25th January, 1907; judgment was entered for the plaintiff on the 26th January, and execution placed in the sheriff's hands on the 6th February. Early in October, 1906, G.H.W. had proposed marriage to Miss C.; she took time to consider, and on the 16th January, 1907 (never having seen him in the meantime), wrote him a letter in which she alluded to the "trouble" he was in (meaning the action), and accepted his proposal on condition that he should settle upon her and her children (if any) $2,500 in money or property. On the 28th January he instructed a solicitor to prepare a marriage settlement, which he did, and this was executed at the solicitor's office, where G.H.W., Miss C., and the trustees named in the instrument, his brother and sister-in-law (whom Miss C. had never seen before and whose home was in a distant province) met, on the following day. The property of G.H.W. included in the settlement was $1,000 in money and an equity in land of the value of $800, being practically the whole of his property. The marriage took place on the same day. In an action against G.H.W., his wife, and the trustees, to declare the settlement fraudulent and void: — Held, that there were circumstances of grave suspicion surrounding the transaction; if the letter were part of a scheme, the fact that G.H.W. was in difficulty, and that the action was pending against him, and that the effect of making the transfer of the property would be to prevent recovery by the plaintiff upon her judgment, would make the transaction void under the Statute of Elizabeth; but, the trial Judge having found that there was an honest offer of marriage, that the letter was genuine, and the wife (then Miss C.) honest in her statement of the condition upon which she would accept the offer, the plaintiff could not succeed. Bulmer v. Hunter (1869), L.R. 8 Eq. 46, distinguished.

Fallis v. Wilson, 15 O.L.R. 55.

—Fraudulent bill of sale—Who may attack —Lien note — Conversion.] — In an action for conversion the plaintiff claimed title under a registered bill of sale which the jury found was made without consideration, and in fraud of creditors, the defendant justified the taking under an unregistered lien note given subsequent to the bill of sale.

Poitras v. Pelletier, 38 N.B.R. 63.

—Fraudulent conveyance — Pleading — Injunction.] — The plaintiffs, in an action before judgment to set aside alleged fraudulent conveyances of his property by the defendant Wright to his wife, obtained an interim injunction to prevent further transfers of the property by either defendant:—Held, that the injunction should be dissolved, because the statement of claim contained no distinct allegation that the grantor was indebted to the plaintiffs at the time of the alleged fraudulent conveyance. Leave to amend the statement of claim was granted; but, as it contained no sufficient allegation of the indebtedness of the grantor to the plaintiffs or any claim for an order against him for payment and it could not, therefore, be determined, until after the amendments were made, what relief would be claimed against the alleged fraudulent grantor which might make him a proper party or whether he would or would not be retained as a party. Held, that the plaintiffs should be ordered to pay the defendants' costs of the motion for injunction and of the appeal forthwith.

Traders Bank v. Wright, 17 Man. R. 614.

— Ejectment — Counterclaim to enforce trust and to set aside conveyance as fraudulent—Statute of Frauds—Improper joinder of causes of counterclaim.] — The plaintiff sought to recover possession of land; and the defendant, by way of counterclaim against the plaintiff and the plaintiff's grantor (her son), alleged that the latter held and conveyed the land subject to a trust in her (the defendant's) favour; and also that his conveyance to the plaintiff was voluntary and without consideration and made for the express purpose of defeating and delaying the defendant and the other creditors of the son, and was frauding and delaying the defendant and the directly allege that she was a creditor, nor did she state that she counterclaimed on behalf of all creditors:—Held, that, the trust, if there was any, resting in parol, there was nothing to take the case out of the Statute of Frauds, and it necessarily failed. Held, also, that if a counterclaim could be asserted on behalf of the defendant and all other creditors of the grantor, the two claims could not be joined in one action or counterclaim; and leave to amend should not be given to enable the defendant to abandon the claim to enforce the trust, and proceed upon the other claim on behalf of all creditors; but the dismissal of the action should be without prejudice to any action which the defendant might bring to set aside the conveyance. Judgment of Boyd, C., affirmed.

Parker v. Tain, 15 O.L.R. 187 (D.C.).

— Setting aside conveyance — Fraud.] — Held, that if a person executes a transfer with a mind and intention to execute it, though his assent may have been obtained by fraud, he is estopped from denying its validity as against subsequent purchasers bona fide for value and without notice; but, that when fraud has been established, the onus is upon such subsequent purchaser to establish that the transfer to him was bona fide, and the Court in determining whether such defence is established will take into consideration all the facts and draw inferences therefrom as to whether or not the transaction was in fact bona fide.

McInnis v. Getsman, 1 Sask. R. 172.

—Exchange of lands — Creditors' action to set aside — Judgment against debtor defendant — Subsequent registration of conveyance to him.] — The defendants A. and B exchanged lands by contemporaneous conveyances, and the plaintiff suing on behalf of himself and all other creditors of A. brought action to set aside the conveyance of A.'s lands to B. The trial Judge found that the conveyance of A.'s lands to B. was fraudulent and void as against A.'s creditors, and ordered that it should be set aside and the lands revested in A. for the benefit of his creditors, but refused to make any direction as to the lands conveyed by B. to A. The conveyance of the last mentioned lands was subsequently registered by the plaintiff's solicitor, and it was contended that the plaintiff was also entitled to claim the proceeds of the property thereby conveyed:—Held, that the registration of the deed of B.'s lands to A. should be vacated and the lands re-vested in B. free and clear of any cloud thereon caused by the registration of the deed.

Pringle v. Olshinetsky, 17 O.L.R. 38.

—Fraudulent transfer of land—13 Eliz. c. 5 — Homestead — Exemption.]—Held, that a transfer of a homestead exempt from seizure under execution was not by reason of the exemption a fraudulent transfer of property under the statute 13 Eliz. c. 5:—Semble, the right to claim the benefit of an exemption is not confined to the execution debtor, but extends at least to members of his family.

Meunier v. Doray, 6 Terr. L.R. 194.

— Collection Act — Assignment obtained collusively.] — Where an assignment under the Collection Act is obtained by collusion between the creditor and debtor, such assignment comes within the category of transfers, made "with intent to defeat, hinder and delay creditors," or "with intent to give the creditor an unjust preference over other creditors," and will not give the as-

signee a better title than the assignor himself had. Farlington v. Ingraham, 36 N.S.R. 467, distinguished.

Zwicker v. Ross, 41 N.S.R. 332.

— Antecedent debts — Scheme to defraud subsequent creditors — Husband and wife.] —Where a conveyance is attacked as fraudulent under 13 Eliz. c. 5, it must be shown that debt of the grantor was in existence at the time of the conveyance, or that a scheme had then been entered into to defraud possible subsequent creditors. A license, under the Liquor License Ordinance is not an asset available to creditors, and the fact that it stood in the name of the husband (the grantor), while the property and business was in the name of the wife, is not a badge of fraud. To constitute a fraudulent scheme on creditors, the debts anticipated must be such as would probably arise out of the conduct of the business:—Semble, (a) that in an action to set aside a fraudulent conveyance the grantor is a necessary party. (b) That in an action to declare a party a trustee for another person the cestui que trust is a necessary party. Held, in the absence of fraud, a husband can make a valid gift or gifts, from time to time, of the earnings and profits of a business claimed by the wife as her separate estate, although the husband may have been allowed to interfere in the management of the business. Held, an action is not maintainable based on alleged false representations whereby a person is induced to sue the wrong defendant, and for the time being, to forego his remedy against the party really liable. There is no precedent for such an action. Held, an examination of a judgment debtor under Rule 380 cannot be given in evidence, against a third party (even an alleged transferee from the judgment debtor) who was not present, and had no opportunity of cross-examining, notwithstanding sub-s. 3.

Clinton v. Sellars, 1 Alta. R. 135.

—Fraudulent conveyance action — Interim injunction.]—The Court has power to grant an interim injunction, quia timet, in a fraudulent conveyance action brought by an execution creditor. An interlocutory injunction order will only be granted over an "interim"; and an order final in form and effect, though reserving liberty to the defendant to move to vacate it, will be set aside or varied. Where persons not parties to the action are enjoined, as an auxiliary remedy, to the injunction against the defendant, the defendant cannot object merely on the ground that they are not parties. The Court will not by injunction tie up more property than actually necessary for plaintiff's protection. A defendant succeeding in substantially varying an ex parte order on motion to set it aside, will be given costs of the motion in any event.

Clinton v. Sellars, 1 Alta. R. 129.

—Intention to defraud — Presumption — Rebuttal — Insolvency.] — A sale can be set aside at the suit of a creditor of the vendor only when the latter has made it with intention to defraud, and the presumption of such intention drawn from his insolvency can be rebutted by proof of circumstances which establish that it never existed.

Forest v. Girouard, Q.R. 33 S.C. 193 (Ct. Rev.).

—Sale of business by husband to wife — Knowledge of wife of husband's intention to prefer certain creditors.] — An insolvent trader sold out his business to his wife, who was one of his creditors, having means of her own, and who actually raised the money to make the purchase:—Held, that the sale and transfer were valid, notwithstanding that the wife knew of her husband's insolvency and that he intended to prefer certain of his creditors to others by payments out of the purchase money. The whole of the purchase money of the business was paid over to the husband on the understanding, however, that the wife would at once be repaid the amount owing to her, which was done:—Held, that the transaction must be considered as an advance of the purchase money less the amount owing to her, and that as to that amount it was fraudulent and void, and she was a debtor to her husband's estate for the portion of the purchase money thus paid back to her, and must account for the same to her husband's assignee for creditors.

Langley v. Beardsley, 18 O.L.R. 67.

—Statute of Elizabeth — Intent.] — Defendant McDonald being indebted to the plaintiffs and others, conveyed a farm to his co-defendants, his wife and father-in-law, for an expressed consideration of $4,000.00 to be paid in cash, notes, and by the proceeds of a loan. The evidence as to payment was contradictory, but the weight of evidence seemed to show that $1,400.00 was paid. Beyond contradictory evidence between the defendants as to the mode of payment there was no evidence of fraud:—Held, that no actual and express intent to defraud or delay creditors being shown in both parties, the transfer, being for valuable consideration, ought not to be set aside.

Manitoba Brewing & Malting Co. v. McDonald, 2 Sask. R. 223.

—Application to sell property alleged to have been fraudulently conveyed — Parties —Necessity of naming in originating summons.]—The plaintiff applied by originating summons under Rule 245 Judicature Ordinance for an order for the sale of a certain interest in the estate of one Broley, "amounting to upwards of $1,000," to which it was alleged the defendant was entitled and which he had fraudulently conveyed to his wife who was served with a copy of the

summons but who was not specifically named therein:—Held, that as Lila Jones, the wife of the defendant, was the person principaliy interested in the application, she should have been specifically cited to appear and the general direction "to all parties concerned" with service on Lila Jones, was not a sufficient compliance with the rule. (2) That the property to be sold was not described with sufficient certainty.

Lamb-Watson Lumber Co. v. Jones, 1 Sask. R. 386.

—Action to set aside—Debtor made party.] —Plaintiff sued to set aside an alleged fraudulent conveyance made by Hudsons, Ltd., and joined the latter as a party defendant. The plaintiff alleged that judgment had been recovered against Hudsons, Ltd., for large amounts, but that the latter were still indebted in other amounts, for which judgment had not been recovered. On an application to strike out Hudsons, Ltd., as unnecessary parties to the action:—Held, that, while the plaintiff was a creditor for an amount for which judgment had been recovered against Hudsons, Ltd., yet, as he was also a creditor in respect of an amount for which judgment had not been recovered, Hudsons, Ltd., were properly parties to the action.

Belcher v. Hudsons, 1 Sask. R. 474.

—Fraud on creditors—Prescription.] — A deed of conveyance which is simulated and brings about no change in possession nor has any other effect as between the parties the sole object being to withdraw the property conveyed from attack by the creditors of the owner is void as to the latter and their action to have it declared so is not subject to the prescription of one year under Art. 1040 C.C. Registration of a deed is not a public act and cannot be admitted to prove that the creditors of the parties had the knowledge of it required by Art. 1040 C.C.

Lemay v. Dufresne, Q.R. 18 K.B. 132.

—Deed — Simulation — Evidence.] — A simulated deed has no existence and is a nullity. Evidence is admissible to establish that the sale of an immovable by a man to his wife's father and another to her by the heirs of her deceased father conceals in reality a gratuitous conveyance by the husband for his wife's benefit in contravention of Art. 1265 C.C. The nullity of these deeds can be adjudicated in an action to which the husband and wife are parties and the representatives of the deceased father of the wife need not be added.

Augé v. La Banque d'Hochelaga, Q.R. 34 S.C. 481.

—Deed — Fraud on creditors — Judgment annulling.]—A deed which is judicially declared a nullity as being executed in fraud of creditors is void in respect to the latter only; it still exists as between the parties to it.

Goudet v. Trembiay, Q.R. S.C. 303.

—Joinder of defendants — Fraudulent conveyance — Action by judgment creditor to set aside.] — The execution debtor is not always a necessary or proper party to an action by an execution creditor to set aside a conveyance as fraudulent.

Gallagher v. Beale, 14 B.C.R. 247.

FRIVOLOUS ACTION.

Action by wife for alienation of her husband's affections—Cons. Rules 259-261.] —The plaintiff brought this action against another woman for alienating her husband's affections, committing adultery with him and inducing him to leave the plaintiff and go to the United States, whereby she was deprived of the services and support of her husband and of the exercise of the remedies provided by the Criminal Law for the support of wives:—Held, following Lambert, 24 A.R. 653, that the plaintiff's action must be dismissed with costs.

Lawry v. Tuckett-Lawry, 2 O.L.R. 162.

—Dismissal of action as frivolous and vexatious.]—On an application to dismiss an action as frivolous or vexatious, if the plaintiff does not answer the affidavits filed in support, they must be taken as true.

Hofius v. Lenora, 13 B.C.R. 226.

FRUIT MARKS ACT.

Fruit Marks Act, 1901, 1 Edw. VII. c. 27 (D.)—Fraudulent packing—Possession for sale—"Faced or shown surface."] — The mere having in possession, for the purpose of sale, packages of fruit fraudulently packed, within the meaning of s. 7 of the Dominion Fruit Marks Act, 1 Edw. VII. c. 27, is an offence under the Act, and it is immaterial that no one was imposed on, and no fraud intended by the person charged with the offence. "The faced or shown surface" of the package mentioned in the said section is not limited to the branded end of such package, but applies to any shown surface thereof.

Rex. v. Jones, 4 O.L.R. 537.

FUGITIVE OFFENDERS ACT.

Offence in another part of His Majesty's dominions—Indorsement of outside warrant by Judge of High Court.]—The prisoner was arrested, in the city of Toronto, on a

charge of embezzlement, on a provisional warrant under the Fugitive Offenders Act, R.S.C. 1906, c. 154, pursuant to a warrant for his apprehension issued by a justice of the peace for a county in Ireland, where the offence was alleged to have been committed, and, after an inquiry before the police magistrate for the city of Toronto, was committed by him to prison, to await return under the Fugitive Offenders Act, R.S. C. 1906, c. 154. The prisoner was apprehended and brought before the police magistrate and so committed without the warrant having been indorsed as provided by s. 8 of the Act. The prisoner obtained writs of habeas corpus and certiorari in aid, and by the return thereto it appeared that he was detained under the authority of the police magistrate's warrant of commitment. Upon the application for the prisoner's discharge, the Irish warrant was indorsed by the Judge of the High Court who heard the application:—Held, Meredith, J.A., dissenting, that the police magistrate had no jurisdiction to enter upon the inquiry, and therefore no jurisdiction to commit the prisoner under s. 12 of the Act; and the prisoner should be discharged. Per Moss, C.J. O.:—A provisional warrant may be issued either before or after the indorsement of the warrant issued outside of Canada; but s. 14 makes it plain that a magistrate before whom a person apprehended under a provisional warrant is brought cannot immediately proceed with an investigation. He can only remand from time to time pending the production of an indorsed warrant, which is his authority to enter upon the investigation. The expression "indorsed warrant," frequently occurring in the Act, has more significance than as a term used merely to distinguish it from a provisional warrant. If it was intended to constitute a warrant without indorsement a sufficient authority to the magistrate to proceed, some other expression more distinctly suggestive of that intention would have been used. At all events, it is safer, in dealing with a matter involving restraint of liberty, to adhere to the primary meaning of the language used, in the absence of a context manifestly controlling it and pointing to a different meaning. Per Meredith, J.A.:—Upon the proper construction of the Act, an indorsed warrant was not essential to the magistrate's jurisdiction; and, even if s. 12 required the production, before the magistrate, of an indorsed warrant for apprehension before committing him, the prisoner would not be entitled to his discharge; the warrant having been indorsed by the Judge of the High Court who heard the application for the prisoner's discharge upon the return to the writs, the prisoner was rightly in custody. Judgment of Meredith, C.J. C.P., reversed.

Rex v. Wishart, 22 O.L.R. 594.

GAME LAWS.

Review of summary conviction—Jurisdiction of County Court Judge.]—Where the County Court Judge of York County quashed on review a conviction made by a magistrate of Northumberland County under the Summary Convictions Act, C.S. 1903, c. 123, for taking one caribou contrary to the provisions of the Game Act, C.S. 1903, c. 33, s. 3 (1) (a), on the ground that mens rea was a necessary part of such offence, and was not proved:—Held, (1), a County Court Judge has jurisdiction to review such conviction, though the offence was committed and the case tried in a county for which he is not a County Court Judge. (Ex parte Graves, 35 N.B.R. 587, followed.) (2) That under the facts the order of the County Court Judge should not be disturbed. Per Barker, C.J., Barry and McKeown, JJ.:—Where there is no want or excess of jurisdiction the judgment of a County Court Judge on review should not be disturbed. Per Landry, McLeod and White, JJ.:—The Supreme Court in the exercise of its inherent jurisdiction to supervise the proceedings of inferior tribunals may set aside the order of a County Court Judge on review in order to prevent a gross miscarriage of justice.

The King v. Wilson; Ex parte Fairley, 39 N.B.R. 555.

—"Hunt," meaning of.]—A conviction under s. 14 of the Game Protection Act, 1898, as re-enacted by c. 20, s. 8 of 1909, for hunting any animal must be supported by evidence showing the species of animal hunted.

Rex v. Oberlander, 15 B.C.R. 134, 13 W. L. R. 643.

Recovery of penalty—Cumulated penalties.]—(1) A conviction for a fine by a justice of the peace under the Quebec Game Laws, made, according to its tenor, in a non-existent district, is void, e.g., a conviction in the "District of Abittibi." (2) A conviction by a justice of the peace for a fine "payable to himself to be applied according to law," when the statute under which the information was laid declares that it belongs wholly to the prosecutor, is void. (3) A conviction by a justice of the peace for a fine and $14 costs is void, such sum being in excess of that provided by the tariff in virtue of section 871 of the Criminal Code. (4) An order in a conviction by a justice of the peace to levy the fine imposed, in default of payment, by seizure and sale of the goods of the person convicted, in a case where the law provides imprisonment as the sole alternative, renders the conviction void. (5) The Quebec Game Laws, by Articles 1405 and 1410, in imposing a fine upon any person found in possession of an animal or part of an animal killed during close

season, does not create as separate offences the possession by such person, at the same time, of several of such animals and of their skins. Consequently the person in whose possession are found 775 skins of beavers killed during close season, is liable for one offence only and subject merely to one penalty of from $10 to $25, and a conviction against him for 775 offences and 775 penalties is void. (6) Recourse may be had by action in the Superior Court to have convictions by justices of the peace declared void, in virtue of Article 50 C.P.Q., notwithstanding that an appeal to another tribunal may lie in virtue of the laws under which the convictions may have been made.

Zimmerman v. Burwash, Q.R. 29 S.C. 250.

GAMING.

—Gaming contract—Money advanced for speculation in stocks.]—An agreement under which money is advanced for the purpose of speculation in stocks, is a gaming contract and no action will lie on an I. O. U. given by the borrower as security for the amount.

Selby v. Clark, 38 Que. S.C. 287.

Broker—Gambling in wheat — No real business transactions—Action for loss.]—Plaintiff brought action to recover from defendant $229.37 alleged to be due him, pursuant to an agreement between them for purchase and sale of wheat on the Chicago wheat market:—Held, that there were no real business transactions between the parties; that any indicia of reality, such as payment of storage of the grain or payment of interest upon bank loans or brokers' advances, were lacking; that their dealings were merely gambling on the Chicago wheat market and prohibited by Criminal Code s. 231 and the contract could not be enforced. Action dismissed. Kaufman v. Gibson, [1904], 1 K.B. 598, followed.

Trench v. Brink, 1 O.W.N. 789, 16 O.W. R. 161.

—Keeping common gaming house—"Fan tan"—Failure to prove unlawful playing for money.]—1. On a seizure, under a search warrant for gaming instruments under Code s. 641 of articles used for playing "fan tan," but without finding any money employed in connection with the game, the prosecution must show that the method of playing was within the prohibition of Code s. 226 as to games of chances and mixed games of chance and skill as "fan tan" is not per se an unlawful game. 2. Code s. 985 does not apply to shift the onus of proof from the prosecutor, unless it appears that the game being played was an unlawful one. 3. The confession of another person arrested with the accused in a gaming-house case, but not jointly charged, is not admissible on the trial of the accused; such person should be called as a witness for the prosecution if it is desired to prove the facts which he professes to confess.

The King v. See Woo, 16 Can. Cr. Cas. 213.

—Criminal law — Vagrancy — Gaming — Betting.]—The defendant, being charged with vagrancy, admitted that he made his living, for the most part, by betting on horse races in the streets, having no fixed place for taking bets or paying them:—Held, that he could not, upon this admission, be convicted as a vagrant, under s. 238 (1) of the Criminal Code. "Gaming" in clause (1) does not include betting.

Rex v. Ellis, 20 O.L.R. 218.

Gaming house offences.]—See DISORDERLY HOUSE.

Gambling transaction—Wager on foot race—Notice to stake-holder not to pay—Action to recover deposit.]—A deposit of money with a stake-holder to abide the result of a foot race is not an illegal transaction under Consolidated Statutes N.B. c. 87, s. 2, and no action will lie against the winner of the bet, who has received the money from the stake-holder after the decision of the event.

Seely v. Dalton, 36 N.B.R. 442.

—Contract — Gaming transaction—Intention of parties.]—A contract, in order to be a gaming transaction, must be so in the intention of both the parties to it. The intention to gamble of one of them, even though known to the other, does not alter the nature of the contract.

Brosseau v. Bergevin, 27 Que. S.C. 510 (C.R.).

—Keeping common betting house—Incorporated company—Lease of premises.]—The president of an incorporated company, owners of a racecourse, who lease for valuable consideration the privilege of taking and receiving bets in part of the premises, is not, merely by virtue of his office, and without anything more than acquiescence on his part, liable to conviction as a party to the offence of keeping a common betting house under ss. 197 and 198 of the Criminal Code. Rex v. Hanrahan (1902), 3 O.L.R. 659, distinguished.

Rex v. Hendrie, 11 O.L.R. 202, 10 Can. Cr. Cas. 298.

—Promissory note — Chose in action — Assignment — "Common gaming house"—Hotel — Game of chance in private room.]—

Robinson v. McNeill, 4 E.L.R. 134 (N.S.).

—Agreement to pay money in an uncertain event — Illegality — Wager.]—
De Jardin v. Roy, 12 W.L.R. 704 (Sask.).

—Forcible entry into gaming house by constable without warrant — Municipal by-law.]—Held, that, having regard to the provisions of s. 641 of the Criminal Code (c. 146, R.S.C. 1906), a police officer is not justified in forcibly entering a gaming house, without warrant or permission from proper authority, notwithstanding the provisions of a municipal by-law authorizing him so to do.
Win Gat v. Johnson, 1 Sask. R. 81.

—Keeping common gaming house—Hotelkeeper — Poker game with rake-off for drinks.] — An hotelkeeper who permits gambling in his hotel for the purpose of advancing the sale of drinks to the players for which purpose a rake-off is taken in the game, is properly convicted of keeping a common gaming house.
The King v. Sala, 13 Can. Cr. Cas. 198 (Y.T.).

GARNISHMENT.

See ATTACHMENT.

GAS.

Liability for damage caused by escape or explosion — Municipal corporation — Powers and liabilities in respect of natural gas.]—A municipal corporation invested with statutory powers to develop or manufacture a dangerous substance—e.g., inflammable gas—is not liable in the same way as an individual, without proof of negligence, for damages occasioned by the escape or explosion of such substance. Where there is evidence reasonably sufficient to support the verdict of a jury, the Appellate Court will not set it aside as perverse or against the weight of evidence.
Purmal v. City of Medicine Hat, 1 Alta. R. 209.

— Independent contractor — Liability — Natural gas company—Exercise of statutory powers.]—The defendant company, acting within their corporate powers and under the statutory powers conferred by R.S.O. 1897, c. 200, s. 3, and c. 199, s. 22, on such companies, instructed a contractor with whom they had a contract to do such work for them, to make connection with the place of business of the plaintiff's tenant for the supply of natural gas thereto. The contractor's employees negligently allowed gas to escape while constructing a trench for the service pipe from the defendants' main line, which had been laid along a public street, thus damaging the plaintiff's property:—Held, that the defendants were liable. The statutory power to break up and dig trenches in streets implied the duty of seeing that the gas was not allowed negligently to escape in dangerous quantities, which duty the defendants could not rid themselves of by delegating it to another. Such negligence was not merely collateral, but was negligence in the very act the contractor was engaged to perform for the defendants.
Ballentine v. Ontario Pipe Line Co., 16 O.L.R. 654.

—Contract to supply gas to public—Measure of damages for breach of contract.]—(1) Under a contract between a municipal corporation and a gas company for the supply of gas to the inhabitants, each one of the latter has an action against the company, to recover damages caused him by breach of the contract. (2) Such damages, in the case of a laundry establishment run by gas, include the wages paid to the employees during the stoppage of the work, but do not extend to profits of merely possible realization. (3) The burden of proof of irresistible force is on the party who sets it up as a defence, and such proof must establish the absolute impossibility of discharging the obligation. Proof of circumstances that merely render it more onerous or difficult, is insufficient.
Markham v. Montreal Gas Co., 34 Que. S.C. 10.

— Tort—Asphyxiation by gas—Defective pipes.]—(1) The owner or operator of an illuminating gas system in a city is liable in damages for asphyxiation of dwellers in a house, into which gas penetrates through the ground, from an escape in a defective portion of the pipes in the street. (2) Irresistible force, force majeure, must be expressly proved and will not be inferred from circumstances.
Garand v. Montreal Light, Heat & Power Co., 33 Que. S.C. 414.

—Natural gas and oil.]—See OIL AND GAS.

—Gas Inspection Act, R.S.C. 1906, c. 87—Liability of consumer to pay for gas when no certificate posted up.]—(1) Section 34 of the Gas Inspection Act, R.S.C. 1906, c. 87, only makes the sale of gas illegal after notice to the undertaker of the location of the testing place prescribed by the Department of Inland Revenue, and until the connections specified in that section are made. (2) Section 44, requiring the posting up of the certificates of tests made by the inspector, does not become operative till s. 34 has been acted on and a testing place prescribed and notified by the undertaker. (3) The penalties provid-

ed for by ss. 59 and 60 for failure to procure and post up the certificates of tests required by section 44, and for selling gas before connections have been made with the testing place, etc., are not incurred when s. 44 has not become operative by notification to the undertaker of the prescribing of a testing place. Per Phippen, J.A.:—Sections 34 and 44 are both subsidiary to s. 31 which limits the obligations therein imposed to undertakers "in any city, town or place for which there is an inspector of gas," and the provisions of ss. 31 to 47 inclusive are not applicable to places for which there is no local inspector.

Carberry Gas Co. v. Hallett, 17 Man. R. 525.

—Negligence—Gas works—Explosion — Verdict—Usual course of work.]—The verdict of a jury that an explosion in a gas works causing the death of an employee was due to the negligence of the employees because they lit by gas and not by electricity the room in which an explosion took place by the contact of an escape of gas with the flame from the gas jet, although it was proved that such mode of lighting is universally adopted and used in gas works, is not so unreasonable that the Court can set it aside or give judgment without regard to it.

Montreal Light, Heat & Power Co. v. Regan, Q.R. 16 K.B. 246, affirming 30 S.C. 104.

—Gas company—Application of profits — Statutory restrictions—Reducing price of gas.]—See COMPANY.

—Sale of gas works to municipality — Arbitration as to price—Franchise.]—See COMPANY.

Re City of Kingston and Kingston Light, Heat and Power Co., 5 O.L.R. 348 (C.A.).

—Negligence—Contractor.] — In actions for damages in respect of an accident against the appellant gas company, it appeared that the appellants were not occupiers of the premises on which the accident had occurred and had no contractual relations with the plaintiffs, but that they had installed a machine on the said premises, and the jury found that the accident was caused by an explosion resulting from gas emitted, owing to the appellants' negligence, through its safety valve direct into the closed premises instead of into the open air:—Held, that the initial negligence having been found against the appellants in respect of an easy and reasonable precaution which they were bound to have taken, they were liable unless they could show that the true cause of the accident was the act of a subsequent conscious volition, e.g., the tampering with the machine by third parties.

Dominion Natural Gas Co. v. Collins, [1909], A.C. 640.

GIFT.

Money in bank—Transfer to joint credit of donor and daughter—Death of donor—Right of survivor.]—J. S. and his wife had money deposited in a bank to their joint credit. The wife died; and thereafter J. S. delivered to the bank a written memorandum, addressed to the bank, and signed by himself, as follows: "This is to certify that I transfer this money in my name J. S. and M. S. in our savings bank account number S. 27 in your bank to the joint credit of myself, the sole survivor, and my daughter M. S., to be drawn by either of us." The money lay wholly undisturbed in the bank until the death of J. S., when it was claimed by the plaintiff, one of the executors of J. S., as part of his estate, and by the defendant, the daughter named in the memorandum, as her own:—Held, that the defendant's story, that her father intended that the money should be at the call of either her or himself, and that, if any were left at his death, she should have it all, was corroborated by the document so as to satisfy the requirements of R.S.O. 1897, c. 73, s. 10, and should be accepted, as against the evidence of the plaintiff and another witness. And held, notwithstanding the general rule that a parol gift of a chattel without delivery is ineffective, that, in the circumstances, the money was during the joint lives joint property with right of survivorship. Interpleader issue found in the defendant's favour; the plaintiff to pay the defendant's costs; those costs and his own costs not to come out of the estate in such a manner as that the defendant would be in fact paying part of them herself (subject nevertheless to the discretion of the Surrogate Judge, when passing the plaintiff's accounts, to allow these costs out of the remainder of the estate).

Schwent v. Roetter, 21 O.L.R. 112.

—Donation mortis causa—Holograph will—Trust.]—The donation à cause de mort is not a mode of disposing of property which is expressly prohibited by law. It is only prohibited by implication and through an omission in the enumeration of the modes of disposal by gratuitous title. (Art. 754 C. C.) That article declares it void only when it is not valid as a will or is contrary to the terms of a marriage contract. (Art. 758 C. C.) Hence, the Courts can give to such a donation the effect of a will if satisfied that it contains the essential conditions. It is thus that they can declare that a disposal of property by letter, the writer of which died with revoking it, is a legacy in trust by a holograph will though express-

ed in these terms—"In case of my death without previous notice of a change in my intentions this hypothec, taken by you in trust, will revert to Madame E. B., etc. You will give her notice of the legacy, serve her interests and act with her to obtain the utmost possible from the investment of my money."

DeSiégès v. Thompson, Q.R. 37 S.C. 424 (Ct. Rev.).

—Donation—Maintenance of donor—Commutation.]—The donor of property for the consideration that the donee shall furnish him with board, lodging, clothing and other necessaries has, in case of incompatibility of character, a right to an action for authority to live apart from the donee and to have a pension in money substituted for the charges agreed to as above.

Laplante v. Fontaine, Q.R. 37 S.C. 128 (Ct. Rev.).

Conveyance of land — Lack of independent advice — Absence of power of revocation — Execution by marksman.] — Action by the administrators of M. to set aside a conveyance of land by M. to the defendant, upon the grounds that it was prepared at the instance of the defendant and executed by M. without independent advice and without full and proper explanation; that it was not in fact his deed; and was procured by undue influence and fraud. There was no evidence of direct influence or of fraud, but M. was an old man, who could neither read nor write, and the evidence left it doubtful whether M. knew that he was putting his mark to a deed, and not to a will (for which he had given instructions) and whether the deed was ever read over or explained to him or not. There was no power of revocation. The conveyance was in effect a gift to the defendant:—Held, that the onus was upon the defendant to establish the perfect fairness of the transaction, and that the donor clearly understood what he was doing, and that onus had not been satisfied. The plaintiffs were, therefore, entitled to have the conveyance set aside and the registration thereof cancelled. The registration is prima facie evidence of the execution as a fact, not that the grantor understood the same. A strong inference against the defendant ought to be drawn from the fact that he did not see fit to put in the box the witnesses who could have explained what took place when M. put his mark to the deed.

Trusts and Guarantee Co. v Cook, 1 O.W. N. 265 (Clute, J.).

—Deposit in savings bank — Bank book handed to donee — Executors and administrators — Bank entitled to have administrator joined in action by donee.]—

Adams v. Union Bank of Halifax, 1 E.L. R. 317 (N.S.).

—Undue influence fiduciary relationship — Transaction between trustee and beneficiary.]—

Wright v. Kaye, 2 E.L.R. 47 (N.S.).

—Improvidence—Deed executed without legal advice—Parent and child—Agreement for support of parent.]—

Inglis v. Paw, 3 E.L.R. 556 (P.E.I.).

— Conveyance by parents to child — Action by parent's creditors—Grantor retaining ample means to pay debts—Laches.]—

Leard v. Cameron, 3 E.L.R. 561 (P.E.).

—Retention of life interest by grantor.]—

Pratt v. Balcom, 7 E.L.R. 236 (N.S.).

—Intention — Incomplete gift — Loan of chattels — Detention — Replevin.]—

Jewish Colonization Association v. Baratz, 2 W.L.R. 97 (Terr.).

— Personal property — Death of donor — Action by administrator to recover from donees — Evidence.]—

McLorg v. Loppe, 7 W.L.R. 833 (Sask.).

Money transaction between man and woman living together in adultery.]—Action for money received by defendant for the use of the plaintiff. Plaintiff, an infant, and defendant lived together as wife and husband, though not married. Plaintiff handed to defendant various sums of money obtained by prostitution while they were thus living together. Part of this money defendant used in purchasing an interest in a hotel property. Defendant simply denied the allegation in the statement of claim:—Held, 1. There was no presumption of a gift under the circumstances, and, as the defendant had set up no other defence than a denial of the debt, the plaintiff was entitled to judgment. 2. Plaintiff was entitled to a charge and lien on defendant's interest in the hotel property for the money and costs and to have the same sold to satisfy her claim.

Desaulniers v. Johnston, 20 Man. R. 64.

—Gift—Undue influence—Duress—Absence of independent advice.]—F., being an unmarried man, a Roman Catholic, and an inmate of a hospital governed by members of a Roman Catholic society, and having an insurance of $1,000 upon his life, payable to his father and brother, a few days before his death declared to the parish priest that he wished the hospital, the defendants, to have the insurance moneys, and that he intended to carry this out by making the plaintiff his wife and appointing her the beneficiary of the policy, she undertaking to pay $500 to the defendants. The marriage ceremony was performed by the priest; F. made a will in favour of the plaintiff, and designated her as beneficiary under the insurance policy, in lieu of his

father and brother. After the marriage, F. stated to the parish priest, in answer to a question put by the latter, in the presence of the plaintiff, that it was his (F.'s) wish and intention that $500 of the insurance money should go to the plaintiff and $500 to the hospital, and the plaintiff assented to this. After the death of F., the plaintiff, who was also a Roman Catholic, under pressure from the Mother Superior of the society and the priest, executed an irrevocable power of attorney, in favour of a solicitor, instructed by the Mother Superior; the solicitor collected the insurance moneys and paid $500 to the plaintiff and $500 to the defendants, less expenses. The plaintiff had no independent advice, did not know what her rights were, and said that when she was asked to execute the power of attorney she remembered that the priest had told her not to "damn her soul for money" and was "scared":—Held, assuming the existence of an ante-nuptial agreement, that, not being in writing, it was void under s. 4 of the Statute of Frauds, and the benefit of the appointment in the plaintiff's favour passed to her free from any obligation or trust arising out of the parol agreement. The plaintiff, by executing the power of attorney and acquiescing in her attorney paying half of the insurance moneys to the defendants, made a gift to the defendants; the relations of the parties and the circumstances cast the onus on the defendants of showing that this gift was the free act of the plaintiff; that onus had not been discharged; on the contrary, the evidence showed that an undue advantage was taken of the plaintiff's situation; she was not a free agent, and had not that protection to which she was entitled; and, in such circumstances, it was the duty of the Court to afford her such protection by undoing the transaction. Judgment of the County Court of Leeds and Grenville reversed.

Finn v. St. Vincent de Paul Hospital, 22 O.L.R. 381.

—Simulated donation—Contestation—Art. 1039 C.C.]—Held (reversing the judgment of the Superior Court, Curran, J.):—(1) Where the donor does not intend to give and does not divest himself of the thing given, and the donee does not intend to receive the thing as a gift, there is no real donation, and Art. 1039 C.C. does not apply—this article applying only where there is a real contract, and not where the contract is simulated. The thing which is nominally given may be seized, therefore, as being still in the possession of the donor. (2) A person who only becomes a creditor subsequent to the execution and registration of a simulated deed of donation of movables by his debtor, may nevertheless allege and invoke the fact of simulation, in his contestation of an opposition, based on such pretended deed of donation, made to a seizure effected by the creditor. Lighthall v. O'Brien, R.J.Q. 6 C.S. p. 159, approved.

Sisenwain v. Roque, 23 Que. S.C. 115 (C.R.).

—Transfer of life insurance.]—The provisions of the Civil Code of Quebec, Arts. 787 and 791, as to gifts inter vivos, do not apply to transfers of life insurance policies.

Montreal Coal & Towing Co. v. British Empire Mutual Life Co., 5 Que. P.R. 302 (Davidson, J.).

—Revendication—Seizure of goods donated—Nullity of donation—Sale with right of redemption.]—Held, 1. That in an action to revendicate goods which have been the object of a gift it is permissible to plead that one of the donors was living in concubinage with the donee at the time of the gift. 2. That, as against the donee, it cannot be pleaded that the gift was invalid because it had been made by the donor with the object of impeding his creditors. 3. That in revendicating things given by a firm all the members of the firm must be made parties to the cause if one of them only holds the things in question. 4. That in an action for revendication it is not permissible to plead that other creditors are claiming rights upon the same things. 5. That proof on the merits before decision of points of law will be ordered upon an allegation by the donor that he sold the things sought to be revendicated with the right of redemption and this with the consent of the donee.

Rousseau v. Verdon, 5 Que. P.R. 219.

—Moneys on deposit—Form of deposit receipt — Survivorship — Testamentary gift.]—The plaintiff's father owned $400 on deposit in a bank to his credit. He procured from the bank a deposit receipt for the amount, payable to himself and the plaintiff, or either, or the survivor. The understanding between the father and son was that the money should remain subject to the father's control and disposition while living, and that whatever should be left at his death should then belong to his son. He retained the receipt intact in his own possession, and it was found amongst his papers at his death:—Held, upon the plaintiff's own evidence, that the purpose of the father was to make a gift to the plaintiff in its nature testamentary, which he could not effectually do except by an instrument executed as a will. Nor could the receipt be regarded as equivalent to a voluntary settlement, reserving to the settler a life interest, with a power of revocation. An action against the personal representa-

tive of the father for a declaration of the plaintiff's ownership of the fund was dismissed, but the costs of both parties were ordered to be paid out of the fund.

Hill v. Hill, 8 O.L.R. 710 (Anglin, J.)

—Venue—Donation—Maintenance.]—If a son in consideration of a deed of donation from his parents, has undertaken to support and maintain them during their lives, an action against him by a person appointed to discharge this duty in his stead should, assuming it to be well found, be brought in the place where the contract was made and not in that in which the services were rendered.

Théoret v. Brunet, 7 Que. P.R. 138 (Sup. Ct.).

—Parent and child—Contract by son — Support of sister.]—A note or writing, signed voluntarily by a son who had already received advances from his father by which the former, at the request of his father, who was dying in poverty and wished to secure the future of his daughter, undertook to pay to the latter a sum of money or annual income for a stated period, is based upon a legal consideration and should not be considered a donation by the father to his daughter, made during an illness deemed mortal and, therefore, void as having been agreed to in contemplation of death.

Brulé v. Brulé, Q.R. 26 S.C. 77 (Sup. Ct.), affirmed by King's Bench, May, 1904.

—Donation—Prohibition against alienation—Substitution.]—By deed of donation entre vifs, the donor gave to the donee for himself and the heirs of his body estoc et ligne a certain immovable of which the donee was to enjoy the usufruct during his life but to have no power to alienate the same at any time, the property to go, on his death, to the issue of his marriage. On these conditions the donor transferred all his rights in the said immovable "to be vested in the donee and the heirs of his body in the direct line":—Held, that the deed of donation created a substitution and on the death of the grevé (the donee) without children such substitution became effete (caduque) and the disposition of the immovable by the will of the grevé was valid. Held, further, that such substitution applied to no relations of the donee other than his children and that the claim de propre "for him and the heirs of his body in the direct line" did not constitute a trust even under the law in force when the donation was made (in 1844) the sole effect of the clause being to create a destination of the thing donated in favour of the heirs who would have entered into the succession of the donee if he had not disposed of it otherwise. Held, also that, the prohibition against alienation only applied to the enjoyment of the usufruct by the grevé and had no effect on the substitution created in favour of his children nor on his power to dispose of what was donated in case the substitution failed.

Crevier v. Cloutier, Q.R. 26 S.C. 373 (Ct. Rev.).

—Stipulation of return to donor or heirs—Opposition.]—An opposition stating that the effects seized were given to the opposant absolutely, but on condition that they should be returned to the donor or his heirs, should the donee predecease without descendants, is frivolous, and will be dismissed on motion.

Fenoglio v. Ouellette, 7 Que. P.R. 158 (Davidson, J.).

—Donation—Benefit of third party—Revocation.]—A stipulation by a donor for the benefit of a third party as a condition of his donation may be revoked without the consent of such third party so long as the latter has not signified his intention to avail himself of it. The renunciation by the donee of the charges in her favour is to be deemed also a renunciation of this stipulation in favour of the third party.

Guerétte v. Ouellet, Q.R. 27 S.C. 45 (Ct. Rev.).

—Donatio mortis cause—Evidence—Delivery for safe-keeping.]—A person on his death-bed handed to his wife out of a satchel which he kept in a closet of his bedroom, $2,000 in bonds and $1,550 in cash, telling her to "take them and put them away; wrap them up and lock them up in your trunk." At the same time he handed to her a pocket book containing $150, saying that it was for present expenses. A few minutes later he handed to his business partner the remaining contents of the satchel, consisting of $1,000 belonging to the firm. Subsequently he made a will bequeathing to his wife $3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property; to two grandnephews $500 each; and to nieces and nephews the residue of his estate. His private estate was worth $7,500. When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand nephews being counted up, he said, "there is more than that":—Held, that there was not a donatio mortis causa to the wife, the deceased intending no more than a delivery for safe-keeping.

Eastern Trust Company v. Jackson, 3 N. B. Eq. 180.

—Husband and wife—Purchase in wife's name.]—Where property purchased by a

husband as a home for himself and wife was by his direction conveyed to her, so that the title might be in her in case of his death, it was held, in a suit brought by the husband against the wife, that a gift was intended, to take effect upon his death if she should survive him. Decree restraining the wife from conveying or charging without his consent, during his lifetime.

Evans v. Evans, 3 N.B. Eq. 216.

—**Possession — Acceptance.**] — Plaintiff's father in his lifetime purchased a piano which after delivery at his home, he gave to the plaintiff then living with him. She accepted the gift and it was afterwards treated as her property:—Held, that the title to the piano was complete in the plaintiff, and she was entitled to recover it from the defendant in spite of an alleged subsequent sale by the father to the latter.

Tellier v. Dujardin, 16 Man. R. 423.

—**Fund deposited with trust company in names of donees—Executed trust.**]—Mrs. P. deposited with the plaintiffs, $3,000 in the names of three of her relatives, the defendants, $1,000 for each, and obtained from the plaintiffs three documents acknowledging the receipt from each of the defendants of $1,000 "in trust for investment," and guaranteeing the payment of interest. Mrs. P. informed the three defendants of what she had done, saying that the money deposited was theirs and they could draw it. She, however, retained the receipts in her own possession, where they remained until her death, and did not inform the defendants of their existence. The cheques for the interest which accrued during Mrs. P.'s lifetime were made payable to the three defendants, but were indorsed by them in favour of Mrs. P., and were cashed by her for her own benefit:—Held, that there was a complete and executed trust created by Mrs. P., enforceable by the defendants, the cestuis que trust.

Toronto General Trusts Corporation v. Keyes, 15 O.L.R. 30 (Anglin, J.).

—**Donation—General donee — Common domicile.**]—Article 797, C.C., in declaring the general donee "held personally for the total amount of the debts" does not make these donees joint and several debtors for the whole of these debts. Therefore, the acknowledgment, by a promissory note signed by the donor after the donation, of a debt due by him at the time of the donation does not interrupt the prescription as against the donee. The common domicile of the donor and donee does not bring about any obligation on the latter's part to pay the former's debts. The seller of effects to the donor even for the joint use has, therefore, no recourse against the donee for the price. When the property donated represents the value of charges imposed by the donation the latter constitutes a contract equivalent to sale and does not give rise to the obligation existing under Article 797, C.C.

Barbe v. Ellard, Q.R. 15 K.B. 526, reversing Ellard v. Barbe, 29 S.C. 165.

—**Donation inter vivos—Breach of conditions.**]—Default by the donee to furnish the donor (his blind, needy and impotent father, and his wife), "the use of a furnished room and fuel for heating," as stipulated in the deed of donation, gives rise to an action for revocation of the donation under the provisions of Article 811, C.C.

Coté v. Coté, Q.R. 29 S.C. 388.

—**Donation — Conditions — Restrictions against sale, seizure or garnishment.**] — The condition imposed by a deed of donation that the property donated "shall not be sold, seized or garnished for any general consideration whatever during the life of the donees" applies to a judicial sale and does not prevent a contractual sale of said property. Oral evidence is not admissible to establish that, when an agreement was executed in writing for sale of a cut of logs on "lot No. 15, range 13th, Magog, Hattley, and lying on the east side of the road called Beach Road" the proposed vendor had represented to the purchaser that the lot contained from 125 to 150 acres, when, in fact, the extent of it was only 75 acres.

Hamel v. Smith, Q.R. 31 S.C. 298 (Sup. Ct.).

—**Delivery — Possession—Presumptions—Oral evidence.**]—The universal legatee who sues to recover a sum exceeding $50 from a person who claims it as a gift by delivery (don manuel) from the testator, can establish the doubtful character of the defendant's possession by presumptions supplemented by oral evidence when it is proved, by the admission of the defendant, that his possession is equivocal, e.g., when the sum at the time it was sent to him was placed by him in a movable belonging to the testator and left at his house and did not withdraw it therefrom until after the testator's death.

Saint-Sauveur v. Ouellette, Q.R. 33 S.C. 330 (Ct. Rev.).

—**Revocation of donation — Affidavit.**]—An affidavit stating the facts which authorize an action to revoke a donation without indicating the nature of the action which the plaintiff proposes to bring is irregular and a conservatory seizure founded on such affidavit will be set aside. The Court in deciding as to the validity of

a conservatory seizure should only consider the statements in the affidavit and should not consider whether or not the declaration sufficiently shows what remedy the plaintiff wishes to obtain nor if the defendant has suffered prejudice from the insufficiency of the affidavit or has waived the benefit of such insufficiency by pleading to the merits.

Cusson v. Cusson, 9 Que. P.R. 174 (Sup. Ct.).

—Gifts inter vivos—Gifts made in trust—Revocation—Non-fulfilment of obligations of donee.]—A gift inter vivos of immovable property, made in trust in the manner provided in chapter IV. (a) of title II. of book III., Art. 981a to 981n in C.C., intituled "Of trusts," is subject to the general rules which govern gifts inter vivos, and, among them, to that of Art. 816 C.C., respecting the revocation of gifts. Hence, the right of revocation for non-fulfilment of the contractual obligations of the donee exists only when it has been stipulated in the deed of gift in trust.

Mathison v. Shepherd, 35 Que. S.C. 29.

—Gift of immovable with substitution to children of donee.]—(1) A gift inter vivos of immovable property, with substitution to the children of the donee, made in 1849, and at any time previous to the Act 18 Vict. c. 101 (1855), could only become valid and effective, though registered, by publication and transcription (insinuation) of the deed, in the office of the Superior Court, in the district in which the property was situated. (2) In an action brought by one of the substitutes, founded on the gift as his title, the nullity of the substitution, for want of publication and transcription (insinuation) of the deed, being absolute, the defendant is not bound to invoke it by special plea, but may do so at the hearing on the merits, under a plea of general issue. (3) A successor by particular title, whose possession joined to that of his author, under a clear title to property, extends over a period of thirty years, acquires ownership by prescription, although the title of a possessor, anterior to the thirty years and from whom subsequent titles were derived, was a precarious one. Thus, when J. B. S. acquired only the usufructuary rights (le droit d'usufruit) to an immovable in 1867, but sold the property without reservation to N.S., in 1869, a subsequent purchaser under an equally clear title who possessed down to 1899, acquired ownership by prescription, interversion of title having taken place.

Saint-Denis v. Trudeau, 18 Que. K.B. 434.

—Delivery.]—Actual delivery of the thing is a necessary ingredient of a valid parol gift or, in other words, a gift is a transaction consisting of two contemporaneous acts, the giving and the acceptance, and these acts cannot be completed without an actual delivery of the subject of the gift.

Hardy v. Atkinson, 18 Man. R. 351.

—Gift to hospital.]—The following provisions in an Act of the legislature, "All the movable and immovable property given to l'Institut du Bon Conseil by Mgr. Guay or others . . . will be conveyed to the corporation of the hospital Guay de St. Joseph de Lévis to be by it enjoyed, used, disposed of, etc., according to the intention of the donors and testators," comprises a declaration that the property given to the defendant was at once transferred to the hospital and actually conveyed without formal action, the statute prescribing none. The future tense used in the Act is equivalent to the present. It is clear that by the said Act the hospital and not the institute is owner of an immovable given to the latter by Mgr. Guay and an action en bornage by the adjoining owner will not lie against the institute.

Guay v. Institut du Bon Conseil, Q.R. 34 S.C. 346.

—Donation—Onerous conditions.] — The charge imposed by donation on the donee to board, lodge, clothe and maintain a person named being appreciable in money constitute a hypothec though their value is not specified in the deed. Such a charge imposed on the donee and his legal representatives in respect to one of his brothers cannot be carried out by a third party to whom he sold the property donated, the beneficiary having a right to insist that it be fulfilled by the donee himself.

Pelletier v. Girard, Q.R. 34 S.C. 318.

—Donation of immovable—Charges on donee—Penalty for alienation—Judicial sale.]—Where a deed donating an immovable subject to payment of rents, to services and other burdens provides that if it was conveyed away the donee should pay $1,000 to the donor, such payment does not form part of the burdens or obligations arising directly from the contract. Hence, a judicial sale under which the purchaser was to "pay, discharge and fulfil all the obligations imposed on the donee by the deed of donation, etc., did not make him liable to pay the above sum which liability the donee had incurred before the seizure under execution nor oblige him to reimburse the amount to a third party who has paid the donor with subrogation of the latter's rights.

Bélanger v. Ouellet, Q.R. 18 K.B. 369.

—Donation.]—See also that title.

—Donatio mortis causa.]—See also that title.

GOODS.

Transfer of title.]—See BILLS OF SALE; SALE OF GOODS.

—Mortgage of.]—See BILLS OF SALE.

GOODWILL.

Dissolution of partnership—Right to firm name.] —See PARTNERSHIP.
Smith v. Greer, 7 O.L.R. 332.

—Trade name.]—See that title.

GRAIN SHIPMENT.

Allotment of railway cars—Statutory regulations in Manitoba and N.W.T. — Manitoba Grain Act, 1900 (Can.) — A railway station agent within the inspection district of Manitoba to which the Manitoba Grain Act, 1900 (Can.) applies, is guilty of an infraction of that statute if he allots cars to the elevator companies having grain elevators at a shipping point in preference to the unfilled prior order of a private applicant for a single car duly entered in the order book pursuant to s. 58 of that Act.
The King v. Benoit, 6 Can. Cr. Cas. 351, 5 Terr. L.R. 442.

GRAND JURY.

Power of summoning more than two grand juries—Order not showing jurisdiction on its face—Disqualification of sheriff —Crim. Code, s. 656.]—The prisoner was convicted at the circuit of the county of C., which opened on the second Tuesday in November, 1897. When the Court first met, as there was no criminal business, the grand jury was discharged. After proceeding for a time with the trial of a civil cause the Court adjourned until November 30, before which time the prisoner was committed for trial. The sheriff, without any order, summoned a second grand jury for the adjourned Court. Objection having been taken, on an order made by the Court, the sheriff summoned a third grand jury, which was practically the same as the second. The jury found a true bill, and the prisoner pleaded guilty to two of the counts in the indictment. It then appearing that the sheriff was related to the prosecutor, the Court, without formally discharging the third jury, allowed the plea of guilty to be withdrawn and ordered a fourth grand jury to be summoned, the venire being addressed to a coroner. The order for summoning the last grand jury (which also directed the summoning of a petit jury) was brief in form and did not show on its face all the facts which necessitated its issue. Among the grand jurors summoned by the coroner were two who had been on the sheriff's third panel. The coroner's grand jury was all drawn from the parish of Woodstock:—Held (affirming the conviction), 1. The order to the coroner to summon the jury need not show on its face all the facts that made its issue a necessity. 2. The facts that the sheriff's jury had not been formally discharged, nor the indictment found by it in terms disposed of were immaterial—the whole proceedings being void by reason of the defect in the returning officer. 3. The power of the Court to summon grand juries is not exhausted by the summoning of two. 4. The disqualification of the sheriff sufficiently appeared. 5. It is not necessary that the grand jury should be drawn from all parts of the county. 6. The fact that some of the jurymen summoned by the coroner were also on the sheriff's panel was not material. 7. It is no objection to the order to the coroner that it directed him to summon both a grand and a petit jury. 8. Section 12 of c. 45 of the Consolidated Statutes applies to criminal as well as to civil matters. Per Tuck, C.J.. —The doctrine held in England that all the coroners of a county, when acting ministerially, constitute but one officer, is not applicable to this province. Per Hanington, J.:—The direction of a venire to a single coroner, and a return by him alone, is sufficient under s. 12 of c. 25 of the Consolidated Statutes, and if not the defect is cured by s. 656 of the Criminal Code.
The Queen v. McGuire, 34 N.B.R. 430, 4 Can. Cr. Cas. 12.

—Irregularity—Grand juror admitted to jury room without being sworn.] — (1) The presence in the grand jury room of an unauthorized person, summoned as a grand juror but not impanelled, during the deliberations of the grand jury will not invalidate an indictment then under consideration, if such person was excluded from the grand jury before the presentment, unless it be shown that the accused was thereby prejudiced. (2) On discovery that a person summoned as a grand juror and coming into court with the grand jury to present an indictment had not been sworn and had been admitted to the grand jury room during their deliberations, the Court may exclude such persons and direct the grand jury to retire to reconsider the bill without requiring the grand jurors to be resworn.
The King v. Kelly, (Que.), 9 Can Cr. Cas. 130.

—Summoning grand Jurors — Constitution of Courts—Criminal Code, s. 662.] — A

provincial legislature has power to determine the number of grand jurors to serve at Courts of oyer and terminater and general sessions, this being a matter relating to the constitution of the Courts, but the selection and summoning of jurors, including talesmen, and fixing the number of grand jurors by whom a bill may be found, relate to procedure in criminal matters in respect of which the Dominion Parliament alone has power to legislate. The Dominion Parliament can exercise its power by adopting the provincial law and has done so by s. 662 of the Criminal Code. The Queen v. Cox, (1898), 31 N.S.R. 311, 2 Can. C.C. 207, approved.

The King v. Walton, 12 O.L.R. 1 (C.A.).

GUARANTY.

See INSURANCE; PRINCIPAL AND SURETY.

GUARDIAN.

—Judicial guardian—Time for discharge.] —A judicial guardian is not liberated nor discharged from his guardianship by the expiration of the year from the date of the seizure and he remains still subject to a rule requiring him to produce the effects committed to his charge unless he shows that they perished without his fault.

Millar v. Gillespie, 5 Que. P.R. 376.

See INFANT.

HABEAS CORPUS.

No original jurisdiction in habeas corpus —B.C. Court of Appeal.]—1. The Court of Appeal of British Columbia has no jurisdiction to grant a writ of habeas corpus in first instance.

The King v. Rahmat Ali, 15 B.C.R. 65. 16 Can. Cr. Cas. 195.

—Justices' conviction for indictable offence—Absence of jurisdiction—Directing further detention.]—The defendant was brought before two justices of the peace and charged with issuing a false cheque. He pleaded "guilty," and they convicted him and imposed a sentence of imprisonment in the Central Prison at Toronto. The offence was an indictable one, and not one of those which two justices are, under Part XVI. of the Criminal Code, authorized to dispose of. Being taken to the Central Prison, the defendant obtained writs of habeas corpus and certiorari in aid, and, on the papers being returned thereunder, moved for his discharge before Clute, J., who made an order quashing the warrant of commitment, but, instead of discharging the defendant from custody, ordered that he should be remanded to the place where he was convicted, and brought before the two justices for a preliminary hearing on the charge:—Held, that the defendant was, when in the Central Prison, "in custody charged with an indictable offence," within the meaning of s. 1120 of the Criminal Code, R.S.C. 1906, c. 146, now amended by 7 and 8 Edw. VII, c. 18, s. 14; and an appeal from the order of Clute, J., was dismissed. Per Meredith, J.A.:—That the order could not be supported under s. 1120; but that, apart from that enactment, there was power to remand the defendant so that he might be dealt with according to law upon the charge originally made against him; that the proper order would be one discharging him out of his present custody and providing for his proper return to his former custody, so that the proceedings which were properly begun against him might be properly continued.

Rex v. Frejd, 22 O.L.R. 566 (C.A.).

—Amended commitment after fiat for writ.]—

Re McMurrer (No. 1), 2 E.L.R. 436 (P.E.I.).

—Warrant addressed to one of a class of which prosecutor is a member—Not void if prosecutor took no part in arrest.]—

Re McMurrer (No. 2), 2 E.L.R. 466 (P. E.I.).

—Arrest in one province on warrant issued in another—Jurisdiction of Judge on habeas corpus application to inquire into facts.] —Where in the case of a charge under s. 475 of the Criminal Code intent to defraud and causation occur in one province and result in delivery of a telegram in another province, the offence is triable in either province: s. 888 Criminal Code. The word "defraud," as used in s. 475 of the Criminal Code, involves or implies something to the prejudice of the financial or proprietary rights of the party defrauded. On an application for a writ of habeas corpus, where the warrant on which the prisoner is detained was issued by a judicial authority without the province, the Judge has jurisdiction to inquire into the facts to such an extent as may be necessary to decide whether or not the judicial authority had jurisdiction to issue the process. A Judge of the superior Court of any province of the Dominion has jurisdiction to prevent removal of an accused prisoner from that province to another upon an information laid by a private individual before a

magistrate in the latter province, if it is made to appear that the proceedings before the magistrate are frivolous or vexatious or mala fide or otherwise are an abuse of the process of the Justice's Court, and to that end may inquire into the facts of the case. On this principle the Judge may on such an application consider the evidence in order to determine if there is such and sufficient evidence of the guilt of the accused as would upon an ordinary preliminary inquiry before a magistrate, make it proper for him to "put the accused upon his trial." . . . though it "does not furnish such a strong presumption of guilt as to warrant his committal for trial." The prisoner sent from Banff, Alberta, to Maizie McGregor (not the informant) at Prince Albert, Saskatchewan, the following telegram: "Get letter at Clayton Hotel, Regina. Come immediately. Ernest threw from horse this morning. Not serious. Have to stay here a week. (Signed) A. H. Matheson." It was shown that this telegram was signed without Matheson's authority. The statements in the telegram were true. Its purpose was to have the person to whom the telegram was sent meet the accused at Banff instead of at Regina:—Held, that it would be impossible to establish an intent to defraud from the sending of the telegram, and as the intent to defraud is an essential element of the offence alleged, the prisoner was discharged.

Rex v. Galloway, 2 Alta. R. 258, 15 Can. Cr. Cas. 317.

Arrest without warrant—Fresh pursuit.]—The police of one province can arrest without warrant a person charged with having committed a crime in another province only where the crime is one for which the accused could have been arrested without warrant in the province where the crime was committed, or where the accused is escaping fresh pursuit: Criminal Code, ss. 30, 33, 649. The coming to British Columbia in September of an officer from Quebec is not a fresh pursuit in respect of a crime said to have been committed on the 1st August. The charge was that the accused, in Quebec, received a ring from S., with directions to hand it to a third person, and that, instead, he converted it to his own use:—Held, that the offence charged fell within the definition of ordinary theft in s. 347 of the Code, and not within s. 355; and for ordinary theft an offender cannot be arrested without warrant. The accused, having been arrested without warrant in British Columbia, was discharged upon habeas corpus.

Rex v. Shyffer, 15 W.L.R. 323.

—Habeas corpus—Jurisdiction of Supreme Court of Canada.]—An application for a writ of habeas corpus was referred by the Judge of the Supreme Court of the province, and, after hearing, the application was refused. On application subsequently made to a Judge of the Supreme Court of Canada, in chambers:—Held, that under the circumstances it would be improper to interfere with the decision of the provincial Court.

In re Patrick White, 31 Can. S.C.R. 383, 4 Can. Cr. Cas. 430.

—Jurisdiction of County Court Judge in New Brunswick.]—A Judge of a County Court has no jurisdiction under s. 108 of the County Court Act to deal with an application for an order for discharge by way of habeas corpus, unless the applicant is confined in the gaol of the county for which he is Judge. Rule absolute for certiorari.

Ex parte Irving, 37 C.L.J. 431 (S.C.N. B.).

—Adjournment—Expenses—Costs—Discretion.]—When the officer or other person to whom a writ of habeas corpus is directed has obeyed it by bringing up the body and making his return, the Judge or Court may make an order for payment by the applicant of the expenses of such officer or person. Dodd's Case (1857), 2 DeG. & J. 510, followed. The costs of proceedings by habeas corpus are governed by s. 119 of the Judicature Act, R.S.O. 1897 c. 51, and are therefore in the discretion of the Court or Judge. Regina v. Jones, [1894], 2 Q.B. 382, followed. Where, in obedience to a habeas corpus, the person to whom it was directed produced the body of an infant before a Judge in chambers, and filed certain affidavits in answer to the writ, making his return thereto, and the applicant thereupon applied for an enlargement, which the Judge granted upon condition of the applicant paying to the respondent a sum for counsel fee and expenses, and the applicant appealed from the order embodying such condition to a Divisional Court, which dismissed the appeal, giving the applicant leave, however, to have her original application heard upon payment of the sum already ordered to be paid and a further sum, the Court of Appeal refused the applicant leave to appeal from the order of the Divisional Court.

Re Weatherall, 1 O.L.R. 542 (C.A.).

—In province of Quebec—Jurisdiction of Judge not resident within the district where the prisoner is confined.]—(1) A person deprived of his liberty, who wishes to obtain the issue of a writ of habeas corpus, must make his application for such writ to any Judge who may be in the district in which the prisoner is confined, and who is qualified and authorized to exercise his judicial functions therein. (2) If

there be no Judge within the limits of such district, the application for a writ of habeas corpus may be made either to a Judge in any adjoining district, or to any Judge in the City of Montreal or in the City of Quebec, according as an appeal from the district where the applicant is confined would be brought to one or the other city. (3) The Court of King's Bench, appeal side, has original jurisdiction at Montreal or Quebec in matters of habeas corpus with respect to any person confined in a district from which appeals are brought to one or the other city; but a Judge of the Court of King's Bench has no jurisdiction to grant an order in chambers in such matter, unless it be first established that there was no Judge within the limits of the district where the prisoner is confined, when the application was made to such Judge of the Court of King's Bench. (4) Where a Court or Judge is not vested with jurisdiction by law, the consent of the parties cannot confer jurisdiction.

Ex parte Louis Tremblay, 11 Que. K.B. 454, 6 Can. Cr. Cas. 147.

—Jurisdiction of County Court Judge in Nova Scotia—Acts of 1897, c. 32, s. 2 — Costs against informant.]—Defendant was convicted of stealing the property of B., and was sentenced to be imprisoned in the city prison of the city of Halifax. An order made by the Judge of the County Court, under N.S. Acts of 1897, c. 32, s. 2, for defendant's discharge, under a writ of habeas corpus, directed that the informant B. pay to defendant his costs of the application and order for his discharge. There was nothing to show that B. was the informant except a statement to that effect in the affidavit of defendant, upon which the application for the order was made, which was not borne out by either the conviction or the commitment: —Held, that the order was wrong and must be set aside.

The Queen v. Bowers, 34 N.S.R. 550, 6 Can. Cr. Cas. 100.

—County Court Judge's Criminal Court— Court of Record—Illegal sentence.] — Habeas corpus does not lie to correct a sentence of imprisonment passed by a County Court Judge's Criminal Court, alleged to be for a time longer than is authorized. The proper mode of procedure is by case reserved or by appeal under Part LII. of the Code.

The King v. Kavanagh, 5 Can. Cr. Cas. 507.

—Proceedings certified without certiorari —Discharge on habeas corpus — Subsequent motion to quash.]—A motion to quash a summary conviction cannot be entertained by a Superior Court without a writ of certiorari for that purpose and a return to such writ. Where on a habeas corpus application the magistrate is directed by an order to return the proceedings relating to the imprisonment and thereupon returns under such order the information, depositions and conviction, such conviction is not by reason thereof brought under the jurisdiction of the Superior Court for the purpose of a motion to quash the same.

The King v. MacDonald (No. 2), 5 Can. Cr. Cas. 279.

—Summary conviction — Appeal—Subsequent habeas corpus proceedings.]—The decision of the Court of General Sessions or County Court in appeal from a summary conviction is final and conclusive, and a Superior Court has no jurisdiction to interfere by habeas corpus.

The King v. Beamish, 5 Can. Cr. Cas. 388.

—Successive applications.]—An application for the prisoner's discharge on the return of a writ of habeas corpus may after refusal by one Judge in Chambers, be renewed before another Judge in Chambers, and the latter may grant a discharge notwithstanding its refusal by a Judge of co-ordinate jurisdiction.

The King v. Laura Carter, 5 Can. Cr Cas. 401.

—Theft—Summary trial—Offender over 17 years of age—Commitment for two years to the reformatory — Transfer to Central Prison on two years' sentence— Petty offence—Six months' sentence.] — The defendant, a youth over 17 years of age, was charged before a magistrate with stealing eighty cents out of the contribution box of a church. The magistrate's return showed that he pleaded guilty and was committed for two years to the provincial reformatory. He was taken to the reformatory and sent on to the central prison and kept there in custody under the warrant of commitment to the reformatory. On a motion for his discharge on the return of a habeas corpus:—Held, that there had been a miscarriage of legal directions in sending a lad of over 17 years of age to the reformatory and sending him on a sentence of two years to the central prison. Held also, that s. 785 of the Code is intended to comprehend summary trial "in certain other cases" than those enumerated in s. 783, and that when the offence is charged and in reality falls under s. 783 (a) it is to be treated as a comparatively petty offence with the extreme limit of incarceration fixed at six months under s. 787. Held, also, that under the circumstances this was not a case for further detention or the direction of further pro-

ceedings under s. 752, and an order for the defendant's discharge was granted.

Rex v. Hayward, 5 O.L.R. 65 (Boyd, C.), 6 Can. Cr. Cas. 399.

—Neglect of peace officer to make a return—Contempt of Court.]—(1) A peace officer upon whom a writ of habeas corpus has been served, directing him to produce a prisoner who is in his custody, is not guilty of contempt of Court in neglecting to produce the prisoner, when, in good faith and for reasons which he believes to be valid, he does not do so. (2) A return setting forth all these reasons is sufficient return to such a writ.

Greene v. Carpenter, 22 Que. S.C. 104 (Andrews, J.).

—Return—Two warrants of commitment for same offence—No intention shown that second in substitution for first irregular warrant.]—Where a return to a writ of habeas corpus, or to an order of the nature of such writ, specifies two warrants of commitment for the same offence, and neither the second warrant nor such return declares the second warrant to be in substitution for or in amendment of the first which is irregular and bad, the prisoner should be discharged.

The King v. Venot, 6 Can. Cr. Cas. 209 (Ritchie, J.).

—Statutory commitment—Warrant for detention—Variance.]—A bastardy statute (R.S.N.S. 51) specially authorizing a commitment until an order of filiation is made or refused, is not complied with if the warrant of commitment directs detention until the prisoner is "discharged in due course of law," and the variance is a good ground for discharge under habeas corpus.

Ex parte O'Donnell, 7 Can. Cr. Cas. 367.

—Justice proceeding with trial instead of preliminary enquiry—Want of jurisdiction.]—Where a justice, having no summary jurisdiction over the offence charged other than to hold a preliminary enquiry and commit for trial, has himself tried and convicted the accused, no order should be made in habeas corpus proceedings for the further detention of the accused and his return to the justice's Court for a preliminary enquiry.

The King v. Blucher, 7 Can. Cr. Cas. 278.

—Certiorari in aid.]—L. accused the applicant before a justice of the peace for the district of having cut wood on his property. The applicant did not appear in answer to the summons issued and the justice fined him $5 and costs, or, on default of payment, to fifteen days' imprisonment at hard labour. A warrant of commitment to jail was issued by the justice under Art. 783 Cr. Code, and the applicant was imprisoned. He at once procured a writ of habeas corpus and an ancillary writ of certiorari to be issued claiming that a single justice of the peace could not issue a warrant of commitment, and that the conviction was illegal:—Held, 1. That a single justice of the peace has no jurisdiction to convict under Art. 783 Cr. Code and that a commitment under such a conviction is bad. 2. When it appears on the face of the warrant that the justice has exceeded his jurisdiction recourse to an ancillary writ of certiorari is unnecessary. 3. The writ of habeas corpus was made absolute and the conviction and commitment were quashed.

Coté v. Durand, Q.R. 25 S.C. 33 (Sup. Ct.). R. v. Coté, 8 Can. Cr. Cas. 393.

—Habeas corpus in civil matters—Commitment—Bailiff—Costs—Form of commitment.]—(1) A person who is restrained of his liberty under a warrant of commitment granted in a civil matter by a Court or Judge having jurisdiction, is not entitled to liberation under a writ of habeas corpus. (Art. 1114, C.C.P.), and more particularly, where no excess of jurisdiction is shown. (2) Even if it were assumed that, notwithstanding the terms of Art. 1114 of the Code of Procedure, the Court has power to inquire into the regularity of the proceedings, the absence in the rule and commitment of a valuation of the goods, upon payment of which the guardian in default to produce the goods would be entitled to be released, cannot be invoked by him as a ground for asking his liberation—such valuation, under Art. 658, C.C.P., being a right to be exercised by the guardian in default, and not a duty imposed upon the seizing creditor. (3) The bailiff of the Superior Court has concurrent jurisdiction with the sheriff for the execution of a writ for coercive imprisonment. (4) The fact that the writ of constrainte par corps, under which the petitioner for habeas corpus is detained, calls on him to pay, in addition to the debt and taxed costs, the costs of the writ of constrainte and of the arrest and commitment of the petitioner, is not an irregularity.

Ex parte Kenotasse, 13 Que. K.B. 185.

—Imprisonment in default of payment—Irregularity in commitment — Costs not ascertained.]—The prisoner was in custody under an order for his imprisonment for one year. In addition to this he was ordered to pay a penalty of $400 and costs within thirty days, and in default to imprisonment for three months unless sooner paid:—Held, that upon habeas corpus proceedings within the year, the objections

that the costs were not ascertained or stated in the order, and that the warrant of commitment erroneously stated that the time for payment of the penalty and costs had expired, could not be considered; but the right should be reserved to the prisoner to apply again for his discharge at the expiration of the year. The amount of the costs should have been fixed by the Judge and inserted in the order, instead of being left to be ascertained by a taxing officer.

Rex v. Carlisle, 6 O.L.R. 718 (C.A.), 7 Can. Cr. Cas. 470.

— County Court Judge—Jurisdiction—C. S.N.B., c. 41.]—A Judge of a County Court has no jurisdiction to grant an order under the Habeas Corpus Act (Consolidated Statutes of N.B., c. 41) where the person applying is not confined within a county of which he is a Judge. Where there is conflicting evidence in a case for selling liquor contrary to the Liquor License Act, 1896, the finding of the committing justice on questions of fact cannot be reviewed on an application for an order in the nature of a habeas corpus.

The King v. Wilson; Ex parte Irving, 35 N.B.R. 461.

—Criminal law—Habeas corpus — Summary conviction — Warrant of commitment—No conviction alleged — Prisoner discharged.]—Application for a writ of habeas corpus and for discharge of prisoner, detained in custody, under a warrant of a justice of the peace in Form V. Criminal Code, s. 596 (committal for trial). The warrant did not allege a conviction but only that the accused had been charged before the justice. The warrant of commitment was admittedly bad, but an amended conviction was returned to the clerk of the Superior Court by the justice of the peace after the argument:—Held, that where a warrant of commitment upon a conviction does not allege that the prisoner had been convicted of an offence, the conviction cannot be referred to in order to support the warrant. Order made discharging prisoner. Semble, that had the warrant shown the prisoner to have been convicted of some specific offence, even though insufficiently stated, the conviction could have been referred to support it. An application to discharge a prisoner held under a defective warrant of committal in execution will not be adjourned in order to procure the return of the conviction with a view to supporting the warrant, if the prisoner has been actually brought up on a habeas corpus, aliter where he has not been brought up.

The Queen v. Lalonde, 2 Terr. L.R. 281, 9 Can. Cr. Cas. 501.

—Appeal—C.P. 1125.]—No appeal lies to the Court of Review in the province of Quebec in matters of habeas corpus ad subjiciendum.

Lorenz v. Lorenz, 7 Que. P.R. 149 (C.R.).

—Warrant of commitment — Amended warrant—Reception on appeal—Form of conviction.]—The prisoner was convicted before three justices of the peace for being the keeper of a disorderly house, bawdy house, or house of ill-fame, or house for the resort of prostitutes—following the words of sub-s. (j) of s. 207 of the Criminal Code—and was committed to gaol for six months under a warrant signed by two of the justices. She obtained a writ of habeas corpus, and upon the return of it moved for her discharge, which was refused by a Divisional Court. She then appealed to the Court of Appeal, and, after the appeal had been argued and judgment reserved, the justices returned a further warrant of commitment signed by all three justices, which was received by the Court of Appeal. The offence was stated to have been committed in a city, for which there was a police magistrate. The warrant returned to the Court of Appeal was signed by all three justices, under their respective seals, and set forth a conviction by them, all acting in the absence of, and one at the request of, the police magistrate:—Held, that under s. 208 of the Criminal Code, as amended by 57 and 58 Vict. c. 57, one justice had jurisdiction to adjudicate upon the charge, and by R.S.O. 1897, c. 87, s. 7, had authority to act in the city in the absence of the police magistrate; and if authority be given to one justice it may be executed by any greater number, and the fact that others join in making the conviction does not invalidate the proceeding. Held, also, that the conviction and commitment, following the language of sub-s. (j) of s. 207 of the Code, properly set out and disclosed the offence; s. 846 (2) of the Code (63 and 64 Vict. c. 46).

Rex v. Leconte, 11 O.L.R. 408, 11 Can. Cr. Cas. 41.

—Arrest in foreign country—Forcible return to Canada without extradition proceedings—Right to question on habeas corpus.]—The prisoner who had committed a number of thefts in Canada, and had escaped to the United States, was arrested there on a telegram from Canada, and, as he alleged, was forcibly brought back against his will, and without the intervention of the extradition proceedings, the Crown, however, alleging that he came back voluntarily. On November 11th he was brought before a justice of the peace of the city where the offences were committed, for preliminary investigation into

the charges. There were then two informations before the justice, taken before the police magistrate on November 6th on which warrants of arrest had been issued, one being that on which the telegram had been sent directing the prisoner's arrest. Two further informations were taken on the same day before the justice for other alleged thefts. A remand was made to the 13th November, the justice issuing his warrant of remand, under his hand and seal, the warrant reciting the bringing of the prisoner before him as a justice of the peace, acting for, in the absence of and at the request of, one of the police magistrates of the city, there being two such police magistrates, and on the depositions remands were noted without it being stated by whom. On November 13th a writ of habeas corpus was issued, to which, by a return, dated the 14th, the jailor returned, as the only cause of the prisoner's detention, the warrant of remand of the 11th November; but on the 16th November he made a further return of four additional warrants of remand, dated the 13th November, under the hand and seal of the said police magistrate remanding the prisoner until the 17th November:—Held, that the circumstances under which the prisoner was brought back to Canada could not be enquired into, that being a matter to be raised by the government of the country whose laws were alleged to have been violated, or at the suit of the party injured against the person who had committed the alleged trespass against him. Held, also, whether or not the justice had jurisdiction to take the informations or to make the remand, by reason of it not appearing that he was acting in the absence of both police magistrates, and for other reasons, the detention of the prisoner was justifiable, for he was properly before the police magistrate on the 13th on the informations taken before him on the 6th November and was then duly remanded; and though the second return was made subsequently to the issue of the writ, it was valid, and could be looked at in support of the prisoner's detention.

Re A. R. Walton, 11 O.L.R. 94 (C.A.), 10 Can. Cr. Cas. 269.

— Certiorari in aid — Jurisdiction.]—A Judge of the Superior Court of the district where a person is restrained of his liberty has jurisdiction to entertain the petition for his discharge on habeas corpus. (2) Habeas corpus does not lie against detention in virtue of a conviction by a Court of competent jurisdiction, and in such a case there is no ground for the issue, as ancillary, of a writ of certiorari to bring up the record in the case in which the conviction was made.

Ex parte Goldsberry, Q.R. 27 S.C. 439, 10 Can. Cr. Cas. 392.

—Quashing writ—Further order—Whipping.]—Under section 752 of the Criminal Code, a Judge has no jurisdiction to make an order, at the time of quashing a writ of habeas corpus, directing the infliction of the penalty of whipping upon a convicted person who is remanded into custody after the date when he had been sentenced to be flogged.

Goldsberry v. Bernatchez, Q.R. 28 S.C. 52 (Sup. Ct.). R. v. Goldsberry, 11 Can. Cr. Cas. 159.

—Substitution of valid for defective conviction.]—The prisoner was convicted under sub-section (b) of section 177 of the Criminal Code, 1892, for an indecent exposure of his person and sentenced to three months' imprisonment. Neither the conviction nor the warrant of commitment stated, although the evidence tended to show, that the act had been done wilfully. He then applied for a writ of habeas corpus:—Held, per Mathers, J., following Re Plunkett, (1895), 1 Can. Cr. Cas. 365, that the prosecution should be permitted, on the hearing of the application, to substitute a new conviction and warrant containing the omitted word; and the substitution having been made, that the application should be refused, but without costs. Held, also, by the full Court, that no appeal to the full Court lies in this province from the decision of a single Judge refusing a habeas corpus application, though a prisoner may make successive applications for the writ to one Judge after another, or he may make a direct application to the Court in banc.

Rex v. Barre, 15 Man. R. 420, 11 Can. Cr. Cas. 1.

—Contestation of intervention—Motion to reject in part—Arts. 224, 1114, 1122 C.P.Q.]—The contestation of an intervention being a plea thereto, a petitioner for habeas corpus may at any time, even at the hearing of the cause, and without delivering reasons in writing, point out irregularities in the proceedings whereby he has been deprived of his liberty.

Pichê v. Gareau, 7 Que. P.R. 331 (Lavergne, J.).

—Habeas corpus—Issue of two writs—Regularity of second—Subsequent arrest.] — The prisoner was convicted of an offence on the 17th of January and sentenced to four months' imprisonment, but instead of being imprisoned his recognizance was taken by the magistrate to appear when called upon and he was allowed to go free. On the 27th of March, without any notice, a warrant was issued and he was arrested and put in gaol. A writ of habeas

corpus was granted and a motion for his discharge was made on the 26th of April, and refused, the papers being on their face regular, but leave was reserved to move for a new writ on the expiry of four months from the day of sentence. A new writ was granted on the 25th day of June, and motion made for his discharge on the 27th:—Held, that there was a right to issue the second writ, the first being premature and there having been no adjudication upon the matter. Taylor v. Scott, (1898, 30 A.R. 475, distinguished. Held, also, that the term of imprisonment having begun on the day of passing sentence, the full term had expired; that the prisoner when out on his recognizance had not been guilty of an escape, and that he was not "at large . . . without some lawful cause," and an order was made for his release. Order for protection of magistrate made on terms.

Rex v. Robinson, 14 O.L.R. 519 (Riddell, J.), 12 Can. Cr. Cas. 447.

—Jurisdiction of Supreme Court of Canada.]—See CANADA TEMPERANCE ACT.

Re Richard, 38 Can. S.C.R. 394, 12 Can. Cr. Cas. 204.

—Extradition warrant—Escape of prisoner—Recapture.]—If a prisoner who has applied for a writ of habeas corpus escapes after the issue of such writ and pending the argument upon its return, and thus himself puts an end to the detention, he thereby waives all right which he might have had under the writ, and no order can be afterwards made for his release, even though he may have meanwhile again come into the custody of the same sheriff. If, however, in such a case he is recaptured or surrenders himself again into custody, the Court is not precluded from granting him another writ of habeas corpus under proper circumstances, and where there has not already been an adjudication upon the merits.

Re Bartels, 15 O.L.R. 205, 13 Can. Cr. Cas. 59.

—Penalty—Recorder's Court — Indefinite penalty.]—When a penal Act fixes the maximum amount of the penalty to be imposed for an offence the Court cannot impose a greater or different penalty on conviction. Where the Act fixes the amount of the fine and provides that in default of payment thereof and costs the offender may be imprisoned for six months at hard labour, a conviction imposing a fine and costs, and, in default of payment, to imprisonment for six months according to law is a nullity and the offender will be discharged from imprisonment on habeas corpus.

Poulin v. City of Quebec, Q.R. 33 S.C. 190, 13 Can. Cr. Cas. 391.

—Conviction—Commitment — Proceedings anterior to conviction.]—Although a conviction on its face appears sufficient to support the commitment of the defendant, the Court will on the return of a habeas corpus, examine the proceedings anterior to the conviction to see if they warrant his detention, and, if they do not, will order his discharge. Regina v. St. Clair (1900), 3 Can. Cr. Cas. 551, 27 A.R. 308, followed.

Rex. v. Simmons, 17 O.L.R. 239, 14 Can. Cr. Cas. 5.

—Discharge of prisoner—Conditions of not bringing action against magistrate.] — Where a prisoner is entitled to his discharge, under a writ of habeas corpus, by reason of no offence being disclosed in the material under which he was committed, such discharge cannot be made conditional on no action being brought against the magistrate, or other person in respect of the conviction, or anything done thereunder.

Rex v. Lowery, 15 O.L.R. 182, 13 Can. Cr. Cas. 105.

—Court of Record—Right to issue writ of habeas corpus to.]—A prisoner charged with perjury elected to be tried without a jury at the county Judge's Criminal Court, and was tried there and convicted, the Judge refusing to state a case for the Court of Appeal; but postponing judgment to enable the prisoner to appeal. The Court of Appeal, however, refused leave to do so. The discharge of the prisoner was then moved for in the High Court under habeas corpus, and certiorari issued in aid thereof; which was refused on the ground that the habeas corpus, etc., had been improvidently issued, that writ not lying to the county Judge's Court, a Court of Record, and the prisoner was remanded for sentence, which was pronounced without any objection. Some time afterwards the sentence was objected to for alleged want of jurisdiction in the county Judge to pronounce it, because the papers which had been returned to but not filed in the High Court under the certiorari had not been brought back, but were in the hands of one of the High Court officers, and so did not repass to the county Judge's Court, a special order of transfer being necessary. A motion for leave to appeal from the conviction, and for an order requiring the county Judge to state a case, was, under the circumstances, refused.

Rex v. Harrison, 15 O.L.R. 231 (C.A.), 13 Can. Cr. Cas. 108.

—Warrant of commitment—Failure to recite conviction—Motion for discharge—Application by Attorney-General for certiorari.]—The defendant was imprisoned

under a warrant of a police magistrate, directed to a constable and the keeper of the gaol, reciting that the defendant was charged before the magistrate for unlawfully selling, at a place and on a day named, intoxicating liquor, and reciting an information for a third offence against the Liquor License Act, and then, without any allegation of a conviction, commanding the defendant's conveyance to the gaol and detention there at hard labour for six months. The defendant procured a writ of habeas corpus, declining a certiorari in aid. Upon a motion made for the discharge of the defendant, counsel for the Attorney-General appeared and asked for a certiorari to bring up the papers. This was granted, subject to all objections, and the motion for discharge adjourned till the return of the certiorari:—Held, that the Attorney-General is entitled to a certiorari of absolute right and absolutely in all cases; and that the recent statute, 8 Edw. VII. c. 34 (O), and the corresponding rules do not affect such right. Held, also, that there was power to adjourn the motion, and that the proper practice was followed. Held, however, that the warrant was bad, and could not be cured or amended under s. 1123 of the Criminal Code, R.S.C. 1906, c. 146, nor under s. 105 of the Liquor License Act, R.S.O. 1897, c. 245. The defendant was entitled to be discharged, and the discharge should not be stayed for a new warrant, nor should terms be imposed.

Rex v. Nelson, 18 O.L.R. 484, 15 Can. Cr. Cas. 10.

—Warrant of commitment—Jurisdiction of magistrate not shown.]—Where the warrant of commitment stated that the prisoner was convicted before a justice of the peace "in and for the said county of Westminster," but the document was signed: "J. Pittendrigh, Cap'n, S. M.":—Held, that the warrant was bad.

Rex v. Hong Lee, 14 B.C.R. 248, 15 Can. Cr. Cas. 39.

—Conviction for offence against provincial Act—Application for second writ—Res judicata.]—The procedure applicable to a motion for a writ of habeas corpus, where there has been a committal for an infraction of a provincial Act (in this case the Liquor License Act) is such as may be prescribed by the provincial legislature. A Divisional Court of the High Court of Justice has no power to hear a motion for a writ of habeas corpus unless a Judge has directed that it be made returnable before a Divisional Court, or unless the parties consent to a Divisional Court entertaining the motion. Judicature Act, R.S.O. 1897, c. 51, s. 67; R.S.O. 1897, c. 83, s. 8; Con. Rule 117; and even if the Court in this case had jurisdiction to grant a motion made to it for the issue of a second writ, the matter was res judicata by the judgment of the Court on a motion to discharge the defendant upon the first writ. R. v. Miller, 19 O.L.R. 125. Taylor v. Scott (1899), 30 O.R. 475, followed.

Rex v. Miller (No. 2), 19 O.L.R. 288, 15 Can. Cr. Cas. 156.

HARBOUR.

See SHIPPING.

HAWKERS.

See MUNICIPAL LAW, III.

HEALTH LAWS.

See PUBLIC HEALTH.

HEIR.

See SUCCESSION.
See EXECUTORS; DEVOLUTION; WILLS.

HIGHWAY.

Coasting on bob-sleighs in streets.]—A village municipality in which "coasting on bob-sleighs" is carried on, as a common practice in the streets, and that does nothing to put a stop to it, is guilty of negligence and liable in damages for accidents to passers-by.

Dudevoir v. Village of Waterville, 37 Que. S.C. 389 (C.R.).

—Misfeasance by Government contractor—Sidewalk construction.]—A contractor who was employed by the Dominion Government to construct a concrete sidewalk around the post office in the town of L., excavated the sidewalk preparatory to putting in the concrete, and, as a temporary crossing for the public and the men carrying on the work, laid down a plank, one end on which rested on the curbstone and the other end on the ground near the entrance to the post office. The evidence showed that the plank was defectively placed, that it fell a number of times in consequence, and that it fell while the plaintiff was crossing it, causing the injuries for which the action was brought. There was no evidence to show that the town or town authorities participated in the doing of the work or that they were applied to for or gave a permit for the opening up of the sidewalk, although they had

knowledge that the work was being done:—Held, that, under the circumstances mentioned, the town was not liable for any act of misfeasance on the part of the contractor or his principal. Maguire v. Liverpool, (1905), 1 K.B. 767 followed.

Hirtle v. Town of Lunenburg, 44 N.S.R. 277.

Obstruction — Injury to pedestrian — Liability of municipal corporation — Indemnity.]—The plaintiff was injured while walking at night upon the sidewalk of a street in a city by tripping over two pieces of scantling placed upon the sidewalk to protect a bit of cement 10 feet square, which had been put down to repair the sidewalk. A lighted lantern had been left at the spot, but it had gone out before the plaintiff came there. The plaintiff sued the municipal corporation for his injuries, and the corporation brought in P. as a third party, under s. 609 of the Municipal Act. P. had been instructed by the defendants' engineer to repair the sidewalk; there was no written contract; he was in the habit of doing repairs for the defendants; he carried on the business of putting down cement walks and roads; he had his own plant, materials, and men, and paid his men for the work they did:—Held, upon the evidence, that the defendants were liable to the plaintiff for his injury, and that P. was liable over to the defendants. P. was a contractor and not a servant.

Reid v. City of Toronto, 1 O.W.N. 450, 699 (D.C.).

—Highway Act, N.S. Acts 1908, c. 4 — Commutation work — Time for performance — Notice.] — The Highway Act, Acts of N.S., 1908, c. 4, provides among other things that commutation work "shall be performed between the first day of April and the 31st day of July in each year":—Held, that this provision is directory and not mandatory and that it is no answer to proceedings for non-payment of the rate and non-performance of the work that the notice stating the time and place for the performance of the work was not served until after the latter of the two dates mentioned.

Municipality of Halifax v. Fredericks, 44 N.S.R. 418.

—County council—Closing of road—Notice.] —A resolution of a municipal council which orders a road to be closed without previous notice to the public is void.

Bédard v. County of Quebec, Q.R. 37 S.C. 186.

—Maintenance of roads—Exception of front roads.]—A municipal corporation charged with the maintenance of roads by virtue of Art. 535 M.C. cannot by by-law, make any exceptions other than those specified in that Article. Therefore, it cannot except, for the maintenance of fences, a road opened by the Government (and handed over to the municipality) under a special Act by which the adjoining owners had received an indemnity for the maintenance for all time, by them and their heirs, of the fences upon it. A road which crosses obliquely and divides into two parts, land bounded by a front road is not a front road for the part of the land beyond which has become a distinct property on being acquired by a new owner.

Carden v. St. Michel de Rougemont, Q.R. 38 S.C. 42 (Ct. Rev.).

—Private lane—Dedication—Acceptance by municipality.]—About forty years before the action, G. laid out a lane in a city between building lots of his own on either side, leading eastward from a street, but blind at the east end. This lane had ever since been open. There was no formal dedication to the city, but the city had put a gas main, two gas lamps, a water main, and a hydrant upon the lane. The city had not assessed the lane; and it was apparently considered in all respects, save one, as a city street. But G. built a sidewalk upon the lane, after what he considered dedication, and also repaired it from time to time as required. In 1896 G. gave the property to his wife, the defendant, but continued to look after it for her. On the 22nd October, 1908, a person drove upon this sidewalk and broke it, but neither the defendant nor her husband knew this until after the plaintiff was injured on the 24th October. The plaintiff, thinking the lane was open at the east end, drove along it towards the east, and, having some trouble with his horse, jumped out upon the sidewalk at the point where it had been broken, and was injured. The part of the sidewalk which was broken had been put in by G. since the transfer to the defendant. In an action for damages for the plaintiff's injuries the jury negatived all negligence except the failure to repair from the 22nd to the 24th October, which they found to be negligence:—Held, that G. intended to dedicate the lane, and the city accepted the dedication, long before the defendant became owner of the property adjoining; the lane was, therefore, a public highway, the plaintiff was properly there, and there was nothing in his act in leaping upon the sidewalk in itself wrong; and the rights of the parties depended upon the duty of the defendant in respect of the sidewalk. Although the defendant did not prove any express permission or license from the city to place or repair the sidewalk, sufficient appeared to show that the city tacitly licensed and permitted what was done; the private liability to repair was co-extensive with that of the city, and not more onerous; there must be ordinary care and diligence—an absence of negligence; and the finding of the jury of negligence in not

repairing within two days, a time which would not justify a Court in inferring notice, could not be allowed to stand.

Rushton v. Galley, 21 O.L.R. 135.

—**Municipal corporation—Keeping roads in good condition.**]—Unless there is a special by-law obliging a municipal corporation to repair a road, a mandamus does not lie to compel it to repair either a front road or a by-road.

Lichtenheim v. Pointe-Claire, 11 Que. P.R. 89.

—**Obstruction at side of road—Injury to travellers.**]—The plaintiffs on a dark night were driving in an overcrowded buggy upon a township line highway, the centre part, designed for vehicles, being in good repair, when the buggy upset upon the edge of the ditch at the side of the central travelled roadway, and the plaintiffs were thrown against some hard substance—they said, iron piping left uncovered by the defendant gas company upon the highway, beyond the ditch and next to the fence, on the part designed for pedestrians—and injured:—Held, assuming that the plaintiffs were thrown against the piping—and that, though not the cause of the injury, occasioned its serious extent—that the proximate cause was the upset of the buggy, which was facilitated at least by its overcrowded and top-heavy condition; that the plaintiffs were not exercising reasonable care; and, although the piping was an obstruction upon the pedestrian part of the way, it could not be said that the municipalities failed to exercise proper care for the safety of travellers upon the central part by permitting it to lie there uncovered. The action was dismissed as against all the defendants without costs, the uncovered condition of the piping being considered in dealing with the costs.

Everitt v. Township of Raleigh, 21 O.L.R. 91.

Closing highway—Damage resulting.]—Defendant council closed a portion of a public highway leading to plaintiff's hotel. Her hotel did not abut or front upon the highway closed:—Held, that its proximity to such highway enhanced its value and the closing of such highway depreciated its value. Plaintiff awarded $500 damages. Re McCauley and Toronto, 18 O.R. 416, specially referred to.

Taylor v. Belle River, 15 O.W.R. 733, 1 O.W.N. 609.

—**Closing portion by municipal corporation — By-law.**] — Municipal corporation closed a portion of a public highway by by-law. Plaintiffs brought action claiming damages, and asked to have the by-law declared invalid or in the alternative to have it declared that one of the plaintiffs was entitled to a right of way over the north half of the portion of the highway so closed. Sutherland, J., dismissed plaintiff's action with costs, holding that the evidence was inadequate to establish that the highway in question was an original allowance for a road, therefore s. 660 (2) of the Municipal Act did not apply, and that it could not be said that the closing of that portion of the highway left plaintiffs without another convenient road to their lands, and that their remedy was under the arbitration proceeding initiated by plaintiffs.

Hanley v. Township of Brantford, 16 O.W.R. 812, 1 O.W.N. 1121.

—**Right of company to place poles and wires on public road.**]—The plaintiffs alleged that the defendants, without leave or license, entered upon a highway in the township and erected and maintained a number of poles and strung wires thereon for the purpose of transmitting electricity from one town to another; and the plaintiffs claimed damages for the trespass, and asked for the removal of the poles and wires. The defendants were incorporated under the Ontario Companies Act to acquire and carry on the electric light and power plant operated at New Liskeard, etc.:—Held, that R.S.O. 1897, c. 200, did not apply to a company having such broad and general powers as were contained in the charter of the defendants. The defendants were in the same position as any other company for commercial purposes. They had no right upon the streets or highways without having received legislative sanction, either directly, or indirectly through the action of properly authorized municipal bodies. It was alleged that the plaintiffs were taking these proceedings mala fide and in order to compel the payment of an extortionate rental:—Held, that the Court had no concern with the motives of the plaintiffs; when they came to the Court, they were entitled to their legal rights, no matter what motive induced them to assert such rights.

Township of Bucke v. New Liskeard Light Heat and Power Co., 1 O.W.N. 123 (D.C.).

—**Encroachment on highway — "Porch or projection attached to any dwelling"—Verandah.**]—When an Act of Parliament begins with words which describe things of an inferior degree and concludes with general words, the latter shall not be extended to anything of a higher degree. A statute confirming a survey of a town provided that houses built before a named date need not be removed though encroaching upon streets as ascertained by such survey, but that this "shall not apply to any fence, steps, platform, sign, porch or projection attached to any such dwelling house":—Held, that a verandah of wood, resting on stone pillars, having its own roof, and firmly attached to such a house was an integral part of the house, and not a porch or

projection attached to it, and need not be removed under the Act. Held, also, that the position of the house and verandah did not debar the owner from applying for compensation under the Ontario Municipal Act for damage sustained, within s. 448 of that Act, by lowering the grade of the street in front.

Williams v. Town of Cornwall, 32 O.R. 255.

—Grading—Arbitration as to lands injuriously affected — Costs — Discretion.]—The power given by the Municipal Act, R.S.O. c. 223, s. 460, to arbitrators under that Act "to award the payment by any of the parties to the other of the costs of the arbitration, or of any portion thereof," should receive the same construction as Consolidated Rule 1130; the discretion given is a legal discretion, and subject to the rule that when the claimant has been guilty of no misconduct, omission, or neglect such as to induce the Court to deprive him of his costs, the unsuccessful party should bear the whole costs of the litigation.

Re Pattulo and Town of Orangeville, 31 O.R. 192.

—Obstruction placed upon boulevard for repairs—By-law prohibiting use of boulevard.]—Plaintiff, in his hurry to get medicine for his wife, attempted to cross a street diagonally, when he fell among some loose scoria blocks placed upon the boulevard by defendants to be used in repairing the street. Plaintiff broke his leg, and brought action to recover damages. Latchford, J., held, that defendants owed no duty to plaintiff to leave the boulevard unobstructed by the blocks; that had plaintiff conformed to the city by-law prohibiting persons from walking on any boulevard where there were crossings, he would not have been injured. Action dismissed.

Breen v. City of Toronto, 2 O.W.N. 87, 17 O.W.R. 41.

—Bridge — Maintenance — Cadastre.]—When the county council (bureau des délégués) has declared a local bridge to be a county bridge it is for the local corporation responsible for its maintenance to determine by procés verbal which of its ratepayers should contribute thereto the effect of the decision of the county council not being to impose upon all the local ratepayers the charge of such maintenance. Though it may be irregular to subject, for work on a bridge, all the owners of lots designated on the cadastre by different numbers without indicating the number of the lot on which the land drained is situated, such irregularity does not make the procès verbal a nullity when it is shown that the lots, though they bear different numbers, form one and the same tract (exploitation). As a municipal bridge should be a charge on all the ratepayers of the concession (rang) in which it is situated certain ratepayers cannot, by procès verbal be exempted from liability for its maintenance on the ground that they are already liable to maintain other bridges constructed on the watercourses which they have made to drain their own lands and in their exclusive interest.

Dupuis v. Parish of St. Isidore, 17 Que. S.C. 482 (Cir. Ct.), affirmed on review 28 April, 1900.

—By-law — Clerical error — Appeal to county council — Repugnancy.]—The municipal council of St. Grégoire had homologated a procés-verbal ordering the opening of a road. In his report to the council, the superintendent had given the date of his appointment as June 13th, whereas it was June 12th. An appeal was taken to the county council to have the procès-verbal quashed as being unjust and onerous to the parties interested. The petition in appeal gave the proper date of the superintendent's appointment, but did not set up the clerical error in his report. The appellant claimed that this error ousted the county council of jurisdiction. A motion was made to consider the procès-verbal on its merits as the objection as to the error was not raised before the local council and could not work any prejudice. An amendment declaring that the council had no jurisdiction and that the procès-verbal be quashed was adopted, and it was quashed without consideration of its merits. In an action to annul this resolution:—Held, that the decision of the county council was contradictory and illegal; that the error as to the date of appointment of the special superintendent was not material, and had not been invoked either before the local council or by the petition on appeal; and that the decision of the county council contradictory in form, was a denial of justice to the respondents, inasmuch as, after declaring it had no jurisdiction, the council quashed a procès-verbal, regular on its face, without inquiring into the merits as it was its duty to do.

Ricard v. Lemyre, 19 Que. S.C. 172 (Ct. of Rev.).

—Maintenance of bridge—Judgment against corporation—Levy on ratepayers.]—A municipal corporation cannot, under Art. 1027 et seq. M.C., raise by assessment on the ratepayers responsible for maintenance of a bridge the amount of a judgment against it in an action brought in consequence of an accident resulting from failure to maintain said bridge. Such a debt resulting from a quasi-délit is due jointly and severally (solidairement) from all charged with the maintenance and cannot be apportioned among them according to the area of their lands and in the proportion in which they are severally responsible for the work on said bridge.

Pinsonnault v. Parish of St. Jacques the Less, 18 Que. S.C. 385 (S.C.).

—Highways — Proces-verbal for construction of road — Distinction between proces-verbal and by-law under Quebec Municipal Code.]—

Gregoire v. Devonee, 4 E.L.R. 74 (Que.).

—Mandamus—Repair of part of street — Urgency.]—Mandamus does not lie to compel a municipal corporation to repair a part of one of its streets, more particularly if it appears that repairs to the street have been begun, if no wrong is shown calling for immediate redress, and if other and adequate remedies exist to cure such wrong as is complained of.

Farly v. City of Montreal, 39 Que. S.C. 13.

—Sidewalk — Negligence — Want of drainage—Formation of ice.]—

Rockwell v. Town of Bridgewater, 2 E. L. R. 378 (N.S.).

—Obstruction — Permit of city officer — Damage to adjoining occupant.]—

Coulstring v. Nova Scotia Telephone Co., 7 E.L.R. 113 (N.S.).

—Obstruction—Gate on road.]—

Reynolds v. Laffin, 7 E.L.R. 100 (N.S.).

—Limitation of action against municipality —Whether action includes mandamus proceedings.]—The limitation of one year prescribed by s. 244 of the Municipal Clauses Act, for commencing actions against a municipality applies to mandamus proceedings to compel a municipality to appoint an arbitrator to determine the amount of compensation for land taken for road purposes.

The Queen v. The District of Mission, 7 B.C.R. 513.

—Non-repair — Defective sidewalk — Injury to pedestrian—Nuisance of long standing amounting to misfeasance.]—Plaintiff lost the sight of one eye by falling on a loose plank in a sidewalk, a spike from the end of the plank penetrating the eye, and the jury found negligence against the municipality and awarded the plaintiff damages. The municipality operated under a special charter, in which it was provided that every public street, road, square, lane, bridge, and highway should be kept in repair by the corporation:—Held, on appeal, per Macdonald, C.J.A., and Galliher, J.A., that under the provision in the charter for repair of highways, it was the intention of the Legislature that a person injured through an omission to repair should have a right of action. Irving and Martin, JJ.A., took a different view. The Court being evenly divided, the appeal was dismissed.

McPhalen v. City of Vancouver, 15 B. C. R. 367.

—By-law for widening street — Destruction of sidewalks — Statutory obligation.]— Where a city by-law has been duly passed for the widening of a street as a local improvement, the city corporation are bound to proceed with the work, notwithstanding that it involves the destruction of sidewalks which the corporation are by statute obliged to keep in repair.

Todd v. City of Victoria, 15 W.L.R. 502 (B.C.).

—Obstruction of street — Offence against municipal by-law—Free use of streets.]—

Re Bettsworth, 11 W.L.R. 649 (Man.).

—Liability for flooding private premises—Sufficiency of culvert — Negligence — Extraordinary rainfall.]—

Cardston Drug & Book Co. v. Town of Cardston, 3 W.L.R. 64 (Terr.).

—Ditch dug in highway—Neglect to guard —Municipal corporation — Independent contractors — Liability for negligence — Misfeasance.]—

McGillivray v. City of Moose Jaw, 6 W. L. R. 108 (N.W.T.).

—Local improvements — Petition against extension of street — Status as petitioner of owner of land expropriated.]—

Re Cameron and City of Victoria, 2 W. L. R. 387 (B.C.).

—Non-repair — Contractors for corporation work—Relief over.]—

Taylor v. Town of Portage la Prairie, 4 W.L.R. 404 (Man.).

—Dangerous operations near highway—Injury to person lawfully on highway—Warning.]—

Stoner v. Lamb, 4 W.L.R. 27 (Y.T.).

—By-law closing lane or highway.]—

Re Loiselle and Town of Red Deer, 7 W. L. R. 42 (Alta.).

—By-laws closing lane and authorizing transfer to private person — Public interest—Prejudice to applicant.]—

Re Weir and City of Calgary, 7 W.L.R. 45 (Alta.).

—Road allowance—Issue as to width of allowance — Encroachment — Title of owner of abutting lands — Hudson's Bay Company title — Evidence of ownership—Surrender to Crown — Surveys — Order in council.]—

Rural Municipality of St. Vital v. Mager, 9 W.L.R. 161 (Man.).

—Non-repair—Injury to pedestrian.]—The Court being evenly divided in opinion, an appeal by the defendants from a judgment upon the findings of a jury in favour of the plaintiff in an action for damages for

injuries sustained from a defective sidewalk, was dismissed:—Held, per Macdonald, C.J.A., and Galliher, J.A., that an action based upon non-repair or non-feasance was maintainable; from the language of a clause in the defendants' act of incorporation providing that every public street and highway should be kept in repair by the corporation, it was intended that a person injured by a breach of the duty imposed should have an action. Irving and Martin, JJ.A., were of the contrary opinion; and were also of opinion that the Court of Appeal should follow the decisions of the full Court of British Columbia when it was the appellate Court for the province.

McPhalen v. City of Vancouver, 14 W. L.R. 424 (B.C.).

—Trespass—Construction of road diversion—Unauthorized entry.]—The defendant M., acting as road-boss under instructions from the reeve and one of the councilmen of the defendant municipality, entered upon the plaintiff's land for the purpose of making a road diversion around a slough on the road allowance. The plaintiff forbade the construction of the road diversion on his land, but M. proceeded to make it. The preliminary steps necessary to give the municipality the right to enter and appropriate the plaintiff's land had not been taken:—Held, that the defendants were guilty of trespass and liable for the damage resulting therefrom. Held, that the plaintiff was entitled to general damages for the trespass and deprivation of the use of the portion of his land taken, assessed at $75; but not to damages for having 9 acres separated from the rest of his farm by the road diversion—whatever loss he sustained in this connection was a matter for consideration in awarding compensation in the expropriation proceedings since taken. Held, also, that the plaintiff was entitled to special damages, assessed at $99, for the loss of flax and wheat destroyed by water backed on the land by reason of the construction of the road diversion without proper culverts. Held, also, that the defendant M. was the servant of the defendant municipality, and in constructing the road diversion was acting within the apparent scope of his authority, and, therefore, the municipality were liable for his acts. Citizens Life Assurance Co. v. Brown, [1904] A.C. 423, followed.

Foley v. South Qu'Appelle, 15 W.L.R. 264 (Sask.).

—Width of highways in Manitoba.]—The plaintiff municipality contended that the public travelled road through the defendant's property, instead of 66 feet wide, should be 99 feet in accordance with a survey made in 1886 by a Dominion land surveyor, pursuant to section 3 of 49 Vict. (D.), now section 9 of c. 19 of the R.S.C. 1906. In authorizing the surveyor to survey the road, the Surveyor-General had directed him to make the road 99 feet wide. This was done and, in 1900, an order-in-council was passed by the Dominion Government approving the survey and transferring to and vesting the road in the Province of Manitoba for the purposes of a public highway. All the evidence, however, according to the finding of the trial Judge, showed that the road in question was only 66 feet wide for many years prior to the survey referred to:—Held, that the Surveyor-General had no authority to make the road of a greater width than it had been or to deprive the defendant of any of his land by giving such a direction, that the Dominion Government could not by legislation interfere with the rights the defendant had acquired, nor would it attempt to do so by order-in-council, that the approval of the survey by the Dominion Government could not deprive the defendant of any of his land, and that he was not bound to move his fence back so as to make the road wider than 66 feet.

St. Vital v. Mager, 19 Man. R. 293.

—Proces-verbal—Obscure clauses—Action to annul.]—1. An action before the superior Court will not lie to annul a proces-verbal on the ground that clauses in it, relating to some of the work to be performed, are drawn in obscure, or even unintelligible language. The proper course for the parties interested is to have the instrument amended and its meaning made clear in the manner provided by law. 2. Actions to annul and petitions to quash are different remedies and while the latter may be resorted to, within the prescribed delay, to have informal proceedings set aside, the former will not avail for the purpose, after such delay has expired, and in a case in which the document impeached does not impose an illegal burden upon the plaintiff.

Vinet v. St. Louis De Gonzague, 19 Que. K.B. 222.

—Agreement between municipalities—Building and maintenance of highway.]—The plaintiffs, a township corporation, alleged an agreement with the defendants, the corporation of an adjacent township, that, in consideration of the plaintiffs opening and building a road through the plaintiffs' township to a point agreed upon in the boundary line between the two townships, and agreeing to maintain the same thereafter as a public highway, the defendants would open and build and thereafter maintain a public road or highway, in continuation of the plaintiffs' road, through the defendants' township. The plaintiffs then alleged that, relying upon this agreement, they built their road, expending thereon large sums of money, but the defendants refused to build the continuation, without

which the plaintiffs' road was useless; and they claimed specific performance of the agreement, a mandamus requiring the defendants to build the road, or damages. There was no contract under seal or by-law of the defendants, but the plaintiffs relied on a resolution of the defendants' council authorizing the building of the continuation of the road, upon condition of the plaintiffs contributing $100 towards the cost, which the plaintiffs did:—Held, that the plaintiffs were not entitled to specific performance, or to a mandamus, or to damages; for, assuming in their favour that an agreement was proved, in its nature within the proper competence of the defendants' council, and a performance to the extent alleged by the plaintiffs on their part, it was not a case where a contract had been fully executed by the plaintiffs of which the defendants had had the benefit, as in Bernardin v. Municipality of North Dufferin, 1891, 19 S.C.R. 581. The plaintiffs were held entitled to recover the $100 paid, as upon a consideration which failed.

Township of East Gwillimbury v. Township of King, 20 O.L.R. 510.

—Bridge crossing stream forming boundary between local municipalities—Assumption by county.]—A bridge spanning the Muskrat River, which forms the boundary line between the township of Pembroke and the town of Pembroke, was built by private persons; in 1875 it was repaired by a committee appointed by the county council, and the repairs were in 1876 paid for by the county, since which time the county council had done nothing to keep it in repair; it had been kept in repair, however, by private subscriptions, and had been constantly used by the public, the road of which it formed part being a public highway, accepted and used as such for more than forty years:—Held, that it had been assumed in 1875 as a county bridge; and the county corporation were not, by their subsequent neglect of duty, relieved from their obligation to maintain and repair it. Held, also, that, having regard to the provision in clause (a) of s. 622 of the Municipal Act, 1903, and upon a consideration of the provisions of secs. 613 to 618, the duty was imposed upon the county of maintaining the bridge, whether it was ever formally assumed by the county or not. O'Conner v. Townships of Otonabee and Douro, 1874, 35 U.C.R. 73, distinguished. Held, also, that the obligation can be enforced under s. 618. Quære, per Middleton, J., whether the decision of the county council can be reviewed by the County Court Judge. Judgment of the Judge of the County Court of Renfrew affirmed

Re Township of Pembroke and County of Renfrew, 21 O.L.R. 366.

—Jury—"Non-repair."]—In an action against a city corporation to recover damages for injuries sustained by the plaintiff, the allegation in the statement of claim was that "the plaintiff tripped by reason of a hole in the boulevard caused by the negligence of the defendants taking up the old sidewalk and not filling in":—Held, that, whether the negligence alleged was misfeasance or nonfeasance, the action was "in respect of injuries sustained through non-repair of streets, roads or sidewalks," within the meaning of s. 104 of the Ontario Judicature Act, and was, therefore, to be tried by a Judge without a jury

Brown v. City of Toronto, 21 O.L.R. 230.

—Liability of for non-repair of sidewalks—Winnipeg Charter, s. 722.]—Under s. 667 of the Municipal Act, R.S.M. 1902, c. 116, or under s. 722 of the Winnipeg Charter, 1 and 2 Edw. VII. c. 77, a municipality is not liable for the consequences of an accident caused by the want of repair of a sidewalk unless negligence on its part is shown. The plaintiff was injured by the tilting up of a loose plank in a sidewalk only ten years old which had been regularly inspected by an officer of the city without the discovery of the defect, and no notice of the defect had been brought home to the city in any way. It appeared that the plank had got loose by the breaking of the nails and not by reason of age or decay of the wood:—Held, that the defendants were not liable.

Davies v. City of Winnipeg, 19 Man. R. 744.

—Public highway—Way of necessity.]—On the 8th Oct. Vincent signed power-of-attorney authorizing the execution and registration of a plan of lands including two lots owned by him, showing a street which occupied 33 feet in width of his two lots. On the 9th Oct. he himself agreed to sell the two lots to the G.T.P. without any reservation of any street or right-of-way over the 32 feet mentioned in the power. Vincent's attorney, without notice of the sale to the G.T.P., executed a plan which was executed by others showing the street, and the plan was registered without any of the signers of the plan being aware of the agreement with the G.T.P. The street shown on the plan did not communicate at either end with, nor was there any outlet anywhere to, any highway. In an action by the G.T.P. against Vincent for specific performance of the contract and against the other property owners for the cancellation of that portion of the plan affecting the two lots:—Held, 1. a parcel of land used by the public, terminating at one end as a cul de sac, can be a public highway. But a parcel of land closed at both ends cannot be a public highway. 2. The registration of a plan approved by the municipality in which the subdivided land is situate which shows as a street a parcel of land closed at both ends and from which there is no outlet to any ordinary highway, does not constitute

the parcel, a highway, even though sales of land have been made according to the registered plan. Such a street becomes merely a private right-of-way. 3. The mere right to a "way of necessity" until used or otherwise defined and located, cannot be said to apply to any particular place suggested for it. 4. The last clause of s. 188 of the Railway Act is intended to protect the railway company upon any agreement made by it with any owner, no matter what change of title may take place within a year and whether such change be with or without notice of the company's claim, and the railway company may enforce such an agreement as against any person, although he may be a purchaser for value without notice. 5. The words "set out and ascertained" (used in s. 188), are not restricted to their meaning to the filing of a plan, profile and book of reference by the railway company, which is necessary before expropriation proceedings may be taken; and where a railway company obtained an order of the Board of Railway Commissioners authorizing the construction of a railway according to a plan attached to the order and showing therein that portion of the land which was the subject of a contract made within one year before the order and which order and plan were registered within a year. 6. Held, that the lands required were by such order and plan sufficiently "set out and ascertained" within the meaning of s. 188, and that the contract could therefore be enforced as against the subsequent purchasers for value without notice. Vincent's agreement for purchase of land provided that conveyance should be "subject to any streets or right-of-way that might thereafter be laid out on said lands in order to provide exit to streets south and east of the property." No right-of-way was laid out and no definite locality was determined for such right-of-way. 7. Held, that this clause did not make the title subject to the implied reservation contained in s. 43 (g) of the Land Titles Act. The provision of that section is limited to a right-of-way already definitely located and fixed in some way both as to place and as to persons entitled to it.

Grand Trunk Pacific Ry. Co. v. Vincent, 2 Alta. R. 393.

—Highway—Obstruction—Raised crossing —Injury to person driving.]—The plaintiff in driving along a highway in a town, in order to pass a vehicle in front of him, turned somewhat to the side of the roadway, but was still upon the part of the highway designed for vehicles, when he encountered an obstacle and was thrown out of his waggon and injured. The obstacle was a wooden crossing, raised at the side of the street to a height of 12 inches above the level of the roadway:—Held, that it was an obstruction in the highway; that leaving it there was misfeasance; and that the defendants, the town corporation, were liable at common law for the plaintiff's injuries. Held, also, that the plaintiff was not guilty of contributory negligence.

Williams v. Town of North Battleford, 14 W.L.R. 684 (Sask.).

— Dedication — Acceptance — Deposit of map—Obstruction of highway by building.]—The defendants were the owners of a block of land in the city of Victoria, fronting on Lime street. About 23 years before action the defendants' predecessor in title built a lean-to on the south side of his building, stretching over a portion of Lime street, and this had been maintained ever since by him and the defendants. The territory which included Lime street was not taken into the city until 1892, and prior to that it was under the direct control of the Crown. In 1861 the "Nagle map" was deposited in the land registry office, under the provisions of s. 54 of c. 3 of the British Columbia statutes of 1860, which enabled the registered owner of an absolute fee to subdivide his land for the purpose of selling the same in allotments, and deposit a map of the same, provided such map should exhibit all roads, streets, etc., set apart for public use. The lots owned by the defendants and Lime street were shown upon this map. The southerly portion of Lime street had been used by the public to a limited extent to gain access to a railway, but the road was not graded nor was any public money expended upon it before being taken into the city limits; since then its use had been about the same as formerly; it was still ungraded; but the plaintiffs in 1894 constructed a surface drain along the street, and in 1895 erected and had since maintained poles on the street, carrying city electric light and fire alarm wires:—Held, that there was a dedication of the street by the depositing of the Nagle map, and an acceptance by the acts of the plaintiffs, if an acceptance was necessary in view of the fact that the defendants' lots were originally purchased under the Nagle map, which furnished the original description by which they were known, and in view of the provisions of the Victoria Official Map Act, 1893. Held, also, that the defendants' claim to a title by prescription failed for want of time (20 years), as well as for want of possession of the necessary character. The plaintiffs acquired a title only in 1892, before which the title was in the Crown, against whom a possession of 60 years would have to be shown. The defendants' possession was of a very small portion of Lime street, was not an exclusive possession, and did not appear to have been under a claim of right—it might have been a mere indulgence. In order to acquire a title by prescription the possession must be an

adverse one of such a character as to presuppose a grant. Held, also, that in face of the provisions of the Victoria Official Map Act, 1893, and the "Ralph map," deposited with the Registrar-General in 1894, showing upon it Lime street, with the same boundaries that were shown by the Nagle map, the defendants could not contend that they had any right to the use and occupation of Lime street. Section 21 of that Act provided for a board of 3 arbitrators to fix, in case of disagreement, the amount of any compensation payable by the plaintiffs; and the plaintiffs asked in this action for a mandamus to compel the defendants to appoint an arbitrator under that section. By s. 3 of the Victoria Special Powers Act, 1907, the Legislature validated the Ralph map as an official map, and provided that ss. 13, 14, 15 and 21 of the former Act should apply to such map, and be binding on all persons affected thereby. But s. 3 went on to provide for the appointment of a sole arbitrator between the corporation and all persons affected. Held, that the Act of 1907 substituted a sole arbitrator for the board of 3 arbitrators, and, a sole arbitrator having been appointed, there was no necessity for a mandamus in this action. Held, also, that until the arbitrator had made his award and the plaintiffs had paid the defendants the compensation fixed, if any, the plaintiffs were not entitled to an injunction and mandamus in respect of the removal of the defendants' lean-to. Held, however, that, as the defendants went to trial on the issues as to whether Lime street was a public highway and whether the plaintiffs' rights were barred by the Statute of Limitations, and all the evidence was directed to those issues, on which the defendants failed, they were not entitled to the costs of the action. Quære, whether, in view of the principle enunciated in London and North Western R. W. Co. v. Donellan, [1898] 2 Q.B. 7, the Court had jurisdiction to deal with any of the matters in question before arbitration. But, as the defendants had not raised that point, held, that the plaintiffs should have a declaration that the portion of Lime street lying between Mary and Catherine street was a public highway; this declaration not to hamper the proceedings or judgment of the arbitrator. No order as to costs.

City of Victoria v. Silver Spring Brewery, 14 W.L.R. 626 (B.C.).

—Non-repair of sidewalk—Injury to pedestrian—Notice.]—In an action by a person who was injured by tripping over a loose plank in the sidewalk of a city street to recover damages for her injuries, it was shown that the sidewalk had been constructed 10 years before the injury; that the nails in the plank had been broken; but no evidence was given to show how that happened, or for how long a period the plank had been loose. Evidence was given that there was an inspection every 7 or 10 days:—Held, that, though the sidewalk was out of repair, it was not shown that it was so to the knowledge of the defendants, and the evidence did not raise a presumption of knowledge from the existence of the defect for any stated length of time; the method of inspection was reasonable; and there was no evidence upon which negligence could be found. A nonsuit was entered.

Davies v. City of Winnipeg, 15 W.L.R. 22 (Man.).

—Non-repair—Notice.]—No action for damages or for a penalty based on failure to keep municipal roads in repair can be brought against a municipal corporation before fifteen days' previous notice in writing has been given to the secretary-treasurer and an action brought without such notice will be dismissed on exception to the form.

Bélanger v. Boucherville, 11 Que. P.R. 362.

—Dangerous road.]—A town corporation, subject to public law under the provisions of Art. 356 C.C. is civilly responsible for the consequences of an accident due to the improper condition of a road left open to traffic during the night where the lack of lighting enhances the risk.

Town of St. Louis v. McCray, Q.R. 19 K.B. 333.

—County council—Maintenance of road.]—The roads in village municipalities being front roads the county council cannot, by proces-verbal order them to be maintained. No more can it order that the road to which the proces-verbal refers be maintained by each municipality through which it passes. Where the council of a county declares that a local road shall be a county road it can impose upon the local municipalities the burden of its maintenance only; it cannot compel them, by proces-verbal to perform the work of opening them. A proces-verbal made under the above conditions of irregularity does not impose on a local municipality an imperative duty which it cannot be compelled by mandamus to perform.

Beaudet v. Leclercville, Q.R. 38 S.C. 77 (Ct. Rev.), reversing 37 S.C. 276.

—County council—Opening of road in two municipalities.]—A county council has the power to have drawn up and homologated a proces-verbal for opening a road situate partly in one local municipality and partly in another within the county.

Giguère v. County of Beauce, Q.R. 19 K.B. 353.

Municipal corporations—non-repair of street—Indictment.]—Proceedings against

the corporation of a city on a charge of neglecting to repair and keep in repair one of its public streets, thereby committing a common nuisance, should be by indictment. Prohibition granted to restrain a preliminary investigation of such a charge before a police magistrate, and an order nisi to set aside the order granting prohibition refused by a Divisional Court.

Regina v. City of London, 32 Ont. R. 326.

—Street—Plan—Dedication—Acceptance.] —The owners of two adjoining lots agreed between themselves to give twenty feet of each lot to form a street, and a plan of sub-division of the lots showing a street of this width was filed by them, the consent of the municipality being given by resolution. The line fence was then taken down and one owner fenced his land so as to leave twenty feet of the lot open to the public; but the other fenced his so as to leave forty feet. Without any by-law or further resolution the municipality did some grading on the sixty feet, and the sixty feet were used by the public for the purpose of a highway:—Held, that the giving of forty feet by one owner did not relieve the other owner from his obligation to give twenty feet, and that he could not, after its acceptance by the expenditure of public money upon it and its use by the public, retract the dedication of the twenty foot strip. Judgment of Boyd, C., 31 O.R. 499, affirmed.

Pedlow v. Town of Renfrew, 27 Ont. App. 611.

—Street—Reduction of proposed width—Ownership of the excess width—Dedication.]—The plaintiff, by petitory action, claimed the ownership of a strip of land under deed of purchase in 1897. It appeared that a street in the village of Hochelaga, was opened in 1874 or 1875, and the width proposed was 100 feet. In 1884, the village of Hochelaga was annexed to the city of Montreal, and the city reduced the width of the proposed street from 100 feet to 60 feet, leaving a strip 40 feet wide which was not used, as originally contemplated, for street purposes. The question was, in whom did the ownership of this strip vest. The plaintiff relied upon her title by purchase from the parties who held the title prior to the proposed widening. The defendant called in her vendor, the Banque Jacques Cartier in warranty, and also pleaded possession for over ten years. The defendant further pleaded to the action, alleging ownership; that the strip in question had formed part of Ontario street for more than ten years; that when the width of the street was, in 1887, reduced to 60 feet, the excess, 40 feet, reverted to her as the adjoining proprietor, and that the defendant had ever since been in possession. To the action in warranty the defendant in warranty pleaded that when it bought the property subsequently sold to the principal defendant, it was bounded in front by the proposed street, and that the subsequent action of the city in reducing the width to 60 feet could not make the bank liable to an action in warranty:—Held (on the principal action), 1. That when the width of the street was reduced, the possession of the 40 feet deducted reverted to the parties who owned the land before the improvement was projected, viz., in this case, the plaintiff's auteurs, and that the title on which the plaintiff rests existed at the date of the sale by the bank to the defendant. 2. The special laws and usages applicable to the dedication of streets can only be resorted to where it is proved that the owner has, in fact, voluntarily and gratuitously abandoned his property to the public use. Otherwise, the principle that no servitude can be established without a title governs. 3. The plea of litigious rights cannot avail the defendant unless the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it, be tendered with such plea (Art. 1582, C.C.). Gauthier v. Monarque, 19 Que. S.C. 93 Davidson, J. 4. (On the action in warranty). The decision of Davidson, J., that the defendant in warranty having sold the land in question to the principal defendant, sous les garanties de droit, as fronting on the street, whereas, at the date of the said sale, a strip 40 feet wide intervened, is liable for the damage thereby occasioned to the principal defendant, was reversed by the Court of Appeal.

Monarque v. Banque Jacques Cartier, 19 Que. S.C. 94.

Same case on appeal 31 Can. S.C.R. 474 on other grounds; see TITLE TO LAND.

—Railway—Bridge over highway—Height of—Injury to person—Railway Act.] —The plaintiff was driving a load of hay on a public highway within the limits of a village, sitting on top of his load. A railway, at a point within the village, was carried over the highway by an iron bridge, and the plaintiff, while driving along the highway under the bridge, was struck on the head by the girders and knocked off the load and injured. The bridge when constructed was built at a height greater than required by s. 185 of the Railway Act, 51 Vict. c. 29 (D.), but the municipality and their predecessors, owners of the road, subsequently so raised its level as to leave less than the statutory space between the road and the bridge:—Held, that the section must be construed as compelling the railway company to construct their bridges in the first place

so as to leave the required space below them to the highway and to maintain them at, at least, that height from the original surface of the highway, and not as obliging them to conform from time to time to new conditions created by the persons having control of the highway. Gray v. Borough of Danbury (1887), 54 Conn. 574, specially referred to.

Carson v. Village of Weston, 1 O.L.R. 15.

—Non-repair—Opening in sidewalk—Injury to pedestrians—Want of guard.]—The plaintiff, whose eyesight was defective, was walking in a city street, when, stepping towards a doorway leading into a tavern, he stubbed his toe against the step or door-sill, and, stumbling back, fell into an area in the sidewalk, used by the tavernkeeper, by the permission of the municipality, for the purpose of putting beer into his cellar, and then open and being used for such purpose. A keg had been placed at each of the outside corners of the opening as a warning to passers-by:—Held, that the municipality were liable for negligence in leaving the opening without an adequate guard; that contributory negligence could not be imputed to the plaintiff; and that the tavernkeeper was liable over to the defendants.

Homewood v. City of Hamilton, 1 O.L.R. 266.

—Closing up road—Necessity for providing another convenient road or way — Farm divided by railway—Separate parcels.]—A farm lot occupied by the owner as one farm, was diagonally divided by a railway into two separate parcels, having a farm crossing provided by the railway, giving access from one parcel to the other. In addition to a road which afforded access to the parcel where his residence was, there was another road which gave access to the other parcel, and which, except by the farm crossing, was the only mode of access thereto:—Held, that the latter came within s. 629 (1) R.S.O. 1897, c. 223, and could not be closed up by the municipal council unless, in addition to compensation, another road or way was provided in lieu thereof.

Re Martin and Township of Moulton, 1 O.L.R. 645.

—Street widening—Expropriation—Abandonment.]—The city commenced expropriation proceedings and forthwith took possession of plaintiff's constructed works thereon and incorporated it with a public street. Subsequently, in virtue of a statute granting permission to do so, the city abandoned the expropriation proceedings without paying indemnity or returning the lands so occupied and used:—Held, that the plaintiff had been illegally dispossessed of his property and was entitled to have it returned to him in the state in which it was at the time it had been so taken possession of and also to recover compensation for the illegal detention. Held, further, that, in the present case, the measure of damages, as representing the rents, issued and profits of the lands usurped by the city, should be the interest upon the value of the property during the period of its illegal detention.

City of Montreal v. Hogan, 31 Can. S.C.R. 1.

—Street railway—Removal of snow.]—By the provisions of a municipal by-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such a manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snow-fall the company removed the snow from their tracks the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street:—Held, that the company had not discharged their obligation and that they were liable to indemnify the city against damages recovered against the city by a person who had in consequence of the bank been upset while driving along the street. Judgment of Rose, J., affirmed.

Mitchell v. City of Hamilton, 2 O.L.R. 58 (C.A.).

—Obstruction in highway—Contributory negligence—New trial.]—An excavation made by defendants in the highway for the purpose of laying a small pipe, when filled in left a projection in the highway from four to five feet in width and from eight to nine inches above the surface. Plaintiff's horse, in passing over the place where the pipe had been laid and the earth filled in, stumbled and fell, throwing plaintiff out, and causing him to sustain serious bodily injuries. In an action by plaintiff claiming damages the evidence showed that plaintiff had driven over the place where the accident occurred, in daylight, a few hours before; that in returning he was driving at the rate of seven miles an hour; that his horse was seventeen years old, and was lame at times; that it had been known to stumble; that it was without shoes at the time of the accident, and that the springs of the plaintiff's wagon were in a defective condition:—Held, by the S. C. of Nova Scotia, that, on the whole case, the earth construction was not negligently made, and was not a more serious obstruction than was usual on such roads at such places, and that the stumbling was due to plaintiff not using proper care, with the

horse and carriage he had, in approaching at that time of the night a place which he had seen before. On the trial, evidence had been given of the individual opinions of plaintiff's neighbours as to his general reputation for veracity, defendant's counsel proposed to ask the question, "Whose opinion do you know?" The evidence having been excluded, Held, that the learned trial Judge erred in doing so, and that the question should not have been disallowed. Held, notwithstanding, that as, assuming plaintiff's testimony to be perfectly true, no case was made out against the defendant, there was no necessity for sending the case back for a new trial for rejection of evidence, there having been no substantial wrong or miscarriage within O. 37, R. 6. Per Weatherbe, J.:—Held, that as defendant had undertaken to support the exclusion of evidence that was clearly admissible, there should be no costs.

Messenger v. Town of Bridgetown, 33 N.S.R. 291, affirmed 31 Can. S.C.R. 379

—Negligence—Maintenance of streets — Accumulation of snow and ice—Gross negligence.]—About 10.30 a.m. on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell, receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shown that there had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employees of the city had scattered sand on the crossing, but the high wind prevailing at the time had probably blown it away:—Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 410), that the facts in evidence were not sufficient to show that the injury to the deceased was caused by "gross negligence" of the corporation within the meaning of R.S.O. 1897, c. 223, s. 606 (2).

Ince v. City of Toronto, 31 Can. S.C.R. 323.

—Dangerous sidewalk—Climatic conditions—Previous neglect of sidewalk by the city.]—(1) The obligation devolving upon a city corporation to keep the sidewalks of the city in a safe condition is temporarily suspended where the climatic conditions—such as heavy rainfalls accompanied by high temperature, followed by strong wind, sudden frost and low temperature—are such that the city could not, by the exercise of reasonable diligence, have remedied the condition of the sidewalk in question before the accident happened. (2) The fact that the sidewalk in question, which was in front of vacant lots, had not been properly attended to throughout the winter, does not affect the decision of such case, the city not being responsible for damages in consequence of negligence which does not apply to the particular circumstances when the damages were incurred.

D'Estimonville v. City of Montreal, 18 Que. S.C. 470 (confirmed in review).

—Powers of special superintendent.] — Under the provisions of Art. 794 M.C. if the special superintendent is of opinion that the petition demanding certain works to be done should be rejected he should so report; if on the contrary he considers it well founded he will be justified in preparing a procès-verbal to that effect. It is not necessary that the works demanded should be specified in the conclusions of the petition; it is sufficient to confer authority on the county council to take action that they be specified in the body of the petition as one of the things suggested to the council and as to which it has the opportunity of exercising its discretion. The Superior Court, by virtue of the powers conferred upon it by Art. 2329 R.S.Q. may exercise jurisdiction over the proceedings of municipal councils whatever they may be, and quash them. It may exercise such powers in the case of a decision of a county council sitting as an appellate tribunal notwithstanding the provisions of Art 1061 M.C. which refuses the right of appeal in such cases.

Piché v. County of Portneuf, 17 Que. S.C. 589 (C.R.).

—Acquisition—Dedication — Prescription.] —In addition to the modes prescribed by the Municipal Code municipal corporations may acquire land for public works: (1) By dedication and abandonment by the owner of land with intent to open and establish it as a public road; (2) By use, possession and maintenance of said land by the public for 30 years; (3) By the opening and use by the public without opposition, of any road for 10 years and upwards under the provisions of 18 Vict. c. 100, s. 40, sub-s. 9. The enclosures and boundaries of a public road established by ancient owners are recognized under our customs and presumed to have been established by these owners with a view of separating their lands from the road in the interest of proper maintenance and also to protect their crops and the lands themselves generally, and such enclosures may serve to aid greatly in the question of dedication.

Jones v. Village of Asbestos, 19 Que. S.C. 168 (S.C.).

—Private way—Dedication—Plan—Injunction.]—The plaintiff's predecessor in title bought a certain lot according to a plan (then unregistered), on which was shown a strip 33 feet in width, running along one side of the lot. The plaintiff claimed that this strip had been dedicated, either as a public highway or a private way for the use of the owner of the lot, and claimed a declaration to that effect and an injunction. On the evidence, the Court found for the plaintiff and gave judgment accordingly.

Daly v. Robertson, 1 Terr. L.R. 427.

Right of person from whose land the strip for a public road was originally detached —Art. 753 M.C.]—The appellant removed a fence and took possession of a strip of land which originally had been detached from his property, but which for many years had formed part of a public highway, and had served to give the respondent access to his property. The respondent brought suit asking that the appellant be ordered to cease his disturbance and replace the fence as it was:—Held (affirming the judgment of the Superior Court, Doherty, J., 20 Que. S.C. 26, but omitting one considérant: 1. That it was incumbent on the appellant, in order to make good his pretension that the strip in question had ceased to be a public road, to prove that by some act of duly constituted and competent authority qualified to act on behalf of the public, the road had been closed or abolished and the rights of the public thereto renounced, or, at least, such a total cessation of use by the public of the road as a public road, and such a conversion thereof to other uses acquiesced in by competent authority, as would constitute a total abandonment by the public and such competent authority of all right thereto as a public road. 2. A person owning land abutting on such road, and who is deprived of the direct access which he previously had thereto, suffers special damage by the closing and obstruction of the road, and has in consequence a right of action in his own name to compel the removal of the obstruction.

Meloche v. Davidson, 11 Que. K.B. 302.

—Trees on—Property in—Damages for injury.]—Trees planted on a public road in the city of Montreal with consent of the municipal authorities and in accordance with the city by-laws, become an appurtenant to the ownership of the immovable in front and for the advantages of which they were planted, and the owner of such immovable may maintain an action for compensation against his neighbours when, by reason of an industry carried on by the latter the trees have been destroyed.

L'Hussier v. Brosseau, 20 Que. S.C. 170 (Sup. Ct.).

—Negligence — Non-repair.]—A municipal corporation having placed a barrier round a portion of the sidewalk which they were repairing, the plaintiff at night going round, fell into a trench dug by a gas company, with consent of the corporation, under an agreement for indemnity and to properly warn and protect the public. No lights were put up by either defendant. The plaintiff brought this action against both for injuries sustained:—Held, that both the defendants were liable to the plaintiff, the corporation for non-repair and not warning the public, and the gas company under special contract with the corporation, and under R.S.O. 1897, c. 199, s. 26, but that the corporation should have judgment over against the company.

McIntyre v. Town of Lindsay, 4 O.L.R. 448.

—Front roads—Maintenance—Evidence — Repartition—Cost of work—Notice—Absent owner—Arts. 399, 400, 401, 824 M.C.]—It is the imperative duty of a municipal corporation and its officials to put the roads in good condition without delay. The evidence of the inspector who has had work on roads done is proof sufficient, if uncontradicted, of its execution, that the sum claimed in an action against a rate payer is the value of the work, and that the defendant is the person liable to pay the cost thereof. A road, crossing the lots of the defendant and other lots in the fourth concession of Gosford having been for a great many years open and free to the public as a road in front of said lots and subject to a procès-verbal which declared it to be a front road, and at the charge as to its maintenance summer and winter, of each owner of land in the said concession in front of which it passed, should, therefore, be maintained by defendant for the portion traversing her lots, and there was no necessity for an assessment roll (acte de répartition) to execute this part of the procès-verbal as there were no works to assess. Even if there were need of an assessment roll as it was a front road open to the public, Art. 824 M.C. should be applied in preparing it. In this case there was no municipal notice to be given or addressed to defendant, residing in England, nor to her agent in Quebec as no writing had been deposited in the office of the council giving the address of either. The road inspector had the necessary work done on defendant's roads, she having failed to do it; he had made out the account for it in his own name as inspector without adding the 20 per cent.; he had done the work without first making the report re-

quired to and receiving authority from the council. Eventually the corporation paid him the amount:—Held, that the corporation had a right to make such payment, and in doing so had paid defendant's debt and could maintain an action against her to be reimbursed the sum so paid; but it had no right to recover the 20 per cent. from defendant, which belonged in this case, to the inspector, and which it had not paid. The corporation is entitled to the 20 per cent. for its own benefit only in the cases provided for by Arts. 399, 400, 401 M.C., and this was not one of them.

Corporation of St. Raymond v. Prior, 21 Que. S.C. 172 (Sup. Ct.).

—Public road—By-law—Notice—Arts. 755, 758 M.C.]—A notice given by a municipal body for the amendment of a by-law of the passing of another, relating to a public road without identifying the road or specifying the proposed amendments or the nature of the new-by-law is not sufficient, especially if the parties objecting thereto will be prejudiced. Under Art. 755 M.C. a road between two local municipalities is a county road, and when under Art. 758 M.C. the county council has declared a local road to be under control of one of these municipalities, it has no longer jurisdiction to amend its by-law so as to declare anew that it is a local road but under control of the two municipalities jointly; but it has the right to make it a county road and then, under Art. 758, par. 3, it can distribute the work by a special declaration as to the land of the owners in each municipality bound to maintain said road. Corporation of St. André-Avelin v. Corporation of Ripon, 4 Que. Q.B. 167, followed.

Corporation of Nelson v. County of Megantic, 20 Que. S.C. 334 (Sup. Ct.).

—Opening road—Contribution from landowner—By-law—Action to quash.]—The defendant corporation cannot compel contribution, according to area, from the plaintiff's lands which have their own front road at a distance of less than 30 arpents, for the opening and maintenance of a road which is of no benefit to said lands and is only for the advantage of others; and a by-law passed by the council of the corporation for that purpose, causing great injustice to the plaintiff in action taken by plaintiff in the ordinary course in the Superior Court. The fact that plaintiff had previously appealed to the county council, which confirmed the by-law, does not deprive him of the right to bring the action. The remedy given by the Municipal Code by petition to quash, does not exclude the present action.

Therriault v. Corporation of the Parish of St. Alexandre, 20 Que. S.C. 45 (Sup. Ct.).

—Street—Dedication to the public—Servitude.]—The proprietors of certain land prepared an official sub-division plan of the property, dividing it into lots and tracing a street thereon. They registered this plan as the official plan and sold lots described as fronting on the street indicated in the plan. They also constructed a sidewalk along the street, and permitted the public to pass freely without objection. They also petitioned the municipal council to annex the property in accordance with the plan, which petition was granted:—Held, 1. That there was a valid dedication of the property as a public street. 2. In any case, the acts above mentioned constituted at least a servitude of right of way over and through the property, in favor of the purchasers of lots described as fronting on such street, and the erection of platforms thereon was an illegal obstruction, and a violation of servitude.

Geoffrion v. Montreal Park and Island Railway Co., 20 Que. S.C. 559 (Archibald, J.).

—Road allowance—Obstruction—Railways—Fences—Municipal corporation—By-law—Railway Act of Canada—Railway committee of Privy Council—Injunction—Removal of obstruction—Jurisdiction.]—An action for an injunction to restrain the defendants from obstructing a highway in the township, by fences on both sides of the defendants' tracks where they crossed the highway, and for a mandatory order compelling the removal of the fences:—Held, that the allowance for the road in question, having been made by a Crown surveyor, was a highway within the meaning of s. 599 of the Municipal Act, and, although not an open, public road, used and travelled upon by the public, it was a highway within the meaning of the Railway Act of Canada, 51 Viet. c. 29. 2. That, although the road allowance had not been cleared and opened up for public travel and had not been used as a public road, it was not necessary for the municipality to pass a by-law opening it before exercising jurisdiction over it; the council might direct their officers to open the road, and such direction would be sufficient. 3. That the right of the railway company, under s. 90 (g) of the Railway Act to construct their tracks and build their fences across the highway was subject to s. 183, which provides against any obstruction to the highway, and s. 194, which provides for fences and cattle-guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public user or with the control over it claimed

by the municipality. 4. That the Railway Committee of the Privy Council had no jurisdiction to determine the questions in dispute; s. 11 (h) and (q) of the Railway Act not applying. 5. That the Court had jurisdiction to grant the relief sought. Fenelon Falls v. Victoria Railway Co. (1881), 29 Gr. 4, and City of Toronto v. Lorsch (1893), 24 O.R. 227, followed. 6. That the highway being vested in the township corporation, who desired to open and make it fit for public travel, the plaintiffs were entitled to have the defendants enjoined from obstructing it, and ordered to remove the fences.

Township of Gloucester v. Canada Atlantic Railway Co., 3 O.L.R. 85, affirmed by C.A. 4 O.L.R. 262.

—Defective sidewalk—Negligence—Notice of defect.]—Where a sidewalk on one of the principal streets of a town on which there was considerable traffic, and which had been down for so long a period as to become unsound, the scantling or stringers being so rotten as to be unable to hold the nails fastening the boards placed across them, its condition is such as to impose on the corporation a constant care and supervision over it; so that where one of the boards was missing for a week leaving a hole six or eight inches deep into which a person fell, and was injured, notice to the corporation of such defect in the sidewalk was assumed and liability for the damage occasioned by the accident imposed on them, Maclennan, J.A., dissenting. The damages assessed at the trial, $1,500, were reduced to $900, the Court being of the opinion that the latter was the more reasonable amount for the damages sustained, a sprained ankle and an affection of the sciatic nerve, from which recovery might be expected at no distant date.

McGarr v. Town of Prescott, 4 O.L.R. 280 (C.A.).

—Establishments—Annulment of procès-verbal.]—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a procès-verbal establishing a public highway notwithstanding that the effect of the procès-verbal in question might be to involve an expenditure of over $2,000 for which the appellants' lands would be liable for assessment by the municipal corporation. Dubois v. Village of Ste. Rose (21 Can. S.C.R. 65); City of Sherbrooke v. McManamy, (18 Can. S.C.R. 594); County of Vercheres v. Village of Varennes, (19 Can. S.C.R. 365), and Bell Telephone Co. v. City of Quebec, (20 Can. S.C.R. 230), followed. Reburn v. Parish of Ste. Anne, (15 Can. S.C.R. 92), overruled.

Toussignant v. County of Nicolet, 32 Can. S.C.R. 353.

—Municipal corporation—By-law closing road—Alderman interested—Road running beyond limits of city—Power to close — Municipal Clauses Act, 1897, s. 50, sub-s. 127.]—The roads mentioned in sub-s. 127 of s. 50 of the Municipal Clauses Act, which may be closed by by-law, are not only such roads as are wholly situate within the limits of the municipality, but include also highways or trunk roads leading into the districts beyond the boundaries.

Styles v. City of Victoria, 8 B.C.R. 406.

—Road between counties—Maintenance —Arts. 261, 266-7, 270-1, 452, 455, 757-9, 761, 764, 804 M.C.]—In the absence of the declaration provided for by Arts. 758 and 759 M.C., it is for the bureau des délégués to take all proceedings respecting a road, such as the grand ligne, situated between two local municipalities within two counties, as those of St. Jean and Chambly. The bureau des délégués constitutes a municipal authority entirely distinct from that of the corporation of the county, although it might have in office as secretary the secretary of the corporation of one the interested counties.

Arbec v. Lussier, 21 Que. S.C. 204 (Cir. Ct.).

—Public road—Discontinuation, proof of—Right of person from whose land it was originally detached—Art. 753 M.C.]—The defendant took possession of a strip of land which originally had been detached from his property, but which subsequently formed part of public highway. The plaintiff asked that the defendant be ordered to cease his disturbance and replace the fence as it was:—Held, that it was incumbent upon the defendant, in order to make good his pretention that the strip in question had ceased to be a public road, to prove that by some act of duly constituted and competent authority, qualified to act on behalf of the public, the road had been closed or abolished and the right of the public thereto renounced, or, at least, such a total cessation of use by the public of the road as a public road, and such a conversion thereof to other uses acquiesced in by competent authority, as would constitute a total abandonment by the public and such competent authority of all right thereto as a public road.

Davidson v. Meloche, 20 Que. S.C. 26 (Doherty, J.).

—Injury to pedestrian—Defect in carriageway—Liability of municipality — Findings of a trial Judge.]—The plaintiff in crossing at night on foot a busy street in a city, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriageway.

There was a hole or depression in the asphalt pavement from 1½ to 1⅞ inches deep at its deepest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial Judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles, and assessed damages to the plaintiff:—Held, Falconbridge, C.J., dissenting, that the plaintiff, using the carriageway when on foot, had no right to expect a higher degree of repair than would render the way reasonably safe to vehicles; and the last finding of the Judge put the plaintiff out of Court. Boss v. Litton (1832), 5 C. & P. 407, explained and distinguished. Semble, per Street, J., that the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage, and therefore the corporation could not be guilty of negligence in regard to it. Per Falconbridge, C.J., that the judgment ought to be upheld, as it was a question of fact, not of law, whether the depression was an actionable defect in the highway.

Belling v. City of Hamilton, 3 O.L.R. 318.

—Railway crossing—Negligence—Railway Act, s. 288.]—Where the railway traffic at the crossing of a highway was very great, and there was no gate, guardian, lamp or other protection for the public, although the railway company had been notified of the dangerous condition of the crossing, the company is responsible under section 288 of the Railway Act of Canada, for a collision which caused the death of plaintiff's son driving along the highway, and which occurred without any fault on his part, the railway company being obliged to take such precautions at crossings as the nature of the traffic requires for the protection of the public.

Girouard v. Canadian Pacific Railway Co., 19 Que. S.C. 529 (Curran, J.).

—Sidewalk thereon built by voluntary subscription and statute labour—Liability of municipality to repair.]—A township municipality was held liable in damages for an injury arising through the non-repair of a sidewalk on a highway within its limits, notwithstanding the fact that the sidewalk was built by voluntary subscription and statute labour, and although the municipality never assumed any control over it nor was any public money or statute labour expended on it with the knowledge of the council, where the latter was aware of the existence of the sidewalk and there has been opportunity to repair it.

Madill v. The Corporation of the Township of Caledon, 3 O.L.R. 66, affirmed, 3 O.L.R. 555 (C.A.).

—Crown lands—Trail—Dedication—Conditional dedication.] — The defendants' claiming under the original squatter on certain Dominion lands, erected a building thereon fronting on an old trail; the original squatter subsequently, in expectation of the Crown recognizing the claims of himself and his assigns, registered a plan of the entire land, whereon was shown a highway approximately conforming to the lines of the old trail, but so that the building in question projected into the highway shown on the plan. The Crown did, afterwards, grant a patent to the original squatter for the entire land, excepting the portions shown on the plan, as reserved for the defendants and others in like position. These excepted portions as they appeared on the plan approximately conformed in size and position to the portions which the squatter had assumed to convey to the defendants and others. Patents for these excepted portions were granted by the Crown to the defendants and others respectively:—Held, that the Crown, by issuing patents in accordance with the registered plan, had adopted it, and thereby dedicated to the public the highway as shown thereon; that the plaintiff municipality, within which the land lay, having demanded of the defendants the removal of the building, so far as it encroached on the highway as shown on the plan, and the defendants having refused to comply with the demand, the plaintiff municipality were entitled to a mandatory injunction to abate the building as being a nuisance. Held, also, that the defendants were consequently not entitled to compensation as owners or occupiers under the provision of the Municipal Ordinance. On appeal to the Court in banc, counsel for the defendants (appellants) having sought to raise for the first time the point that although there had been a dedication, such dedication was made and accepted subject to such constructions as existed upon it at the time of dedication, the Court, considering that the point was not covered by any of the grounds stated in the appellants' notice of appeal, Held, that the appellants were not at liberty to raise the point at this stage.

Town of Edmonton v. Brown, 1 Terr. L.R. 454. Affirmed 23 Can. S.C.R. 308.

— Obstruction—Nuisance — Indictment.] —See CRIMINAL LAW.

R. v. Nimmons, 1 Terr. L.R. 415.

—Bridge—Non-repair—Liability of municipal corporation—Threshing engine — Traction engine.]—An engine used for the purpose of operating a thresher or grain separator, is not a "traction engine" within the meaning of R.S.O. 1897, c. 242; and a municipality is bound to keep its bridges in such a condition that they will bear the weight of such an engine.

Pattison v. Township of Wainfleet, 22 C.L.T. 364 K.B. (Ont.).

—Defective road—Action—Security—793 M.C.]—(1) The failure by plaintiff, who is not a ratepayer, to deposit ten dollars, as security for costs, in accordance with Art. 793 M.C., must be raised by preliminary exception and not by the plea to the merits. (2) In regard to the deposit required by 793 M.C., there is no distinction between actions for a penalty and actions for damages. (3) A municipal corporation is bound to keep roads at all times in good order, and can only be relieved by proving force majeure.

Young v. Township of Stanstead, 21 Que. S.C. 148.

—Horse straying on highway—Injury to boy—Contributory negligence.] — Defendant's horse was on the highway, having escaped from a field which was fenced in, when a boy of twelve years of age tried to catch him by taking hold of a rope then around his neck, and in doing so he was kicked and injured. There was no evidence either that the defendant knew the horse was accustomed to stray or had any vicious propensity, or had any such fault, and there was evidence that it had been interfered with by several boys, of whom the injured boy was one, and that the latter had more than ordinary intelligence, and fully understood the risk he ran. In an action for the injury by the boy and his father:—Held, that they could not recover. Patterson v. Fanning (1901), 2 O.L.R. 462, distinguished.

Flett v. Coulter, 5 O.L.R. 375 (Britton, J.).

—Opening of road—Procès-verbal—Homologation—Amendment.]—(1) Oaths required by the Municipal Code may be sworn before a notary. (2) A procès-verbal providing for the opening of a road complies with the law if it states where such road will be opened and that ditches and trenches will be provided where necessary, even though it does not mention the particular places where they will be made, or anything more than their size. (3) If the procès-verbal states that the road will pass at a place where there is a cheese factory, or at any other place where it cannot pass without the consent of the owner of the land, or if it imposes the duty of erecting fences on persons who cannot be obliged to do so, such owner, or person illegally subject to such burden, can alone attack the procès-verbal on this ground. (4) In a procès-verbal numbers and dates may be indicated by figures. (5) A municipal council applied to for homologation of a procès-verbal may amend it by adding details, the absence of which would have made it a nullity. (6) A road extending over more than one municipality is not a county road, it is merely a local road for each municipality according to the situation of the respective parts.

Mondoux v. County of Yamaska, Q.R. 22 S.C. 148 (Ct. Rev.).

—Municipal corporation—Winter road — Maintenance.]—A winter road open to the general public, over which a large number of persons are accustomed to pass and on which there is nothing to indicate that it is private, is a public road, and the corporation of the municipality in which it is situated is liable for accident happening from neglect to keep it in repair.

Duchene v. Corporation of Beaufort, Q. R. 23 S.C. 80 (Cir. Ct.).

—Repair—Accident — Negligence.] — In an action for damages against a municipal corporation in consequence of injuries received from an accident on a road under its control, it is not sufficient to prove that the road was in a bad state of repair; it is necessary to show that this condition of the road was the direct and immediate cause of the accident, which could not have been avoided by taking the precautions which should be taken by a prudent man.

Beaulieu v. Corporation of St. Urban Premier, 22 Q.R. 22 S.C. 208 (Ct. Rev.).

—Municipal corporation—Repair—Maintenance of streets—Action for damages.]—Art. 793 of the Municipal Code, which requires a person who brings an action against a municipal corporation of which he is a ratepayer in consequence of neglect to keep and repair the streets and sidewalks of the municipality, to deposit the sum of ten dollars with the prothonotary of the Court where his writ is issued, as security for the costs, applies to actions for damages on account of such want of maintenance, and not merely to those claiming the penalty provided for by the article.

Lalonge v. Parish of St. Vincent de Paul, Q.R. 23 S.C. 65 (Sup. Ct.).

—Municipal corporation—Negligence — Non-repair of bridge—Absence of railing —Sufficiency of notice.]—The plaintiff was crossing a bridge in the defendant's township during a thunderstorm at night on May 6th, 1902, when lightning caused

his horse to swerve, and its foot went into a gap in the logs of the bridge close to the edge, and there being no railing they all fell over the side, and the plaintiff was injured. On May 26th he gave notice to the defendants of the accident as having occurred on May 7th, instead of May 6th, but describing the circumstances, and also that he had sought the aid of a neighbour whom he named:—Held, that the cause of the accident was the negligence of the defendants in not providing a railing, and that the thunderstorm was one of those ordinary dangers which ought to have been thus provided against. Held, also, that the notice given to the defendants was sufficient within sub-s. 3 of s. 606 of the Municipal Act.

McInnes v Township of Egremont, 5 O. L.R. 713 (D.C.).

—Sidewalk—Obstruction — Marching in procession—Impeding free passage of foot passengers.]—Where a body of sixty students marched upon a sidewalk in files of four with arms linked, any of them may be properly convicted of an offence against a municipal by-law prohibiting "walking or marching in a group or near to each other on the sidewalk so as to obstruct a free passage for foot passengers" although sufficient space remained for persons walking in single file to pass them.

The Queen v. Yates, 6 Can. Cr. Cas. 282 (Chipman, Co.J.).

—Common law right of free passage—"Salvation Army" — Obstruction of street.]—(1) There is no legal right at common law for persons to assemble in any numbers upon a highway and to remain assembled there as long as they please to the detriment of others having equal rights of passage over the highway. (2) An assembly of a moral and religious character, e.g., the Salvation Army, is subject to the same rule, and members thereof who hold a religious service on a town street and thereby collect a crowd which blocks the free passage of the street are properly convicted under a statute prohibiting persons from standing in a group or near to each other on the street so as to obstruct a free passage for carriages, etc.

The Queen v. Watson and Kenway, 6 Can. Cr. Cas. 331 (Chipman, Co.J.).

—Road allowances—Reservations in township survey — General instructions.] — Where the Crown surveyor returned the plan of original survey of a township without indicating reservations for road allowances upon the boundaries of the township and his field notes appeared to the Court to support the view that no such allowances had been made by him:—Held, that the general instructions and model plan for similar surveys did not afford a presumption sufficiently strong for the inference that there was an intention upon the part of the Crown to establish such road allowances. Judgment of the Ontario Court of Appeal reversed. Tanner v. Bissell, 21 U.C.Q.B. 553, and Boley v. McLean, 41 U.C.Q.B. 260, approved.

East Hawkesbury v. Lochiel, 34 Can. S.C.R. 513.

—County bridge—Change to local bridge —Procès-verbal.]—A bridge which has been deemed and treated as a county bridge under formal procès-verbeaux can only be declared local, although such may be its situation, by a resolution adopted or a procès-verbeaux homologated for the purpose, a mere notice of the taking into consideration of a procès-verbal where such declaration is made does not meet the requirements of the law. A local corporation, which, if it were declared a local bridge, would be obliged to maintain it in the state required by law and by the procès-verbeaux and by-laws governing it, has a sufficient interest to demand the setting aside of the procès-verbal which gives the bridge a local quality.

Parish of St. Ignace du Coteau Landing v. County of Soulanges, Q.R. 25 S.C. 153 (Sup. Ct.).

—Duty of municipal corporation—Snow drifts—Temporary side track.]—Plaintiff in travelling on a highway within the corporation boundary with a team of horses and wagon came to a place where the road was impassable on account of drifted snow for more than half a mile. At the side of the road between the ditch and a frame fence was a temporary track made by the travelling public which was safe while the frost lasted and the snow was hard; but a thaw was in progress, which had commenced three days before. When those in the wagon sought to use the track the horses broke through, and the wagon was in danger of being upset. Plaintiff got out and in assisting the horses was injured by one of them:—Held, that under the circumstances it was the duty of the defendants to have opened up a way through the drifts sufficient to enable vehicles, such as wagons in which the plaintiff was travelling, to have passed in safety along this highway; that the defendants had notice that the highway was out of repair and that the plaintiff was entitled to recover. Judgment of a Divisional Court affirmed.

Hogg v. Township of Brooke, 7 O.L.R. 273 (C.A.).

—Municipal regulation — Underground telephone wires.]—The plaintiffs, whose system of communication had been in op-

eration in the town of Owen Sound for some years, changed their office and in connection with the change wished to carry their wires to that office across the street in which it was situated, underground, in a conduit, instead of overhead by poles, and the defendants refused to consent:—Held, that the defendants' power under the statutes 43 Vict. c. 64 (D.) and 45 Vict. c. 95 (D.), to regulate the mode of user of the street must be exercised in good faith in the interests of the public and of the municipality, and not for ulterior purposes, and (as found on the evidence) not having been so exercised, was of no effect.

The Bell Telephone Company v. Town of Owen Sound, 8 O.L.R. 74 (Meredith, J.).

—Road laid out by private person—Assumption for public user—Expenditure by township corporation on sidewalk—Non repair.]—A highway in a township laid out by a private person had been used as such for many years, and a sidewalk had been built upon it by the defendants under the supervision of their pathmaster, and the council had by by-law appropriated money to pay for the construction of it, and payment had been duly made to the persons who built it:—Held, that this was sufficient to establish that the highway had been assumed for public user by the corporation within the meaning of s. 607 of the Municipal Act, 3 Edw. VII. c. 19 (O.). The purpose of s. 598 is to declare that certain classes of roads are public highways; and it has no bearing on the question whether an actual highway laid out by a private person has been assumed for public user. The highway had been for a long time in a very bad state of repair, so covered with water at certain seasons that it was impossible for a pedestrian to pass from one side to the other without wading through mud and water. The plaintiff was injured by reason of cinders which the third parties had, about a week before the accident, spread upon the road in order to afford a passage across it:—Held, that the defendants ought to have anticipated that some such means of passing from one side to the other would be adopted by the third parties, and were liable for negligence in the performance of their statutory duty to keep the highway in repair, but the third parties were liable over to the defendants.

Holland v. Township of York, 7 O.L.R. 533 (Meredith, C.J.C.P.).

—Closing—By-law—Clerical error—Rules of construction.]—In a by-law passed by the corporation of the city of Victoria, having for its object the closing of a portion of the Craigflower Road, the word "by" was omitted inadvertently, and with the result that by the strict grammatical construction of the by-law a former by-law dealing with the same road was declared closed, instead of the road itself:—Held, that certain words in the enacting clause should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended.

Esquimault Water Works Company v. City of Victoria, 10 B.C.R. 193.

—Lands liable for road work—Legal interest in roads—Power of Superior Court over decisions of municipal councils.]—Held (confirming the judgment of Cimon, J.):—1. Municipal councils have no power to create servitudes on lands; they can only give effect to those already created by law. 2. Those lands only can be charged with servitude of road work which have an interest in such work. 3. The interest required by law is not the personal interest of the owner of the lands, but that arising from the situation of the lands. 4. Article 795 M.C. does not give to municipal councils the power arbitrarily to charge lands with road work, irrespective of any legal interest arising from the situation of the lands. 5. The Superior Court has the right to interfere with decisions of municipal councils, whenever any question of legality is involved therein.

Therriault v. Corporation de N.-D. du Lac, 24 Que. S.C. 217 (C.R.).

—Municipal law — Road between two municipalities—Art. 755 M.C.]—Where one side of a road runs along the boundary line between two local municipalities, although such road is wholly situate in one of them, it is a county road, under the provisions of Art. 755, paragraph 2, of the Municipal Code.

Walsh v. Parish of St. Anicet, 25 Que. S.C. 319 (C.R.).

—Opening in sidewalk by permission of corporation—Negligence of licensee—Liability of corporation—Three months' limitation.]—Section 606 of the Municipal Act, R.S.O. 1897, c. 223, which requires an action against a municipal corporation for its default in keeping its streets in repair to be brought within three months, applies to an action against a corporation for an accident occasioned by the failure to properly guard an opening made, with the corporation's permission, in the sidewalk adjoining certain premises for access to the cellar thereof; at all events, it was never intended that the granting of such permission, authorized by section 639 of the Act, should render the corporation liable for the acts and omissions of its licensee, except subject to the above requirements

of section 606. Judgment of Boyd, C., 2 O.L.R. 579, affirmed.

Minnes v. Village of Omemee, 8 O.L.R. 508 (D.C.).

—Non-repair—Negligence of municipal corporation—Notice of accident—Reasonable excuse for want of.]—In an action against a municipal corporation to recover damages for injuries sustained by reason of non-repair of a highway, the ruling of the Judge at the trial as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof" and whether the defendants have been prejudiced in their defence, under section 606 of the Municipal Act, 3 Edw. VII. c. 19 (O.), is subject to appeal. A servant or servants of the defendants had actual knowledge of the accident to the plaintiff and its cause on the day it happened. It was caused by the cave-in of a well-travelled public street in the centre of a city. The plaintiff's left and only remaining arm was broken, and he sustained other injuries. He was in a hospital, suffering great pain, during the seven days allowed by the statute for giving notice, and notice was not given until the eleventh day after the accident:—Held, that there was reasonable excuse for the want of a notice in due time; and that the defendants had not thereby been prejudiced in their defence. Armstrong v. Canada Atlantic Railway Co. (1901-2), 2 O.L.R. 219, 4 O.L.R. 560, applied and followed.

O'Connor v. City of Hamilton, 8 O.L.R. 391 (D.C.).

—Non-repair of bridge — Negligence — Notice of action—Misfeasance.]—(1) Under section 667 of the Municipal Act, R.S.M. 1902, c. 116, a municipality is liable for damages caused by a heavy traction engine breaking through rotten timbers in the approach to a bridge on one of its public highways on which work had been performed and improvements made by it, when such engines had, to the knowledge of the officials of the municipality, been passing over the bridge for the previous two years and no attempt had been made to stop such traffic or to warn those in charge of it of any danger, such bridge being the strongest one across the river within many miles. (2) Defendants could not be held to have been guilty of negligence amounting to misfeasance, so as to make them liable in damages independently of the statute, by reason of having failed to stop up a spike hole in one of the joists in the approach, in consequence of which it had rotted away more than the others on account of water lodging in the hole. (3) The notice of action required by the statute to be given to the municipality need not be signed by the claimant personally or show that she was claiming in her capacity of personal representative of the deceased. (4) The words "happening of the alleged negligence," in the section referred to, should either be construed to read, "happening of the injury or damages resulting from the alleged negligence," or it should be held that the negligence continued to "happen" up to the time that the damages resulted from it, otherwise no notice of the action or claim could be given, in compliance with the statute, in any case where the negligence had existed for more than a month before the injury resulted from it. (5) Plaintiff could recover nothing on behalf of a son of deceased who, in the circumstances and position of his father, could have had no reasonable expectation of pecuniary benefit from the continuance of the life, nor on behalf of a nephew or an adopted child, as they do not come within the provisions of R.S.M. 1902, c. 31, or any other enabling Act.

Curle v. Brandon, 15 Man. R. 122.

—Non-repair—Notice of accident—Reasonable excuse for want of.]—While the plaintiff was engaged in driving a watering cart along the street, the surface suddenly gave way, and the cart falling, or partly falling, into the hole thus caused, the plaintiff was thrown out and injured. The break in the street was caused by the falling in of a sewer pipe which had been laid some 12 or 14 feet below the surface of the ground, about 20 years before and which for 18 years had given no indications of being out of repair. In an action to recover damages for the injuries, the negligence alleged was, that the street was at this time, and for a long time previous had been, out of repair and dangerous for travel, to the knowledge of the defendants; that the bed of the street was of quicksand; and that the sewer pipe had been improperly and negligently laid therein:—Held, upon the evidence, reversing the judgment of a Divisional Court, 8 O.L.R. 391, that there was not sufficient evidence of the existence of surface indications of danger below, which the defendants could be charged with negligence, in not having attended to before the day of the accident; and that, in the circumstances, negligence could not be imputed to the defendants either in the original construction of the sewer or the absence of subsequent examination and inspection. Semble, as regards the question whether there was reasonable excuse for omission to give the statutory notice of the accident under s. 606 of the Municipal Act, 3 Edw. VII. c. 19 (O.), that what may constitute reasonable excuse is not defined and must

depend very much upon the circumstances of the particular case. Where there is actual knowledge or verbal notice, it may be regarded as an element of the excuse, but something more is required. The fact of the accident, by itself, is not a reasonable excuse, if it is not accompanied by some disabling circumstance. The plaintiff was not misled by any one into not giving notice, and was under no disability except that of ignorance of the law. Armstrong v. Canada Atlantic Railway Co. (1902), 4 O.L.R. 560, referred to.

O'Connor v. City of Hamilton, 10 O.L.R. 529 (C.A.).

—By-law of council to close street and sell land—Street shown on registered plan but not taken over or improved by municipality.]—(1) When the owner of land has registered a plan of sub-division of it into lots and showing a street and has sold lots lying alongside and facing on the street, he is bound by the plan and cannot, without the consent of the purchasers, close up the street and retake the land composing it, and what he could not do himself the council of the municipality has no right to do for him by passing a by-law effecting that result. (2) When it clearly appears that a by-law of a municipal council has been passed for an improper purpose, it should be quashed as being an abuse of the powers conferred on the council by the Municipal Act. Re Morton and Township of St. Thomas (1881), 6 A.R. at p. 325, followed. (3) Under section 667 and subsection (d) of section 693 of the Municipal Act, R.S.M. 1902, c. 116, the power of a council to sell roads stopped up by them is restricted to original road allowances and to public roads which have been duly dedicated as such and over which the council has established its jurisdiction, and is not conferred in the case of a street simply shown on a private plan of sub-division and which the council has not improved or assumed any liability to repair. (4) The approval by the Lieutenant-Governor in Council, pursuant to subsection (c) of section 694 of the Municipal Act, has not the effect of making valid a by-law which is unauthorized by the Act. (5) The promulgation of a by-law, under the provisions of sections 425 and 426 of the Act, cannot have the effect of validating a by-law which the council has not power to pass. Such promulgation simply cures defects in the substance or form of the by-law and in the steps leading up to the passing of it.

Re Knudsen and Town of St. Boniface, 15 Man. R. 317 (Perdue, J.).

— Dedication—Expropriation — Presumption—User.] — K. brought an action against D. and R. for trespass to her land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years, and there was an old statute authorizing its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost:—Held, reversing the judgment of the Supreme Court of Nova Scotia (20 N.S. Rep. 95), that in the absence of any evidence of dedication of the road it must be presumed that the proceedings under the statute were rightly taken and K. could not recover. Held, per Strong, J.:—Long occupation and enjoyment unexplained will raise a presumption of a grant not only of an easement, but of the land itself; and not only of a grant, but of acts of legislation and matters of record.

Dickson v. Kearney (1888), 1 S.C. Cas. 53.

—Streets—Power to raise the level—Liability for injury to owners of abutting property.]—The city of Saint John, by its charter, had power to alter and repair its streets. Under this charter the corporation frequently altered the level of streets. An Act of the legislature recited that, owing to irregularities of the ground upon which the city was situate, it had been found expedient to make alterations in the level of streets, that this had rendered it necessary for proprietors of houses to erect steps and stairways to obtain access to their properties, that the corporation had undertaken to authorize this being done, but doubts had arisen as to its power so to do. The statute thereupon proceeded to empower the council of the corporation to permit such steps to be placed upon the highway so long as they did not encroach beyond a certain distance. In 1874 the corporation raised the level of Church street supporting the work in front of the plaintiff's house by a wall and placing a fence thereon, cutting off his direct access to the street. The plaintiff claimed first, that the defendants had no statutory authority to do the work complained of, and, secondly, that, in the construction of the work, the defendants had acted arbitrarily and oppressively, even if they had the statutory power to raise the level of the street. At the trial the plaintiff was nonsuited, the Court holding that, in raising the level of the street, the corporation had acted within the powers granted by its charter and that there was no evidence to support the contention that the council had acted arbitrarily. On appeal to the full Court it was held, the Chief Justice and Duff, J., dissenting, that the nonsuit should be set aside, and a new

trial had between the parties, the Court holding that as a matter of law the defendants had not, under any Act of the legislature, authority to raise the street in the manner in which they did raise it, and that whatever might be their jurisdiction over the street, the particular mode in which they raised the street in question was in excess of their jurisdiction. On appeal to the Supreme Court of Canada:—Held, Fournier and Henry, JJ., dissenting, that the judgment of the full Court (18 N.B. Rep. 636) should be set aside, and the nonsuit granted at the trial restored. Held, per Gwynne, J., that by the Act of Incorporation and other Acts of the legislature, the power of altering and repairing the highway was restricted by no condition save the implied one that the work should be done so as not to constitute a public nuisance; and, if not a public nuisance, the convenience of all private persons, however great the damages suffered, had to yield to the public interest.

City of Saint John v. Pattison, (1880), 1 S.C. Cas. 537.

—General and long continued bad repair —Loss of profits thereby to owner of omnibus line.]—W. was the proprietor of an omnibus line plying in certain streets of the city of Halifax during the winter of 1881-2, under a license from the city. About the 10th January the snow fell very heavily, and by about the 20th, owing to the snow being thrown from the sidewalks into the street, the roadway became filled with pitch holes, some of which were four feet deep. Other severe snow storms through the winter aggravated the condition of the road. The plaintiff alleged that, by reason of this bad repair of the highway, he had suffered damages to a large amount by the wrecking of his carriages, straining of his horses, breaking of harness, etc., and loss of profits through the diminution in traffic on his 'bus line. Plaintiff complained to the city authorities, asking that men be put to work to level the snow between the sidewalks, but his request was refused. The action was tried before McDonald, C.J., and a jury, when a verdict for the plaintiff for $600 damages was found. The defendants obtained a rule to set aside the verdict and for a new trial, which after argument, was discharged by the Supreme Court of Nova Scotia (16 N.S. Rep. 371). On appeal to the Supreme Court of Canada:—Held, the Chief Justice and Gwynne, J., dissenting, that the judgment of the Court below should be affirmed, and the appeal dismissed with costs. Held, per Strong, J., that, under the Act incorporating the defendants and subsequent Acts amending the same, not only were the defendants liable to indictment for breach of their public duties in respect of the matters complained of, but the plaintiff could also maintain an action as a person especially injured thereby. Held, per Strong, J., that the evidence was amply sufficient to warrant the trial Judge in leaving the case to the jury, and the condition of the street being one which might have been remedied by levelling the hillocks which had been formed, and which caused the damage the respondent complained of, the verdict should be upheld. Held, per Strong, J., that the loss of profits claimed was not too remote, but was quite as much an immediate and natural cause of the injury as was the loss of custom in Lancashire & Yorkshire Railway Co. v. Gidlow, L.R. 7 H.L. 517. Held, per Henry J., that the city of Halifax was liable for the negligence of the street commissioners although they were appointed by the city council and not by the Court of General Sessions as provided by R.S. N.S. (4 ser.) c. 49.

City of Halifax v. Walker, 1 S.C. Cas. 569.

—Boundary roads—Bridges—Deviation of boundary road—Liability of adjoining counties.]—The county of Victoria adjoins the county of Peterborough on the west, and, up to 1863, the counties were united for municipal and other purposes. The boundary line road between the county of Peterborough, and the lots merely passed between the 10th concession of the township of Verulam in the county of Victoria and the 19th concession of the township of Harvey in the county of Peterborough, and the lots in the latter concession from 1 to 15 constituted a range of broken lots forming a narrow strip of land fronting on the west side of Pigeon Lake, and separated by that body of water from the rest of the township. The boundary line road between these counties deviated at several places, owing to natural obstructions, and near the village of Bobcaygeon, which was wholly situate in the township of Verulam, the road in deviating from the boundary line crossed the two outlets of Sturgeon Lake, and bridges were built there, during the union at the joint expense of the two counties, and were treated as subject to a joint control and liability. By 42 Vict. c. 47 (O.), which came into force on the 5th March, 1880, that portion of the township of Harvey, lying on the west of Pigeon Lake was detached from Harvey and joined to Verulam for all purposes. The bridges near the village of Bobcaygeon having got into disrepair, the defendants refused to admit any liability therefor, contending that, since the passing of 42 Vict. the repair of these

bridges rested wholly with the county of Verulam. At the trial before Robertson, J., it was held, (15 O.R. 446) that, notwithstanding the provisions of 42 Vict., the bridges remained under the joint control and liability of the two counties. On appeal to the Court of Appeal, (15 A.R. 617), it was held that by virtue of the legislation, Verulam had become a township bordering on a lake, and that the boundary line between the two townships, which was also the county boundary line, had now become the centre line of Pigeon Lake, and not, as formerly, on the original road allowance between Verulam and Harvey. On appeal by the plaintiff to the Supreme Court of Canada:—Held, that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed with costs. Per Taschereau, Gwynne and Patterson, JJ., that since the passing of 42 Vict. c. 47, the boundary line must be regarded as having always been as by that Act established, with the range of broken lots wholly in the township of Verulam in the county of Victoria, and with the boundary between Verulam and Harvey running along the centre line of Pigeon Lake; and that sections 535 and 538, c. 184 R.S.O. (1887), no application as those sections only applied to cases where the intention of the survey was that there should be a road upon the boundary line, but, viewing the boundary line as located by the Act of 1880 in and through Pigeon Lake, it could not be said that the bridges in question were upon the road between the two townships, or on a deviation from such road.

County of Victoria v. County of Peterborough, (1889), 1 S.C. Cas. 608.

—Highways across railway — Right of private individuals to make.]—See RAILWAY.

Re Reid and Canada Atlantic Railway Co., 4 Can. Ry. Cas. 272.

—Dangerous machine in highway — Use by independent contractors—Precautions —Injury to passerby—Liability of corporation and contractors.]—In a public and busy street of a city a horse which was being driven became frightened by a steam roller engaged in repairing an intersecting street, and swerving suddenly upon the plaintiff, who was passing on a bicycle, injured him. The roller was the property of the city corporation, and was being used by paving contractors under a provision in the contract. The work was being done for the corporation, and it necessitated the use of the roller. It was shown that the roller was a machine likely to frighten horses of ordinary courage and steadiness; that of this the city corporation's servants were aware; and that proper precautions were not taken on the occasion in question to warn persons of the approach of the roller to the street on which the horse was passing:—Held, that the place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the city corporation, if they had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller; and the corporation could not rid themselves of this obligation by intrusting the work to a contractor. Penny v. Wimbledon Urban District Council, [1898] 2 Q.B. 212, [1899], 2 Q.B. 72, followed. Held, also, that the contractors were bound equally with the corporation to take notice that the roller was likely to cause danger to the public, and their failure to take proper precautions occasioned the accident. Judgment of Meredith, C.J.C.P., affirmed.

Kirk v. City of Toronto, 8 O.L.R. 730 (C.A.).

—Highways—Deviation — Boundary line road.]—Held, Osler, J.A., dissenting, that the road in question was a boundary line road within the meaning of 3 Edw. VII. c. 19, s. 617, sub-s. 2, notwithstanding its deviation for the purpose of avoiding the expense of building bridges across a river.

Township of Fitzroy v. County of Carleton, 9 O.L.R. 686 (C.A.).

—Dedication of highway—Public user — Crown lands — Locatee—Acquiescence — Subsequent grant without reservation.]—In 1834 an order of the quarter sessions was made under 50 Geo. III. for the opening of a highway through several lots, the title to one of which was still in the Crown, although it had been recently occupied under a license from the Crown. The road described in the order was never opened, but another road following the same general direction, was opened across this lot and others in 1835 or 1836 and was ever after regularly travelled and used as a highway, fenced off from the lot referred to, improved from time to time by statute labour and public money, and treated by the locatee and his successors in title as a public highway. In 1904 the plaintiff, claiming to be the successor in title of the original locatee, established his right, to the satisfaction of the Crown, and a patent was issued to him, in which no reservation or mention of any road was made:—Held, that the road in question had become established as a public highway, the plaintiff had no right to close it, and the defendant, as one of the public, had a right to remove the plaintiff's obstructions, and

was not liable in trespass for having done so. There was evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a sessions order was made for the establishment of a highway but never acted upon was no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication.

Fraser v. Diamond, 10 O.L.R. 90 (Street, J.).

—Nuisance—Piling ties on highway.] — A number of worn out railway ties were taken from the line of railway during ordinary working hours by section men employed by the defendant company and were piled on a highway at a railway crossing, the foreman of the section men intending to take them to his house for firewood. It was the custom of the section men to get rid of the worn out ties either by burning them beside the track or by taking them home for firewood. The plaintiff's horse while being driven along the highway shied at the ties and the plaintiff was injured:—Held, that there was evidence to support the jury's finding that the ties had been placed upon the highway in the course of the employment of the section men and that the defendants were therefore prima facie responsible, but that there being no finding that the ties were a nuisance in the sense of being calculated to frighten horses generally, this being an essential element of liability, a new trial was necessary. Judgment of a Divisional Court reversed.

Forsythe v. Canadian Pacific Railway Company, 10 O.L.R. 73 (C.A.).

—Municipal corporation—Streets — Maintenance—Mandamus.]—A municipal corporation, when it has authorized the opening of a street, must keep it in good condition, whatever may be its importance, and the amount of the taxes levied on the adjoining owners, and can be compelled to fulfil its obligation by mandamus.

Goulette v. City of Sherbrooke, Q.R. 25 S.C. 387 (Sup. Ct.).

—Road inspector—Action against property owner—Declaration.]—A road inspector who sues to recover the price of materials for and work on a sidewalk and public road in front of defendant's property, must show in his declaration that the work was ordered by the municipal corporation, and if he does not set up a by-law to that effect, his action will be dismissed on inscription en droit.

Paré v. Deschamps, 7 Que. P.R. 4 (Sup. Ct.).

—Negligence—Repairs—Want of warning—Proximate cause — Horse beyond control.]—Where two causes combine to produce an injury, both of which are in their nature proximate, the one being a defect in a highway and the other some occurrence for which neither party is responsible, a municipal corporation is liable in damages if the injury would not have been sustained but for the defect in the highway. The defendants were held liable in damages because while they were repairing a bridge on a highway they failed to give warning or put up a barrier, and an accident happened in consequence of a driver's attempt to turn suddenly off the highway when he came to the bridge, his horse at the time being almost beyond his control in consequence of a break in the harness.

Thomas v. Township of North Norwich, 9 O.L.R. 666 (D.C.).

— Elevated highway — Repair — Guard-rails — Defective harness—Negligence of driver.]—The female plaintiff was being driven by her mother over a highway at a point where a hill had been partly cut down and the valley filled up making a good level road from 7 to 10 feet above the natural level of the ground. The horses and conveyance belonged to the mother and the neck-yoke and harness were defective to her knowledge, but there was no evidence that the daughter was aware of it. The neck-yoke broke, the control of the horses was lost and the conveyance went over the bank and the daughter was injured:—Held, that it was the defendant's duty to keep the highways in such a condition of repair as the reasonable demands of the traffic over them from time to time required, having regard to their means of performing such duty; that the failure of the defendants to place guard-rails or a protection along the embankment was a breach of that duty, and that their fault was the proximate cause of the female plaintiff's injury. The driver was driving carelessly and the defective harness and her carelessness largely contributed to the accident. Held, that although her contributory negligence would have been an answer to any claim by herself, it could not be said that it was the proximate cause of the daughter's injury. Held, also, that the mother's negligence should not be attributed to the daughter who was ignorant of the state of the harness, etc., and in the absence of such knowledge the defence of her contributory negligence failed.

Plant v. Township of Normandy, 10 O.L.R. 16 (Meredith, J.).

—Repair of sidewalk—Proper construction—Incomplete state — Misadventure.] —The defendants were taking up an old

and putting down a new board sidewalk on a street and had completed the work up to a point somewhere in front of plaintiff's shop when the workmen were taken away to perform some urgent work in another part of the town and were away about a day and a half. Plaintiff, who was aware of what was being done and of the incomplete state in which the work was left, drove up in a cart and in alighting slipped off the unfinished end of the sidewalk and was injured:—Held, that the defendants were not liable for the injury.

Belleisle v. Town of Hawkesbury, 8 O.L.R. 694 (Britton, J.).

—Crown reservation for road—Towns Incorporation Act, R.S. c. 71, s. 170—Effect of investing streets in town—Expropriation proceedings.]—Defendant, in making application for a grant of land from the Crown represented that the land applied for was "near" the town of Sydney, when in fact it was in said town. Also that the land was "unoccupied and unimproved," when in truth, to defendant's knowledge, it was then in the occupation of the Dominion Steel Co., being a part of land which had been expropriated by the town and conveyed to the company for use in connection with their works:—Held, affirming the judgment of Ritchie, J., in favour of plaintiff, that the Crown having been induced by false suggestions and fraudulent concealment to make a grant which it would not have made if the Crown officers had been properly informed, the grant must be set aside. The land in question was a portion of what was known as the "Cornish town road," being land reserved by the Crown many years previously for the purpose of a public road or highway, but which had never been used, and was wider than was required for the purpose, and out of which some grants had been made. By the provisions of the Towns Incorporation Act, R.S. c. 71, s. 170, all public streets, roads, highways, etc., were vested absolutely in the town, and the town council was given full control over the same. Quære, whether, after the passage of this Act, the Crown had any further control over the portion of the Cornish town road lying within the limits of the town. Held, that the statute was not to be construed as not applying to the road in question merely because it had not been used or was wider than was required. Also, that the grant was one which the Court had jurisdiction to vacate. The right of the town to expropriate the land in question was contested on the ground that, being Crown land, the Act enabling the expropriation to be made, (Acts of 1899, c. 84) did not apply. Held, that the absence of authority, if any, was removed by the Act ratifying and confirming the expropriation proceedings (Acts of 1900, c. 66).

Attorney-General v. McGowan, 37 N.S. R. 35.

—Road—Dedication to public use.] —Dedication of a road in a municipality as a public street or road is sufficiently established by the following facts: (1) Registration by the proprietor of a subdivision plan, and deposit of book of reference, on which the road is indicated and described as a street or road. (2) The opening and laying out of the land by the proprietor as a street, and the placing of sidewalks thereon. (3) The free and uninterrupted use of the street by the public for more than ten years; (4) Exploiting of the adjacent land by the proprietor and selling lots as bounded by a public street. (5) Use of the street by the public as the only direct access to the railway station. (6) Acceptance of the dedication by the public and the municipality—the uninterrupted use of the street being a sufficient acceptance.

Shorey v. Cook, 26 Que. S.C. 203 (Dunlop, J.).

—Deviation and closing street — Lands injuriously affected.]—The claimants alleged that their lands were injuriously affected by the doing of certain acts authorized by Clause 2 of the Tripartite Agreement and two by-laws passed by the respondents—(1) Authorizing and permitting the Grand Trunk Railway Co. to place, maintain, and use certain tracks on the Esplanade opposite the claimants' premises; (2) deviating and closing a portion of Berkeley street. The premises of the claimants were 125 feet to the west of Berkeley street and south of the Esplanade. The Tripartite Agreement was validated by 55 Vict. (Ont.) c. 90, s. 2, the latter providing that the respondents should pay to any person whose lands are injuriously affected by any act of the corporation in the execution of said agreement, compensation, which, if not agreed upon, should be ascertained by arbitration. The arbitrators awarded $100 as damages for the deviation and closing of Berkeley street, and found that the other matters, for which compensation was claimed, were not acts done by the respondents in execution of the Tripartite Agreement, for which the claimants were entitled to any compensation from the respondents. The award also provided that the arbitrators' and stenographers' fees and costs of the award should be paid by the respondents in any event:—Held, 1. That the claimants were not entitled to damages for the deviation and closing of Berkeley street. Moore v. Township of Esquesing, (1891), 21 C.P. 277; Falle v. Tillsonburg, (1893), 23 C.P. 167, followed

2. That the railway tracks were placed upon the Esplanade under the authority of an order of the Railway Committee. 3. That the respondents had done none of the acts complained of in the execution of the Tripartite agreement. 4. That the respondents had no authority, since 51 Vict. c. 29, to consent to a railway company constructing its lines upon any street in the city of Toronto. 5. That the claimants' lands were not "injuriously affected," within the meaning of 51 Vict. c. 29, so as to entitle them to compensation. Powell v. T., H. & B. Railway Co., (1898), 25 A.R. 209, followed. 6. That the respondents were entitled to the general costs of the arbitration and award. In re Pattulo and Town of Orangeville (1899), 31 O.R. 192, followed. The claimants also claimed damages to two water lots opposite their property in the harbour and unpatented. Held, that the respondent was not liable.

Re Medler & Arnot and Toronto, 4 Can. Ry. Cas. 13 (C.A.) (Ont.).

—Procés-verbal — Amendment—Notice.] —Neither the plaintiff nor his lands were subjected to any charge in respect to the opening and maintenance of a street ordered by an homologated procès-verbal: —Held, that the municipal council could not, by by-law, amend the procès-verbal so as to subject the plaintiff or his lands to a charge for these works unless public notice had first been given showing plainly that, by the contemplated by-law, they would be called upon to contribute therefor. A public notice addressed to "all whom it may concern" that the municipal council of the parish of St. Alexandre, at a sitting to be held on Tuesday, the 13th October, inst., at 8 o'clock a.m., would pass a by-law to amend the procès-verbal of . . . respecting the works to be done on the streets therein mentioned and the persons affected, is insufficient as regards the plaintiff who was not until then interested in the procès-verbal or the said streets, nor affected thereby. Consequently, the plaintiff could, by action in the Superior Court, cause the said by-law to be quashed as against him for illegality, since he had had no opportunity of being heard before the council and showing that he should not be subject to such charge.

Bouchard v. Corp. of St. Alexandre, Q.R. 25 S.C. 415 (Sup. Ct.), affirmed on review, 31 Oct., 1904.

— Work on road—Taxation—Default — Sale of land.]—The cost of work on a road done at the expense of an owner of land in default under Arts. 397 et seq. M.C., is only assimilated to a tax and recoverable as such when it has been established by a judgment given on proceedings taken under the Municipal Code. The extract sent by the secretary-treasurer of a local municipality to the secretary-treasurer of the county, pursuant to Art. 373 M.C., and the notice given and published by the latter under Arts. 988-9 M.C., should, on pain of nullity, contain the amount of the taxes affecting the immovables mentioned therein. The sale, under Arts. 1000-1 M.C. of an immovable described in the said extract and notice as being charged with a sum exceeding that actually due for taxes, is void. The prescription of two years provided for by Art. 1015 M.C. applies only to voidable sales and not to those which are avoided by a radical defect.

Dent v. County of Labelle; Gagnon v. Canton of Lochaber, Q.R. 27 S.C. 171 (Sup. Ct.).

—Winter roads—Art. 840 M.C.]—In laying out winter roads outside the bounds of the summer route the municipalities can only exercise the powers conferred on them by Art. 840 M.C. and, therefore, an owner of land facing the summer route cannot be allowed to attack the road chosen by the municipality.

Pesant v. Parish of St. Leonard, 7 Que. P.R. 220 (K.B.).

—Non-repair of highway—Injury to pedestrian—Sidewalk — Supervision.] — In an action for damages for injuries sustained by the plaintiff from a fall upon a sidewalk in a town, it appeared that the defect in the sidewalk was slight in character—not conspicuous or notorious — on a street comparatively little frequented, over which there was weekly supervision, and that the defect had not existed more than six days before the plaintiff was hurt, was not actually noticed by any officer of the municipality, and that no complaint was lodged:—Held, that notice of the condition of the sidewalk was not to be attributed to the municipality.

McNiroy v. Town of Bracebridge, 10 O.L.R. 360 (Boyd, C.).

—Non-repair of highway—Jury notice.]—In an action for damages for injuries sustained by the plaintiff from a fall upon a highway under the control of the defendant municipality, the statement of claim alleged that the accident to the plaintiff was caused by the faulty, improper and negligent construction of the pavement, which, being built upon an incline and having a smooth surface, "would call for the ordinary rough finish which it is customary and prudent to build under said conditions:"—Held, that the action was for "injuries sustained through non-repair" of the highway, within the meaning of s. 104 of the Judi-

cature Act, R.S.O. 1897, c. 51, and that a jury notice was therefore irregular.

Armour v. Town of Peterboro, 19 O. L.R. 306.

—Obstruction to street—Damages—Allegation of knowledge of obstruction—Nonfeasance.]—In an action against the city of St. John for damages sustained in an accident caused by an obstruction in one of the streets of the city, the declaration alleged that the defendant wrongfully and negligently allowed a sidewalk in one of the streets to be obstructed by a pile of lumber, and wrongfully and negligently allowed it to remain there for an unreasonable time, without lights or other signals thereon, whereby the plaintiff was thrown down and sustained the injury complained of:—Held, that as the declaration did not allege that defendants had knowledge of the obstruction, it disclosed a mere non-feasance, and was bad on demurrer.

Rolsten v. City of St. John, 36 N.B.R. 574.

—Closing highway—Property injuriously affected.]—A property on the west side of a street running north and south was held to have been "injuriously affected" within the meaning of section 437 of the Municipal Act, 1903, by the closing of a street running from the first street in an easterly direction opposite the property in question and an award of compensation by the official arbitrator to the owner of the property was upheld, the principle of Metropolitan Board of Works v. McCarthy (1867), L.R. 7 H.L. 243, being applied.

Re Tate and the City of Toronto, 10 O.L. R. 651 (C.A.).

— Dedication—Plan—Registration before incorporation.]—A plan showing the locus in quo as a street was made and filed before, but practically contemporaneously with, the locality being set apart as an incorporated village, the former being on June 3rd, 1873, the latter on June 25th, 1873. The lots were first sold under the plan in 1876. Subsequent legislation which was retroactive, declared that allowances for roads laid out in cities, towns and villages, fronting upon which lots had been sold, should be public highways:—Held, that the road in question was a public highway and subject to the jurisdiction of the municipality.

McGregor v. Village of Watford, 13 O. L.R. 10 (Boyd, C.).

—Road—Procès-verbal — Petition to set aside.]—Where by a definite judgment of the Circuit Court, a procès-verbal for the opening of a road has been declared regular, and its homologation granted, this homologation does not lapse by efflux of time, especially where most of the bridges have been completed, a part of the road built, and the material for the construction of the whole road purchased.

Bigras v. Laval County, 7 Que. P.R. 419.

— Declaring certain bridges county bridges.]—A structure for crossing the waters of a lake, with a wooden section 243 feet long spanning the waters at low water, and embankments at either end of 140 feet and 260 feet respectively, the whole width being covered at high water, is a bridge over 300 feet in length within the meaning of section 617 (a) of the Consolidated Municipal Act, 1903, whereby certain bridges over that length may be declared county bridges. Semble, section 617 (a) is not to be read as applying only to bridges crossing rivers, streams, ponds, or lakes, to the exclusion of bridges crossing ravines.

Re Mud Lake Bridge, 12 O.L.R. 159 (D. C.).

— Dedication—Acceptance by public — User.]—An action was brought by the city of Toronto against the G. T. Ry. Co., to determine whether or not a street crossed by the railway was a public highway prior to 1857, when the company obtained its right of way. It appeared on the hearing that, in 1850, the trustees of the General Hospital conveyed land adjoining the street describing it in the deed as the western boundary of allowance for road, and in another conveyance, made in 1853, they mention in the description a street running south along said lot. Subsequent conveyances of the said land prior to 1857 also recognized the allowance for a road:—Held, (Idington, J., dissenting), that the said conveyances were acts of dedication of the street as a public highway. The first deed executed by the Hospital trustees, and a plan produced at the hearing, showed that the street extended across the railway track and down to the River Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh. Held (Idington, J., dissenting), that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to show an acceptance by the public of the highway.

Grand Trunk Railway Company v. City of Toronto, 37 Can. S.C.R. 210.

—Excavation in street—Failure to properly guard—Contributory negligence.] — Plaintiffs sought to recover damages from the defendant town for injuries sustained in falling into a ditch or trench which had been dug across one of the streets of

the town by a contractor under the town authorities in connection with the construction of a system of drainage. The evidence showed that plaintiffs drove out of town in the morning, before the trench was dug, and were returning after dark when they were thrown into the trench which, in the meantime, had been dug across the greater part of the street, and had been left unguarded and insufficiently lighted. The jury found, in answer to questions submitted to them, that the town was guilty of negligence in not properly guarding the excavation, but that the driver of the carriage could have avoided the accident by the exercise of reasonable care:—Held, on an equal division of the Court, that the judgment entered on the findings, in defendant's favour, must be affirmed.

Weir v. Town of Amherst, 38 N.S.R. 477.

—Negligence—Allowing piles of lumber to remain on highway.]—On the side of a road allowance in front of a saw mill large quantities of logs, bark and rubbish were allowed to be piled and to be left there. The plaintiffs were driving with their horse and buggy along the allowance; while passing the place in question, the horse became frightened and swerved from the beaten track in the direction of the pile, and in attempting to turn back again into the road the front wheel of the buggy came in contact with a log lying about two or three feet from the travelled way; whereby the buggy was overturned, and the plaintiffs thrown out and injured:—Held, that the defendants were liable therefor.

Kelly v. Township of Whitchurch; Baker v. Township of Whitchurch, 11 O. L.R. 155, affirmed 12 O.L.R. 83 (D.C.).

—Non-repair—Negligence—Notice of accident—Reasonable excuse.]—On one of the streets of the city there was a hole in the sidewalk about twenty feet long, caused by the stone flags having fallen in, and bottom being covered with broken stones, iron and other debris; while along the side of the curb, bricks to the height of eight feet had been piled, at one end of which a lamp had been placed; but the place where the cavity was, was in total darkness. The plaintiff, who was not very familiar with the city, was walking after dark along the street, when he fell into the hole, and was so seriously injured that he had to be taken to the hospital, where he remained for over three weeks, two of which he was obliged to remain in bed, his condition being such that he was mentally incapable of giving to the city the notice of the accident within the seven days prescribed by section 606 (3) of the Municipal Act, 3 Edw. VII. c. 19 (O.). It appeared that the city was not prejudiced by the want of notice:—Held, that the street was out of repair, so as to render the city liable to the plaintiff; and that, under the circumstances, the plaintiff had shown sufficient excuse for not giving the notice. O'Connor v. The City of Hamilton (1905), 10 O.L.R. 536, distinguished.

Morrison v. City of Toronto, 12 O.L.R. 333 (D.C.).

—Procès-verbal—Homologation — County road — Cost of maintenance — Levy by county.]—Where a procès-verbal charges the maintenance of a road upon certain ratepayers of a local municipality and the order homologating it, at the same time, declares the road to be a county road, the county is obliged to see to the execution of the procès-verbal and to directly levy the cost upon the ratepayers in the manner provided by Act 941 of the Municipal Code, without reference to or the aid of the local municipality where the road is situated.

County of St. John v. Corp. of St. Jacques-le-mineur, Q.R. 14 K.B. 343.

— Repairs—Negligence—Practice—Deposit for costs.]—The omission to make the deposit required by Act 793 of the Municipal Code in the case of an action by a person who is not a ratepayer in the defendant municipality is not ground for dismissal of the action, but may be the subject of dilatory exception. (2) The corporations of rural municipalities are liable in damages for injuries sustained on account of want of repair of roads used by mere permission of the owners of lands which have the character of municipal roads under the provisions of Article 749 of the Municipal Code.

Lalongé dit Gascon v. Parish of St. Vincent de Paul, Q.R. 27 S.C. 218 (Ct. Rev.).

—Repairs to highway—Bridge carried away by flood—Continuing cause of action.]—(1) A private individual who suffers special damages caused by the neglect of a municipal council to replace a bridge on a public highway that had been carried away by flood is entitled to recover for such damages in an action against the municipality under section 667 of the Municipal Act, R.S.M. 1902, c. 116. (2) A mandamus to replace the bridge should not be granted in such a case, as there is another adequate remedy, viz.: to proceed by indictment, but the refusal of the mandamus should be without prejudice to the plaintiff's right so to proceed. (3) Under sub-section (b) of above section the plaintiff's claim for damages should be limited to such as he had suffered since one month prior to the service of his notice of action on the municipality.

(4) The cause of action being a continuing one, damages should, under Rule 566 of the King's Bench Act, be assessed up to the date of the delivery of the judgment. (5) It is proper to bring such an action in the Court of King's Bench, even if the damages allowed should be within the jurisdiction of the County Court, and the plaintiff should have full costs.

Noble v. Municipality of Turtle Mountain, 15 Man. R. 514 (Richards, J.).

—Repair—Notice.]—Sources of recurring and repeated danger on a street are to be watched and guarded against by a municipality. Where a contractor for taking down a building had laid planks on a sidewalk, which were fastened at both ends with iron straps to keep them together, which straps were raised from time to time by teams and wagons passing over them, leaving a space between the straps and the planks into which a passer-by put her foot and was thrown to the ground and injured:—Held, that when the normal condition of a sidewalk is disturbed, it is the primary duty of a municipality to see that in its altered state, it is kept in proper repair, and in a busy and much frequented place in excellent repair; and that when the source of danger has existed in a crowded street of a city for two weeks or even somewhat less, notice of the want of repair and of dangerous condition will be attributed to the authorities. In this case the corporation was held liable notwithstanding there was evidence of repair by nailing down the straps when discovered to be loose. Judgment of Britton, J., affirmed.

Gignee v. City of Toronto, 11 O.L.R. 611 (D.C.).

—Snow fences—By-law—Conditional undertaking by municipality to pay for fences.]—The defendants' council passed a by-law enacting:—"that where the road is liable to be blocked with snow in winter, and where in the opinion of the council such drifts would be prevented by the removal of any . . . fence and replacing the same by wire or other fence, the council may order the removal of such fence, ... and in the removal of such fence or fences by the owners and the erection of such wire or other fences as the council shall direct, the parties erecting such wire or other fences shall be paid out of the general funds of the municipality a sum not exceeding," etc. The plaintiff before erecting certain wire fencing submitted his contract for it to the council through A., and at a session of the council, and in the presence of the township clerk and several councillors, the reeve expressed to A. the opinion and order of the council that the plaintiff's existing fence should be removed, and its direction for or approval of the erection of the proposed wire fence; and A. communicated this order and direction to the plaintiff, and thereupon the plaintiff removed his existing fence and had the wire fencing in question erected:—Held, that the defendants were liable to pay for the wire fencing. The by-law was a conditional undertaking by them to pay, and the plaintiff had fulfilled the required conditions. By the Act respecting Snow Fences, R.S.O. 1897, c. 240, s. 1:—"If the council and the owner cannot agree in respect to compensation to be paid by the council, then the same shall be settled by arbitration in the manner provided in the Municipal Act and the award so made shall be binding upon all parties":—Held, that this did not preclude the jurisdiction of the Court where as here the parties were not merely unable to agree as to the amount of compensation, but the municipal corporation wholly repudiated liability.

Brohm v. Township of Somerville, 11 O. L.R. 588 (D.C.).

— Street widening—Highway—Expropriation—By-law—Resolution.]—On suit by three ratepayers of a municipality to set aside a resolution of the council and for reimbursement of moneys paid as indemnity, in virtue thereof, for lands said to have been appropriated by the municipality for widening streets:—Held, that, in the absence of a by-law authorizing the expropriation of the lands for such purpose the resolution was invalid and should be annulled and that the moneys so paid should be returned to the municipality.

Marsan v. Guay, Q.R. 28 S.C. 145 (Sup. Ct.).

—Township bridge—User by other municipalities—Repair and maintenance.]—By section 617a of the Con. Mun. Act. 3 Edw. VII. c. 19 (O.), where a township bridge is over 300 feet in length the township council may, by resolution, declare that by reason of such length, and that it is being used by inhabitants of municipalities other than the township, and is situated on a highway, being an important road and affording means of communication to several municipalities, it is unjust that the township should be liable for its maintenance and repair and that such liability should be imposed on the county, an application may be made to the county Judge to have it so declared:—Held, that such user need not be by the inhabitants of municipalities within the county, the material point being its extensive use for travel by neighbouring municipalities, whether in or out of the county; nor that the road which affords such means of communication should either be a line of

road extending through the municipalities referred to or a main trunk road with branches into different municipalities; all that is necessary is that it should be an "important road" connected with other roads or ways forming a means of communication, whereby the inhabitants of such municipalities may pass and repass over the said bridge.

Township of McNab v. County of Renfrew, 11 O.L.R. 180 (D.C.)

—Private road—User by the public with permission of the owner.]—A road originally opened as a private road on private property will not be presumed to have become a public road in the possession of the municipality in which it lies, merely because the owner has allowed the public the use of it for six years without objection. The municipal corporation cannot therefore proceed en complainte against the owner who closes the road.

Township of Onslow v. McGough, 30 Que. S.C. 256.

—Procès-verbal for maintenance of road—Notice of meeting of interested ratepayers—Insufficiency.]—(1) A public notice by a special superintendent of a meeting of interested ratepayers, under Article 796, M.C., that it will be held upon the ground in the said road, the length of the latter being four or five miles, is void for uncertainty of place. (2) A procès verbal and report deposited for homologation by a special superintendent must show on their face that all the formalities required by law were duly complied with. A procès-verbal will be declared void after homologation when the report does not show that the notice for convening the meeting of the interested ratepayers was given and published seven clear days before the day appointed therefor. (3) A procès-verbal which imposes the maintenance of a front road on the owners of parcels of land of thirty arpents or less in width who already have one to maintain, is null and void. (4) A procès-verbal which imposes the maintenance of a front road on the ratepayers, so that the portion of each is longer than twice the width of his land, is null and void. (5) A procès-verbal which lays the maintenance of a road on ratepayers who have little or no use for it and which is necessary and almost essential to other ratepayers of a different range of the municipality, as an outlet, and who are not made to contribute to it, is unjust and oppressive and the Court will quash it as such at the suit of the parties interested.

Beauchemin v. Township of Roxton, 31 Que. S.C. 86.

—Regulations—Quashing.] — Regulations as to highways are left to the discretionary power of municipal corporations in the mode provided by the municipal code. The recourse by action to annul them, founded on the right of supervision and reformation by the Superior Court, by virtue of Article 50 C.C.P., is only open in the case of abuse and injustice, arising out of bad faith and so grave as to amount to oppression.

Pepin v. Village of Massueville, Q.R. 15 K.B. 261.

—Mandamus—Municipal corporations.] — The recourse to the writ of mandamus to compel a municipal corporation to perform a legal duty is not open to another corporation which is equally bound to the performance of such obligation and which is also in default. Therefore, when two municipalities have the maintenance, in different proportions, of a bridge which connects them and is in need of repairs the one cannot proceed by mandamus against the other if it has not furnished its own share of the maintenance.

Village of Gatineau Point v. City of Hull, Q.R. 15 K.B. 354.

—Compensation for lands injuriously affected—Closing road—"Advantage derived from contemplated work."]—Under section 437 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), every council shall make to the owners of real property taken by the corporation or injuriously affected by the exercise of its powers due compensation for any damages necessarily resulting from the latter "beyond any advantage which the claimant may derive from the contemplated work: —Held, that this means the "contemplated work" of the corporation alone, and that a person injuriously affected by the closing of a road, part of a scheme for granting facilities to a lumber company, was entitled to compensation without any diminution because of the company's mills enhancing the value of his lands. Under section 629 no road established shall be closed whereby any person will be excluded from ingress or egress over such road, unless, in addition to compensation, some other convenient way is provided:—Held, that a road need not, in order to come within the above section, actually form a boundary of land, provided there is ingress or egress to and from such land over it.

In re Brown and City of Owen Sound, 14 O.L.R. 627.

—Liability for non-repair of highway — Notice of action.]—Under section 722 of the Winnipeg Charter, which is the same in effect as section 667 of the Municipal Act, R.S.M. 1902, c. 116, the corporation will be liable in damages for injury sustained by a person in consequence of a

fall caused by stepping on and so breaking down a rotten plank in a sidewalk laid down by the corporation on a public highway, and the said sidewalk being very old and decayed underneath, it being shown that the defect, although not apparent, would have been detected if there had been a proper and adequate system of inspection employed. The notice of the action given by the plaintiff, pursuant to sub-section (b) of the same section, stated that she claimed from defendants $1,000 damages with respect to the matters therein set out and that she would commence an action in the Court of King's Bench to recover that sum for injuries sustained by her through the omission and default of defendants to keep in repair a public sidewalk on the east side of Main street between Polson and Bannerman avenues in said city. The accident happened at a point between Polson avenue and Atlantic avenue which is between Polson and Bannerman avenues. It was given within a month from the date of the injury, but did not state such date or the nature of the injury or how it had occurred, or the place more specifically than as above. The trial Judge gave plaintiff a verdict for $3,000 damages:—Held, that the statute, which only requires "notice of any such claim or action," should receive a liberal construction, and requirements, not specifically stated and not necessarily implied, should not be read into it, and that the notice given was sufficient. Curle v. Brandon (1905), 15 M.R. 122; Jones v. Bird (1822), 5 B. & Ald. 837; Martins v. Upcher (1842), 3 Q.B. 662, and Bond v. Conmee (1889), 16 A.R. 398, followed. Clarkson v. Musgrave (1882), 9 Q.B.D. 386, and St. John v. Christie (1892), 21 S.C.R. 1, distinguished on the ground of differences in the wording of the respective statutes. Held, also, that, as plaintiff's injuries had resulted much more seriously after the notice was given than she anticipated, she was not precluded by the terms of the notice from claiming and recovering in the action a larger amount than $1,000.

Iveson v. Winnipeg, 16 Man. R. 352.

—Streets, property of corporation in — Vancouver Incorporation Act.]—Section 218 of the Vancouver Incorporation Act, 1900, provides, in part, that every public street . . . in the city shall be vested in the city (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved). In an action for an injunction to restrain the corporation from digging and blasting for the construction of a drain on a street within the corporate limits, plaintiff submitted that a proper construction of the word "vest" as used in section 218, did not authorize the corporation to dig to an excessive depth:—Held, adopting the ruling in Roche v. Ryan (1891), 22 Ont. R. 107, that the word "vest" was not a vesting of the surface merely, but is wide enough to include the freehold as well, but, held, on the evidence, that it had not been shown by the plaintiffs that substantial or irreparable injury would be sustained by them through the construction of the drain.

Cotton v. City of Vancouver, 12 B.C.R. 497.

—Excavation—Non-repair of highway.]—Plaintiff's statement of claim, in an action for injuries sustained by falling into an open sewer dug in the street by the defendants, alleged that such injuries "were caused by the negligence of the defendants in not securely guarding said sewer and making same safe for passengers using said street:"—Held, that the failure of the defendants to guard the excavation was non-repair within the meaning of section 104 of the Judicature Act, and a motion to strike out the jury notice was allowed.

Burns v. City of Toronto, 13 O.L.R. 109.

—Procès-verbal in abeyance—Resolution of municipal council ordering works.]—(1) A procès-verbal for the opening of a municipal road, made and homologated before the statute 60 Viet. c. 27 (Que.), remains in force until it is abrogated by a subsequent procès-verbal or by-law. A municipal council has therefore the power by resolution to order the performance of work specified in such a procès-verbal which has been allowed to remain in abeyance for a period of over forty years. (2) A procès-verbal cannot remain in force for a part and become inoperative for another part under 60 Viet. c. 27, s. 7 (Que.). When therefore it is made and homologated for the opening of two roads, one a front road and the other a by-road, and its provisions are carried out in respect of the latter, it is in force as a whole and does not become prescribed in respect to the front road. (3) Prescription of a procès-verbal under the statute must be expressly pleaded by the party who seeks to avail himself of it. (4) The above statute has no retrospective operation and applies only to procès-verbeaux made after it came into force. (5) The rule of Article 825 M.C., that no one is bound to maintain more than one front road on the same lot of thirty arpents depth affords no ground of annulment of a procès-verbal, but only of application to the municipal authorities to shift the burden in conformity with it. (6) Irregularities of procedure are not sufficient grounds for an action to set aside municipal proceedings but of appeal or petition to quash provided in the Municipal Code for the purpose.

Corporation of Ste-Justine de Newton v. Leroux, 15 Que. K.B. 159.

—Liability for non-repair of road—Work done on part of road distant from place where accident occurs—Evidence of notice.]—(1) If work is performed on a public road by a municipality to facilitate travel between points on both sides of the place where the work is done, so as to provide a completed road between such points for the use of the public, the municipality is liable, under section 667 of the Municipal Act, R.S.M. 1902, c. 116, in case an accident happens by reason of non-repair of the road at any place between those points, although no work has been done at or near that particular place. (2) When an obstruction in the shape of a barbed wire fence has been allowed to remain across part of a highway for more than three months at that season of the year during which road repairs would naturally be made, notice of its existence should be imputed to the municipality notwithstanding the absence of direct evidence of notice.

Couch v. Municipality of Louise, 16 Man. R. 656.

—Dedication—User by public.]—In an action for a declaration that a portion of the River road lying between Burgar and Dorothy streets, in the Town of Welland, was not a highway, but the private property of the plaintiffs:—Held, reversing the judgment of Anglin, J., 12 O.L.R. 362, that the evidence did not establish dedication, and that the plaintiffs were entitled to succeed. Held, also, that the Attorney-General was not a necessary party.

Macoomb et al. v. Town of Welland, 13 O.L.R. 335 (C.A.).

—Obstruction—Municipal corporation — Mis-feasance—Liability for wrongful acts of committee of council—Injury to traveller.]—The municipal council of a township having decided to construct a ditch along a highway, under the provisions of the Ditches and Watercourses Act, appointed three of their number a committee to meet on the highway, and there to let the contract for the work by public competition. This the committee did, and, in order to indicate where the ditch was to be constructed, they drove stakes in the highway, one being near the centre of the travelled portion. The contract was let, and the stakes were left in position, projecting about six inches above the ground, and unprotected by barrier, light, or otherwise. One of the plaintiffs, in walking upon the highway struck her foot against one of the stakes, and was thrown to the ground, and injured:—Held, that the injury was caused by misfeasance, and that the municipal corporation were liable for the acts of the committee, who were acting within the scope of their authority. Damages were assessed for the plaintiff who was injured at $1,500 and for her husband at $500.

Bibbar v. Township of Crowland, 13 O.L.R. 164 (Mulock, C.J. Ex.D.).

—Bridge over stream stopping flow of water—Destruction of highway—Duty of municipality to repair.]—Where the destruction of a highway is caused by the gradual encroachment of the sea or a lake, arising from natural causes, the water occupying the former location of the highway, and whereby there is a change of ownership in the land encroached upon, it becoming vested in the Crown, and available for purposes of navigation, there is no liability on the part of the municipality, by virtue of its duty to keep highways in repair, to replace the highway; but if the element of ownership does not arise, a duty to repair may exist where the destruction is of such a character, taking into consideration the cost of repair, that the restoration of the highway may not unreasonably be regarded as coming within the bounds of such duty. In a creek, in the Town of Dundas, a couple of dams built some sixty years ago had broken away, whereby large quantities of stones, sand and other debris were carried down and deposited in the channel adjacent to the plaintiff's land, the accumulation being added to by a bridge across the creek, built by a railway company, which choked the flow of water, the effect being that a portion of the highway in front of the plaintiff's land, and which was the only mode of ingress and egress to and from it, was washed away, rendering it difficult for two vehicles to pass each other. By removing the check to the flow of the water, caused by the bridge, and by the expenditure of $150, a roadway 30 feet wide could be furnished, while at a cost of $800 a permanent and satisfactory roadway could be provided: — Held, no question of ownership arising, and taking into consideration the cost of repair, the destruction of the highway was not of such a character as would relieve the municipality from their obligation to repair; and that they were liable to the plaintiff for the special damage he had sustained by reason of their neglect. A mandamus will not be granted in such a case. If the relief sought was as one of the public the remedy would be by indictment. An injunction was also refused, it not appearing that the municipality had interfered with the flow of the water. The judgment of Street, J., 10 O.L.R. 300, reversed.

Cummings v. Town of Dundas, 13 O.L.R. 384 (D.C.).

— Public lane—Strip of land adjoining used as part of.]—To constitute a legal

possession of land, not only must there be a corporeal detention, or that quasi detention, which according to the nature of the right, is equivalent thereto, but also the intention to act as owner of the land; no legal possession is acquired by the exercise of a supposed right as one of the public. The rear portions of the plaintiff's and the defendant's lands abutted on a public lane, a strip of land between the fence erected on defendant's land and the boundary of the lane being unenclosed. The plaintiff, for over 20 years, believing this strip to be a part of the lane, had been accustomed to drive over it to get to his stable, doing so in the exercise of a supposed right as one of the public, and not as an easement to his land:—Held, that he had not acquired any right to use the strip.

Adams v. Fairweather, 13 O.L.R. 490 (D.C.).

—Highways across railway — Right to construct.]—See RAILWAY.

—Non-repair of streets—Right of action.] —The provisions of the Municipal Ordinances in force in 1893, or subsequently relating to the repair of sidewalks, etc., are not applicable to the city of Calgary, although not expressly declared inapplicable by the special Ordinance incorporating the city, which was passed in that year. Although a duty to repair streets may be expressly imposed upon a municipality, no action lies against it for damages for injuries resulting from non-repair.

Clark v. City of Calgary, 6 Terr. L.R. 309.

—Damages—Notice of action.] — When plaintiff proves that he has given the notice of action required by the Municipal Code, the failure to allege notice in his declaration is not a cause of prejudice to the defendant and not a ground for exception to the form.

Pageot v. St. Ambroise, 10 Que. P.R. 79.

—Defective sewer—Duty of city to repair —Notice—Misfeasance.]—If the city fails to repair a leak in one of its public sewers after notice of the defect, it is guilty of a misfeasance, and is liable for damages by water finding its way from the leak into the cellar of an adjoining property. Curless v. Town of Grand Falls, 37 N.B.R. 227, followed.

McKay v. City of Saint John, 38 N.B.R. 393.

—Action—Notice—Charter of Montreal — Unnecessary proceedings.] — The city of Montreal sued for damages caused by non-repair of a sidewalk can set up that the notice required by its charter before bringing action was not given within the prescribed time. If the property owner whose duty it is to maintain the sidewalk in repair is sued in warranty by the city and enters a separate defence he will be obliged to pay his own costs even if the action fails as the city is not obliged to pay for two contestations when one would suffice.

Bray v. City of Montreal, 9 Que P.R. 167 (Sup. Ct.).

—Repair of road—Plea not proved—Appeal.]—A municipal corporation which, in an action based on the bad state of its roads, pleads that said roads have been kept in good repair it will be ordered to pay its own costs if the bad state of the roads is proved though the action is dismissed on another ground. A Court of Appeal should not interfere on a mere question of costs unless the Court of first instance has violated some principle or committed a flagrant injustice.

Lauzon v. Township of La Minerve, 9 Que. P.R. 955 (Ct. Rev.).

—Contributory negligence—Notice of action—Remedy over against third party.] —The plaintiff's claim was for damages caused by falling from his bicycle into a deep unguarded excavation in a lot owned by the defendant Luce on the corner of a public street and a lane in the city of Winnipeg. He was riding down an inclined part of the highway towards and close to a portion of it which was only about 30 feet wide, and which was obstructed for half its width by a pile of building materials in the possession of, and maintained there by, Luce, and, observing that the remainder of the roadway was at the moment occupied by a team with a loaded wagon, he attempted to stop by back-pedalling. But the chain then came off the sprocket wheel, and, being unable to check his speed, he tried to turn into a lane on the hither side of the obstructions. His speed was too great, however, and he ran into the excavation at the edge of the lane, being seriously injured. It appeared that the proper city officials had notice of the obstructions being on the street for a considerable time previously and that they had requested Luce to remove them. It was contended on behalf of the city that the plaintiff had been guilty of contributory negligence, as he was aware of the condition of the street and of the chance that it might be wholly blocked at any time, and should not have run the risk of the chain slipping off whilst going down the incline. He was, however, an experienced bicycle rider, and had used the same wheel for several years without the chain having ever come off:—Held, that he was not guilty of contributory negligence in the matter, and that the city was

liable in damages to the plaintiff. The city also set up that notice of the claim had not been served on the city clerk, as required by s. 722 of the Winnipeg Charter, 1 and 2 Edw. VII. c. 77. The notice relied on was a letter which the plaintiff delivered personally to the chairman of the board of works and which contained full particulars of the accident and of the injuries received and asked for payment of $350. This letter reached the city clerk within the time required by that section. Held, that the statute was sufficiently complied with to enable the plaintiff to recover. Held, also, that the city was entitled, under s. 728 of the charter, to relief over against Luce for the amount of the plaintiff's judgment and all its costs in the action.

Mitchell v. Winnipeg, 17 Man. R. 166.

—Purchase and dedication of land for a public highway by the municipality — Priority as against subsequent purchaser who registered his deed first.]—When land is purchased by and conveyed to a municipality under the Municipal Act for a road and thereafter dedicated and used as a public highway, it becomes vested in the Crown by virtue of s. 622 of the Act, and a subsequent purchaser, although he bought without notice of the prior conveyance or of the existence of the road and registered his deed before the registration of the deed to the municipality, acquires no title to the road as against the Crown notwithstanding s. 68 of the Registry Act, R.S.M. 1902, c. 150, which does not apply to the Crown, and notwithstanding the failure of the municipality to register the by-law establishing the road as required by s. 699 of the Municipal Act. Such purchaser, therefore, has no title to complain of the registration of the deed to the municipality as a cloud on his title.

Pulkrabek v. Russell, 18 Man. R. 26.

—Dedication, as distinguished from conveyance—Acts from which dedication will be inferred—Condition in letters patent to open roads, if the land granted be laid out in building lots.]—Held, 1. Dedication of land to the use of the public, as a road, is distinguished from conveyance by the fact that the latter is express and by title, and the former is implied in acts, which must, however, clearly disclose the intention of the owner. When such acts appear to be in execution of a condition under which the owner has acquired the whole property they will bear out the inference more readily than if performed by an absolute owner, free to deal with his property as he chooses. Hence, the grantee under letters patent from the Crown of a beach lot, upon the condition that, if it be laid out for building lots, a sufficient number of cross streets will be left open, etc., who (a) sells a lot bounded on a given side to a lane or passage of twenty feet, with the right of way over it to the purchaser in common with the neighbouring proprietors; (b) describes this twenty foot strip as a road, in a notice of renewal of registration, though he renews his registration simultaneously as to the land itself of which the strip is a part, and (c) sells half a dozen lots by the numbers given on a plan which has no numbering of the strip, and with the actual mention of the continuation of it as being a reserved road, will be held to have dedicated the strip to the use of the public as a road. 2. When land is granted on the condition that if it be laid out for building lots, a road or roads will be left open, etc., the obligation arises as soon as any building lots are laid out and sold for which the roads may be required, and not only after the whole land granted has been so laid out and sold.

Rhodes v. Pérusse, 17 Que. K.B. 60.

—Notice of suit—Municipal corporation.]—When damages are claimed from a municipal corporation because the highway in front of plaintiff's residence was obstructed by logs and lumber, the action must be preceded by the notice mentioned in Art. 793 M.C.

Pageau v. Corporation of St. Ambroise, 9 Que. P.R. 407.

—Maintenance of roads—Repairs by municipality in default of persons liable — County road.]—(1) A county road being under the control of the county municipality, the local municipality in which it lies has no power to repair it and no right to recover the cost of such repairs from persons in default. (2) The owner of a lot under thirty arpents in depth is not liable for the maintenance in repair of more than one front road.

Parish of Ste. Marthe v. Leblanc, 31 Que. S.C. 193.

—Repairing of a country road — Order closing road.]—A petition for a writ of mandamus to oblige a municipal council to repair a winter road will not be granted, if previous to the presentation of this petition, the municipal council had determined to close that road and an effective by-law to that effect had been passed.

Desjardins v. Ste. Rose, 9 Que. P.R. 257.

—Municipal corporation—Repair of roads —Negligence—Accident.]—Municipal corporations are liable for the consequences of accidents resulting from the improper condition of the roads they are obliged to maintain. When an accident results from the concurrence of a fortuitores event and a quasi-delit the remedy of the person injured is none the less open

against the author of the quasi-delit; but the Court in awarding damages should take into account the two causes of the accident and apply the rule as to common fault.

Parker v. Township of Hatley, Q.R. 33 S.C. 250 (Sup. Ct.).

— Opening of street—Obsolete procès-verbal—Irregularity.]—The existence of an old procès-verbal for opening a street which has never been acted upon is no hindrance to the passing of another for opening a street in front of the same lands for a distance of thirty arpents. The Act, 60 Vict. c. 57, s. 7, which declares that any procès-verbal not acted upon within five years shall cease to be in force applies to those made before, as well as after, its passing. Failure in a procès-verbal to designate the portion of the work to be performed by each ratepayer is not a cause of nullity, but is at most, an irregularity which the council can cure by amendment.

Couture v. County of Megantic, Q.R. 31 S.C. 541 (Sup. Ct.).

— Municipal by-law — Maintenance of street—Unjust discrimination — Prescription.]—A municipal by-law which places upon an owner of land the obligation of doing work for maintenance of a street in front thereof to an extent exceeding, by more than half, the proportion of work to be done by owners of other lands of equal value is illegal and oppressive and the owner injured may maintain an action in the Superior Court to have it annulled. The prescription of thirty days provided for by Art. 708 M.C. has no application to such an action.

Roussin v. Parish of Ste. Dorothie, Q. R. 31 S.C. 520 (Ct. Rev.).

—Negligence—Obstruction of street.]—A person who leaves a vehicle in the street beside the sidewalk, even though space enough is left for traffic, is guilty of negligence and liable for the consequences of any accidents that may result therefrom.

Chartrand v. Peck Rolling Mills, Q.R. 32 S.C. 419 (Ct. Rev.).

—Municipal corporation—Public road — Repair—Maintenance.]—A municipal corporation is liable for the consequences of an accident caused by the improper condition of a public road for the maintenance of which it is responsible. It cannot escape such liability by pleading the difficulty of maintenance at the place where the accident happened, the imprudence of the victim thereof in using an unwieldly carriage and restive horse and his failure to drive with proper care.

Benoit v. Corporation of St. Stanislas de Kostka, Q.R. 31 S.C. 353 (Ct. Rev.).

—Accident—Negligence—Want of repair —Notice of accident.]—In an action brought by the plaintiff against the corporation of a city for an accident by reason of alleged want of repair of one of its streets, such non-repair consisting in one of the granolithic blocks, where it joined another block, having sunk from three-quarters to half an inch, thereby causing the other block to be above it to that extent, but had been worn down at its edge about one-quarter of an inch, and had been in this condition from eight to ten years. There was no evidence of any prior mishap or complaint made regarding it, and though the city officials did not regard it as dangerous, they admitted it would be better to have it bevelled down:—Held, that there was no actionable negligence on the defendants' part. The notice of the accident required to be given within seven days thereafter, under s. 606 (3) of the Consol. Municipal Act, 1902, 3 Edw. VII. c. 19, is not dispensed with by reason merely of the defendants not being prejudiced by the omission to give it. There must be some reasonable excuse therefor: the plaintiff's illness, the result of the accident, must render him mentally or physically incapable of doing so.

Anderson v. Toronto, 15 O.L.R. 643.

— Municipal corporation—Maintenance of road — Drought.] — An unusual drought claimed as having prevented repairs to a road is not force majeure which relieves those charged with its maintenance from liability for accidents caused by its bad condition.

Picard v. Trustees of Toll Roads of North River, Q.R. 31 S.C. 258 (Ct. Rev.).

—Obstruction—Injury to traveller—Knowledge of danger—Negligence — Municipal corporation—Misfeasance or nonfeasance.] —The mere fact that the plaintiff knew that a heap of dirt was standing upon a highway is not sufficient to disentitle him to recover damages from a municipal corporation for personal injuries sustained by him owing to the heap having been negligently left there unguarded:—Held, also, that the doing of a lawful act in such a way as to endanger the safety of the public was misfeasance—the whole was one act and an unlawful act.

Keech v. Town of Smith's Falls, 15 O. L.R. 300 (D.C.).

—Bridge—Maintenance by counties—Computation of length—Embankments.] — A bridge crossing Casselman creek in the township of Williamsburg, was held not to be a bridge over 300 feet in length, within the meaning of s. 617a of the Consolidated Municipal Act, 1903, the Court being of the opinion that the embank-

ments at the ends of the wooden structure (44 feet long) which spanned the creek were not, upon the evidence, to be regarded as forming part of the bridge. In re Mud Lake Bridge (1906), 12 O.L.R. 159, distinguished.

Re Township of Williamsburg and Casselman Creek Bridge, 15 O.L.R. 586.

— Icy condition of a road—Liability of municipality.]—(1) The defence of irresistible force (force majeure) to an action of damages for tort must be specially pleaded. (2) The icy condition of a road when it does not appear that it was due to a sudden change of temperature and that there had been no time to mend it, does not constitute force majeure which will avail to relieve a municipality from liability for accidents.

Lachance v. Corporation Notre Dame, 32 Que. S.C. 481.

—Municipal corporation — Negligence — Lighting of streets.]—A municipal corporation is liable in damages for injury by accident on one of its streets caused by insufficient lighting. The charge by the Judge to the jury can be attacked for error in law only.

City of Montreal v. Guaranteed Pure Milk Co., Q.R. 17 K.B. 143.

—Reservation for highway—Opening first front road—Appropriation—Indemnity.] — In proceedings for the opening of first front roads for which reservations have been made in the grants of land by the Crown, the provisions of the Quebec Municipal Code requiring a description of the lands appropriated for the highway and the owners thereof are imperative and not merely matters of form which may be cured by the provisions of Art. 16 of that Code, and failure to comply with these requirements nullifies the proceedings. Judgment appealed from (Q.R. 17 K.B. 566), reversed.

King's Asbestos Mines v. South Thetford, 41 Can. S.C.R. 585.

—Obstruction—Nuisance — Prevention of access to property—Individual injury.]—The right of ingress from and egress to a public highway parting a person's land is a private right differing not only in degree but in kind from the right of the public to pass and repass along such highway; and any disturbance of the private right may be enjoined in an action by the land owner alone.

Harvey v. British Columbia Boat and Engine Co., 14 B.C.R. 121.

—Dedication of highway—Conditions in Crown grant—Access to beach.]—A strip of land, extending from a public road to the River St. Lawrence, formed part of a beach lot granted by the Crown, in 1854, on condition that, in case of subdivision into building lots, "a sufficient number of cross streets shall be left open so as to afford easy communication between the public high road, in rear of the said beach lot, and low water mark in front thereof." Prior to 1865 the lot was subdivided and, on the plan of the subdivision, the strip of land was shown as a lane or passage. Reference to this lane or passage was made in a deed of sale executed by the owner, in 1865, and the cadastral plan of the municipality, made in 1879, for registration purposes, showed it as a public road. In 1881, in connection with the registration of charges on the land, the owner made a statutory declaration and gave notice to the registrar of deeds, as required by the "Cadastral Act," describing the strip of land in question as "a road 20 feet wide." It was also shown that, during more than thirty years prior to the action, the strip of land had been used as a lane or passage by the general public:—Held, affirming the judgment appealed from (Q.R. 17 K.B. 60), Idington, J., dissenting, that these circumstances constituted complete, clear and unequivocal evidence of the intention of the owners of the beach lot to dedicate the strip of land in question for the purposes of a public highway, that no formal acceptance of such dedication by the corporation of the municipality was necessary to render such dedication effective in favour of the general public, and that, even if there had originally been any limitation reserved as to the use thereof by a special class of persons only, it had become a public highway by reason of long user as such. Although no right of ownership can be affected by cadastral plans, they must, in view of their publicity, be considered as having some probative effect in respect of persons having interests in the lands described therein.

Rhodes v. Perusse, 41 Can. S.C.R. 264.

—Defective sidewalk — Injury arising from.]—Plaintiff was injured by stepping on a wooden grating in a sidewalk, which grating, when put in was found on the evidence to be structurally defective. The grating was put in by the owners of the abutting property under a permit from the corporation:—Held, that, notwithstanding the statutory provision as to notice to the corporation of accident so happening, the corporation must be taken to have had knowledge of the originally defective construction of the grating, and were therefore liable.

Macpherson v. City of Vancouver, 14 B.C.R. 326.

—Damages—Notice of suit.]— The right of an action for damages against the city of

Montreal being based primarily on the sufficiency of the notice as to the place where the accident occurred according to Art. 536a of the charter, a notice stating that the accident occurred on a sidewalk at the corner of two streets, while it appears by the evidence that the plaintiff fell on the crossing between these two streets, is insufficient.

Seybold v. City of Montreal, 10 Que. P. R. 377.

—Donation—Public use—Default by municipality.]—In an action to set aside a deed donating lands to a municipality for the opening of streets on the ground of default by the latter to carry out the obligations mentioned in the deed, the defendant cannot have the action dismissed for want of tender by the plaintiff of the amount spent on the streets.

Lionais v. Village of Lorimier, 10 Que. P.R. 266.

—Action against municipality — Double remedy—Maintenance of highway.]—The action for a penalty and that for damages mentioned in Art. 793 M.C. are independent actions and the fact that the plaintiff has sued for the penalty for default in repairing a highway is no bar to an action for damages for the same default. In such an action for damages it is not necessary to allege that the notice required by Art. 793 M.C. has been given; if notice is necessary the irregularity can only be taken advantage of by exception to the form.

Pageau v. Corp. of St. Ambroise, 10 Que. P.R. 208.

— Road work—Default of land owner — Performance by municipality.]—The landowner in default to maintain in repair his front road has no recourse against the municipality which does the work for slight damage caused thereby to his property.

Salois v. Parish of St. Francois de Lac, Q.R. 36 S.C. 69.

—Public road—Space between ditch and fence.]—When a road is bordered by a ditch there is no presumption that the space between the ditch and the fences of the adjoining owners forms part of it. Therefore an action for possession against the owner who has built a wall on such space only lies in favour of the municipal corporation when the latter can show possession of the land for a year. The existence of a sidewalk on such strip is no proof of possession by the corporation or the public when it appears that the same was placed there by the adjoining owner or his auteurs to give to customers a better access to their shop.

Parish of St. Francois Zavier de Brompton v. Salois, Q.R. 34 S.C. 238.

—County council — Appeal—Control of roads.]—An appeal lies to the county council from the decision of a local council rejecting a petition to "place the roads under the control of the council of the parish." The county council seized by way of appeal, of the above mentioned petition can, if the majority of members of the local council have a personal interest in the matter, exercise all powers of the latter which are applicable, Art. 136 M.C. A county council which in such a case passes a by-law placing the maintenance of roads upon the municipality in the mode provided by Art. 535 M.C., exercise administrative functions and need not hold an enquête to establish the facts which are known to its members. A by-law providing that the roads of the municipality should be under the immediate control and charge of the corporation according to the provisions of Art. 535 M.C. "sufficiently conforms to the demand of the interested parties to place all the roads . . . . under control of the council of the parish as to all works to be done in future for the proper maintenance of said roads." It cannot be annulled on the ground that it provides for something not demanded.

Parish of St. Charles des Grondines v. County of Portneuf, Q.R. 18 K.B. 380.

—Procès-verbal for the opening of a road —Informalities.]—(1) A procès-verbal for the opening and maintaining of a road is null and void for all, or any one, of the following omissions or informalities: (a) When the resolution of the council appointing the special superintendent does not prescribe a delay for making it. (b) When the special superintendent has not been sworn before making it. (c) When the special superintendent omits to give notice of the time and place of the public meeting of the interested ratepayers. (d) When no notice is given of the time and place at which the council is to make the examination of the procès-verbal. (2) A procès-verbal that imposes on a ratepayer the obligation of erecting and maintaining fences on a third front road, when he has already two such roads to maintain, at a distance of less than thirty arpents from that in question, is illegal, unjust and oppressive and gives him a right of action in the Superior Court, to have it quashed.

Meredith v. Township of Onslow, 36 Que. S.C. 243.

—Negligence—State of sidewalk—Action against municipality—Liability of owner or occupant.]—The action in warranty, in case of proceedings for damages through accidents caused by defective sidewalks, etc., given by 62 Vict. c. 58, s. 300, sub-s. 92 (Que.) to the city of Montreal against

owners or occupants obliged to keep them in repair only lies when there is default on the part of the latter to conform to the requirements of the statutes and city by-laws or non-performance of their duty in this respect. Hence, an owner or occupant sued in warranty can plead that at the time of the accident the sidewalk in question was in good repair and in the condition prescribed by the statute and by-laws; he is only obliged to intervene and defend the principal action or to indemnify the city against which judgment has been given after having been judicially declared garant.

City of Montreal v. Le Curé, etc., de Ste. Agnes de Montreal, Q.R. 18 K.B. 258.

—Jury trial—Defective sidewalk.]—The obligation of owners and occupants of property adjoining the public streets of the city of Montreal imposed by sub-s. 92 of s. 300 of the city charter (62 Vict. c. 58 (Que.)) to guarantee the city against liability for damages in consequence of accidents caused by defects in their sidewalks arises only from the provisions of this Act (Art. 1057 C.C.) and not from a délit or quasi-délit. The recourse in warranty which it provides does not fall within the terms of Art. 421 C.P.Q., so as to give a right to a jury trial.

Le Curé, etc., de Ste. Agnes de Montreal v. City of Montreal, Q.R. 18 Q.B. 263.

—Nuisance in the highway — Defective culvert.] — Plaintiff's horse stumbled through a rotten culvert on a public road within the municipal limits, and plaintiff and his wife were thrown from the vehicle and injured. The culvert, constructed of cedar, covered with a few inches of earth, had been placed there some 16 years previously, and it had never been inspected, repaired or renewed during that time:—Held, that the municipality had been guilty of misfeasance in allowing the culvert to become a nuisance, and was therefor liable. Borough of Bathurst v. Macpherson (1879), 4 App. Cas. 256, followed.

Cooksley v. New Westminster, 14 B.C.R. 330.

—Municipality—Roads—Depth of range.]—There is no statutory provision that a range shall be only thirty arpents in depth. It is merely provided that a ratepayer is not obliged to keep in repair, on land of thirty arpents in width, more than one front road. There is no limit to the extent of land nor number of lots in a range and the fact that one range considerably exceeds another in depth does not justify the Court in imposing on ratepayers the burden of maintaining the highway in repair.

Goulet v. Corp. of Ste. Anne, Q.R. 35 S.C. 289.

—Establishment of road—Special superintendent—Liability of landowners.]—The appointment of a special superintendent and inspection of the premises is not required for passing by-laws amending the procès-verbeaux for establishment of roads. Art. 774 M.C. respecting fences and ditches on front roads is intended to govern cases not otherwise provided for and municipal councils may derogate from its provisions by by-law or procès-verbal. A by-law which, in establishing a front road, has the effect of placing the obligation to repair more than one such road on owners of land of less than thirty arpents in width is not void for that reason. The owners can demand that the new road be maintained as a highway for the portion as to which they are charged and failing a declaration to that effect they are only liable for work on the road in nearest proximity to their respective residences, Art. 825 M.C. The Courts should only interfere with the exercise of their discretionary powers by municipal councils when it works injustice or is clearly illegal.

Blanchard v. Parish of St. David, Q.R. 35 S.C. 277.

—Maintenance of streets—Negligence — Climatic conditions.]—The obligation imposed on municipalities to keep the streets and roads in a condition suitable for traffic may be affected by climatic conditions and implies a reciprocal obligation on the part of the public to use them with care. Therefore, a carter who, in full daylight, undertakes to drive a heavy cart down a hill in Montreal, which, he sees, is covered with ice, and who, when the cart has begun to slip, adds to the impetus by an improper direction to the horses, is alone responsible for the accident which results therefrom, and has no recourse against the city.

Gougeon v. City of Montreal, Q.R. 34 S. C. 324.

—Closing of streets—Injury to adjoining owners—Access to property—Damages.]—A municipality in exercising its right to close a street or public way is liable for damage caused to adjoining owners by increasing the difficulty of access to their property. When the injury caused results in additional expense, varying from time to time, of conducting a business but without destroying it, the owner can recover only this excess in expenses so far as it is incurred. He cannot demand a round sum for depreciation in the value of his property and trade which is uncertain and impossible to determine.

City of Montreal v. Montreal Brewing Co., Q.R. 18 K.B. 404, varying 30 S.C. 280.

—Bridge—Duty of municipality to keep in repair—Use of traction engines on high-

ways.]—The duty imposed upon a municipality, by s. 606 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), of keeping its highways, inclusive of bridges and culverts, in repair, is, so far as relates to traction engines, subject to the requirements of s. 10 of R.S.O. 1897, c. 242, and the amendments thereto made by s. 43 of 3 Edw. VII. c. 7 (O.), and s. 60 of 4 Edw. VII. c. 10 (O.), whereby such engines, if of eight tons or over in weight, and not exceeding twenty tons, can only be run over a bridge or culvert subject to the condition that the owner must, at his own expense, first strengthen the bridge or culvert, and while so using them keep them in repair; but as to a threshing machine, if of less than eight tons in weight, the above obligation is not imposed; but the owner or person in charge is subjected to the obligation, which is imperative, and constitutes a condition precedent, that before crossing any such bridge or culvert, he must lay down thereon planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine, etc., and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting therefrom to the flooring or surface of the bridge or culvert. Where, therefore, the owner of a threshing machine under eight tons in weight, was in the act of drawing it across such a bridge, without having first put down planks, and though the bridge as constructed was not of sufficient strength to sustain the weight of the engine, but would have been had the boards been used, thereby diffusing the weight of the engine, and it fell through the bridge, damaging it, it was held, in an action brought by the owner of the machine against the municipality, that no liability was imposed on the municipality, but that the owner was liable to the municipality upon a counterclaim for the damage so sustained.

Goodison Thresher Co. v. Township of McNab, 19 O.L.R. 188 (Reversed by Supreme Court of Canada, December, 1910.)

—Crown patent—Reservation of travelled road—Subsequent survey increasing width of road.]—The Crown patent under which the plaintiff held the land in question reserved all travelled roads crossing the same "existing as such on the 15th day of July, 1870, which by and under the laws of Assiniboia were or may be held to be legally public highways," and the evidence showed that the road in question had never extended south of a fence which the plaintiff had built along the south side of the road and he had been in undisturbed occupancy and enjoyment of the land south of the fence up to the time the defendants had removed it. The defendants, however, relied on a survey of the road in question made in 1886 by a surveyor named Dufresne alleged to have acted under instructions from the Dominion Government, of which instructions no proof was given. It appeared that Dufresne had, by his field notes, made the road 99 feet wide on the plan prepared by him, but it was not shown by whom he was sent to make the survey or what authority he had to make it. It also appeared that the provincial government had, by order in council dated in 1899, approved of a report referring to the surveying and transferring to the province of certain thoroughfares or trails and amongst them the road in question as surveyed by Dufresne in 1886, and that the Dominion government had, by order in council dated in 1900, approved the above report and directed the said trail to be transferred to and vested in the Province of Manitoba:—Held, following Peckett v. Poole, 11 M.R. 508, that the survey in question was not originally legal and binding and was not made so by the Dominion order in council passed 14 years thereafter, and that the Dominion government, after granting patents for the lands, could not afterwards interfere with the private rights of parties holding under them.

Heath v. Portage la Prairie, 18 Man. R. 693.

—Closing part of highway extending into other municipalities.]—By s. 637 of the Consolidated Municipal Act, 1903, the council of every county, township, city, town and village may pass by-laws, (1) for . . . stopping up roads . . . "wholly within the jurisdiction of the council":—Held, that the word "wholly" is used with reference not to the locality of the road, but to the jurisdiction of the council over it; and the council of a municipality has jurisdiction to pass a by-law closing part of a continuous highway passing through that municipality and extending into other municipalities. In re Falle and Town of Tillsonburg (1873), 23 C.P. 167, followed. Hewison v. Township of Pembroke (1884), 6 O.R. 170, commented on.

Re Taylor and Village of Belle River, 18 O.L.R. 330.

—Effect of by-law closing streets passed without notice.]—By a plan duly recorded in the proper land titles office, the area, incorporated within the bounds of the city of Regina was shown as divided into blocks and lots, streets and lanes. The defendant, the city, acquired block 197, excepting one lot which was subsequently acquired by the plaintiffs, and other land,

and being desirous of creating a number of warehouse sites, the city decided to close the streets and lanes leading to block 197, and for that purpose passed a by-law. No notice of this by-law was given to the registered owner of the lot subsequently acquired by plaintiffs. The defendants, having passed the by-law, proceeded to sell block 197 and portion of the streets and lanes so closed, and buildings were erected which obstructed the way of egress and ingress to plaintiffs' lot, and plaintiffs sued for a declaration that the streets and lanes closed were public highways, and for the removal of the obstructions:—Held, that until notice is given to the registered or assessed owners of all land abutting upon any street or lane which it is proposed to close by by-law, under the provisions of s. 5 of c. 28 of the Ordinances of 1903 the city council has no jurisdiction to pass any by-law closing such streets. (2) That if any by-law is so passed without notice, the provisions of s. 101 of the Municipal Ordinance (c. 70, C.O., 1898) and 307 of the Regina charter (c. 46 of 1906), now s. 193, City Act, c. 16, of 1908, will not validate any act done under such by-law, the lack of jurisdiction to pass such by-law without notice not being "a want of substance or of form."

Gesman v. City of Regina, 2 Sask. R. 50.

—Road allowance—Road opened up in lieu thereof.]—On a survey made in 1791, a road allowance was set out along the front of certain lots, which ran down to a lake. The road allowance, however, was not opened up, or used as a road, but some time prior to 1850 a road running along the lake shore, the land therefor being taken from these lots, was, as a matter of convenience, opened up and used in lieu of the original road allowance, and continued to be so used ever since, the township doing work and expending money thereon. No compensation was paid to the owners; but they took over and enclosed the road allowance as part of their lands, and have occupied it for a period of some sixty years. In consequence of the waters of the lake encroaching on the lake roadway, it had, from time to time, to be moved back, these owners giving the lands for the purpose without any compensation. In 1908, by reason of the expense occasioned in keeping this road in repair, through the encroachment, the township council determined to open up the original road allowance, and served a notice on the owners of the lots stating that a by-law would be introduced for this purpose on a named day, but without making any offer of compensation:—Held, that the notice was sufficient; for even if the time of the meeting should have been stated in the notice, as it appeared that the applicants had either attended the meeting, or were represented by counsel, and were heard before the by-law was passed, they were now precluded from objecting thereto. Held, however, that as no compensation was paid for the lands originally taken for the lake shore road, or from time to time therefor as the road was encroached upon, and the applicants being legally in possession of the lands constituting the original road allowance, such lands could not be taken away from them, for the purpose of opening up the road, without their being awarded compensation, as provided for in s. 641 of the Municipal Act, 3 Edw. VII. c. 19 (O.); and the by-law for the opening up of the road was therefore quashed.

Lister v. Township of Clinton, 18 O L.R. 197.

HIRE RECEIPT.

See Sale of Goods; Bailment.

HOLIDAY.

Woodmen's liens—Time for filing—Last day falling on a "holiday."]—Claims of lien under the Woodmen's Lien for Wages Ordinance were filed on the 21st May, 1910, the 20th May being the last day for effective filing under ss. 6 and 7 of the Ordinance. By s. 21 of the Interpretation Ordinance, if the time limited by any Ordinance for any proceeding, or the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall be extended to and such thing may be done on the day next following:—Held, that the 20th May, being the day proclaimed by the Governor-General as a day of general mourning for King Edward VII., was not a "holiday" within the meaning of the Interpretation Ordinance nor of the Dominion Interpretation Act. Semble, that, if it had been a holiday, the plaintiffs would have been entitled to maintain their liens by the filing on the 21st. Held, also, that Rule 554 of the Judicature Ordinance did not apply, because the reference in that Rule to "Sunday or other day on which the offices are closed" means "or other day on which the offices are legally closed." The plaintiffs' actions to enforce their liens were dismissed, but the plaintiffs were awarded personal judgments for the amounts claimed, under the amending Ordinance of 1909.

Peterson v. Drabeson, 15 W.L.R. 87 (Y.T.).

HOMESTEAD LAWS.

Homestead—Lease by homesteader before patent—Transfer or assignment of homestead right.]—The plaintiff made homestead entry for certain Dominion lands. Before he was recommended for patent he leased the land to the defendant for one year, the defendant, on his part, covenanting to do certain things. After the expiration of the term, the plaintiff sued defendant, alleging breach of covenant, for which he claimed damages. It was objected that he could not recover, the lease being void, being an assignment or transfer of homestead rights prohibited by Dominion Lands Act:—Held, that a lease of homestead land is an assignment or transfer of the rights which a homesteader has by virtue of his entry, and, being so, is void under the provisions of the Act. 2. That, while a tenant is estopped from his questioning his landlord's title so long as he is in possession of the land, such estoppel lasts only so long as the lease is in force, and the term having expired, the tenant was no longer estopped. 3. That, in any event, the estoppel would not be allowed to interfere with the proper carrying out of an Act of Parliament. 4. The contract being void, no action could be maintained in respect of the breach thereof.

Klinck v. Greer, 3 Sask. R. 157.

—Dominion Lands Act—Charge on land created by homesteader before recommendation for patent.]—A charge on land created by a homesteader before it is recommended for patent is absolutely void under s. 142 of the Dominion Lands Act, R.S.C. 1906, c. 55, and a declaration of the Minister of the Interior under that section waiving the forfeiture of the homestead right that would otherwise follow the giving of such a charge has not the effect of making it valid in the hands of the grantee. One who took a conveyance of the property from the homesteader after recommendation for patent is not estopped from setting up the invalidity of a charge created before recommendation by reason only that he had acted as the agent of the party in acquiring the prior charge, having ceased to be such agent before getting his deed.

American Abell Co. v. McMillan, 19 Man. R. 97.

—Exemption from seizure.]
See EXECUTION.

—Alienation of.]
See TITLE TO LAND.

Agreement to assign interest in homestead before issue of patent—Illegality.]—Under s. 42 of the Dominion Lands Act, R.S.C. c. 54, as re-enacted by s. 5 of 60 and 61 Vict. (D.), c. 29, an agreement made by a homesteader, before issue of the patent and before procuring a certificate of recommendation for patent from the local agent, to assign and transfer an interest in the homesteaded land to another person, though made in good faith and for an adequate consideration, is absolutely null and void and cannot be enforced at the suit of such other person. Abell v. McLaren (1901), 13 M.R. 463, not followed.

Cumming v. Cumming, 15 Man. R. 640 (Dubuc, C.J.).

Municipal taxes on.]—
See ASSESSMENT.

—Agreement to assign interest in homestead before issue of patent—Illegality.]—Under s. 42 of the Dominion Lands Act, R.S.C. c. 54, as re-enacted by s. 5 of 60 and 61 Vict. (D.), c. 29, an agreement made by a homesteader, before issue of the patent and before procuring a certificate of recommendation for patent from the local agent, to assign and transfer an interest in the homesteaded land to another person, though made in good faith and for an adequate consideration, is absolutely null and void and cannot be enforced at the suit of such other person. Abell v. McLaren (1901), 13 M.R. 463, not followed.

Cumming v. Cumming, 15 Man. R. 640 (Dubuc, C.J.).

HOSPITAL.

Consumptive Sanitarium—Nuisance.]—
See PUBLIC HEALTH.

R. v. Playter, 1 O.L.R. 360, 4 Can. Cr. Cas. 338.

HOTELKEEPER.

—Deposit of trunks by boarder — Negligence.]—1. The keeper of a hotel is responsible for the effects of a guest, who is boarding at his hotel, to the same extent as if he were a traveller, and parol evidence is admissible, as in the case of a necessary deposit. 2. It is negligence on the part of a hotelkeeper to store trunks of a boarder in an unlocked room.

Greene v. Windsor Hotel Company, 26 Que. S.C. 97 (Trenholme, J.).

Neglect to provide fire escape in bedroom—Death of guest in fire.]—In an action by the widow of H. to recover damages for his death by reason of the negligence or default of the defendant, it appeared that H. was a guest in the defendant's hotel, and was in bed at night in a bedroom not provided with a fire escape, as required by s. 3, sub-s. 1, of "An Act for the Prevention of Accidents by fire in Hotels and other Like Buildings," R.S.O. 1897, c. 264, when a fire broke out; the fire completely destroyed the floorings of the hotel building, and H.'s body was found in the basement, but not under the room

which he had occupied:—Held, that the evidence warranted the conclusion that the absence of a fire escape compelled H. to seek some other means of escape, and that in the effort he lost his life; and thus the defendant's failure to perform his statutory duty was the direct cause of the death. Held, also, that the object of the Act is to benefit the occupants of hotels and other buildings; and the plaintiff's cause of action arising from the breach of the statutory duty was not taken away by reason of the provision in the Act (s. 6) that the proprietor of an hotel shall, on summary conviction for neglect to observe any of the provisions of the Act, incur a fine, no portion of which goes to the injured person or his family.

Hagle v. Laplante, 20 O.L.R. 339.

—Loss of property of guest—Negligence—Contributory negligence.]—Appeal from verdict of County Court in favour of plaintiff. The plaintiff arrived at the city of Winnipeg, by train, and, intending to put up at defendant's hotel, delivered some of his luggage to the driver of a Baggage Transfer Company to be taken there. He then walked to the hotel, registered his name, and was assigned a room where he left his valise which he had carried with him. Later in the same day, the Transfer Company's driver brought the plaintiff's parcels to the hotel, left them in the hall with other luggage and informed the hotel clerk in the office that he had done so. The part of the hall where the parcels were left was not visible from the office. The hotel was crowded, the city was unusually full of visitors, persons going to and from the hotel bar passed the place where the parcels were and it was not a safe place for unwatched luggage to be left in. The plaintiff noticed his parcels there about eleven o'clock the same night, but did not remove them or draw the attention of the hotel servants to them. The next day he noticed that the parcels were not in the hall, but said nothing about it until the third day after, when he asked for the parcels. They could not then be found, and the presumption was that they had been stolen. Neither the defendants nor any of their servants had paid any attention to the parcels or moved them in any way:—Held, per Richards, J., that the parcels got into the custody of the defendants when the driver who brought them reported to the hotel clerk that he had done so, that the plaintiff was justified in assuming, when he saw his parcels in the hall, that they were being cared for by the defendants, and that, when he missed them the next day, he had a right to suppose that they had been put into the defendants' baggage room, and that he had not been guilty of such negligence as to disentitle him to recover their value from the defendants. Per Perdue, J.—The plaintiff was guilty of such gross negligence, under the circumstances, in not calling the attention of the hotel keepers to his parcels, when he saw them lying in the hall, and taking no steps to have them removed to a safer place, as to relieve the defendants from their common law liability as innkeepers: Oppenheim v. White Lion Hotel Co., (1870) L.R. 6 C.P. 515; Cashill v. Wright, (1856) 6 E. & B. 890, and Jones v. Jackson, (1873) 29 L.T. N.S. 399.

The Court being divided the appeal was dismissed without costs.

Barrie v. Wright, 15 Man. R. 197 (Richards and Perdue, JJ.).

—Deposit by traveller—Liability of innkeeper.]—A person making a prolonged stay at a hotel and lodging by the month, or otherwise, is a traveller within the meaning of Art. 1233 (4) of the Civil Code and may make proof by oral testimony as to the deposit of his luggage. This may be done under the first paragraph of that article where the innkeeper is a merchant and the deposit something in respect to matters of a commercial nature. (2) An innkeeper who places luggage of a traveller in an unlocked room, open to everybody, is at fault and guilty of negligence within the meaning of the second exception of Art. 1815 C.C. The loss of the luggage resulting therefrom renders him liable for damages exceeding $200 to the extent of the total value.

Windsor Hotel Co. v. Greene, Q.R. 14 K. B. 56.

—Sale of intoxicaing liquors.]—
See LIQUOR LICENSE.

HUSBAND AND WIFE.

I. COMMUNITY OF PROPERTY.
II. SEPARATE PROPERTY AND SETTLEMENTS.
III. ALIMONY AND SEPARATION.
IV. WIFE'S AUTHORITY TO SUE OR DEFEND.
V. DOWER.
VI. DIVORCE AND ANNULMENT.
VII. FORM OF MARRIAGE.
VIII. HUSBAND'S LIABILITY FOR WIFE'S TORTS.

I. COMMUNITY OF PROPERTY.

Marriage contract—Mutual gifts.]—The capacity of a party as stated by error in a deed (e.g., universal legatee of her deceased husband) cannot be invoked against her as proof of her renunciation of a right incompatible with such capacity. The gift, to the survivor, of the usufruct of all their property made by consorts in their mar-

riage contract, which contains also a clause for making movable immovables includes immovables given to one consort after marriage on condition that they shall remain his separate property.

Blanchard v. Pepin, Q.R. 38 S.C. 302.

—Domicile—Business carried on by wife.]—The habitation of a married couple is such to the provisions of Arts. 173-5 C.C. respecting marital authority. The first paragraph of Art. 83 C.C. which prescribes a single domicile for consorts applies to domicile in fact as well as in law. Therefore, a wife separate as to property who, in her husband's absence but with his consent opens and carries on a boarding-house where she has her own domicile thereby establishes a domicile for her husband who, on returning, has a right to occupy it with her and, if necessary, to enter by force and occupy it. He has, besides, a right of action to have it declared that his wife, who refuses to submit to him, is deprived of her right to the gifts, donations of immovables, etc., which he made to her on their marriage and to judgment against her for the value thereof.

Robinson v. Gore, Q.R. 38 S.C. 97 (Ct. Rev.).

—Restitution of conjugal rights—Judgment against wife.]—A rule nisi will not issue against the wife condemned to admit her husband into the conjugal domicile when she has begun to comply with the judgment by permitting him to occupy a room therein. It is by application for a rule nisi and not by a direct action that the husband should proceed who wishes to compel his wife to execute a judgment condemning her to permit him to resume conjugal relations.

Robinson v. Gore, 11 Que. P.R. 179.

Action against wife—Authorization by husband—Service.]—A wife common as to property, defendant in an action, is only properly served if a copy of the writ and declaration is served on her husband as well as herself; service at the conjugal residence by leaving with the husband, for defendant, a copy of the writ in which mention is made of the husband "to give authority to his wife" is insufficient and a nullity. In an action for damages for verbal injuries against a wife under the control of her husband, want of authorization of the wife either by her husband or by the Court, avoids and annuls the judgment against her. The fact that the husband received from the bailiff the copy of the writ intended for his wife, that he retained the attorney for the defence, and that he took part in the enquête does not constitute a sufficient authorization and the husband has a right to set this up against a judgment against his wife in an action for damages being executed against the property of the community.

Thibaudeau v. Desilets, 10 Que. K.B. 183; 4 Que. P.R. 1 (Q.B.).

—Abandonment of community—Séparation de biens.]—The abandonment by the wife of the community, in an action en séparation de biens should be made to the prothonotary or before a notary; an abandonment before a commissioner of the Superior Court is void and of no effect. The wife authorized by the judge to take proceedings against her husband en séparation de biens does not require a fresh authority to abandon the community.

Trudeau v. Labossière, 4 Que. P.R. 46 (S.C.).

—Community—Personal injuries.]—A wife common as to property with her husband can join with him in an action for compensation for injuries to her personally. The wife common as to property sued with her husband may give evidence on her own behalf.

Sullivan v. Town of Magog, 18 Que. S.C. 107 (C.C.).

—Obligation of wife—Debt of community—Obligation after dissolution—Arts. 1301, 1369, 1370, 1371 C.C.]—The wife, after a judicial dissolution of the community, cannot become liable for a debt of the community, notwithstanding she may have accepted it, any such obligation being really incurred on behalf of her husband, who is liable to the creditors for the full payment of such a debt for which the wife is liable only for her proportion, and that only up to the amount of her benefit therefrom.

Bastien v. Filiatrault, 31 Can. S.C.R. 129, affirming 15 Que. S.C. 445.

—Action en partage.]—Held (on exception to the form:)—A married woman, common as to property, cannot take an action to account and en partage unless her husband be made a co-plaintiff with her in the suit.

Giroux v. Giroux, 19 Que. S.C. 372 (Andrews, J.).

—Continuation of community—Inventory—Proces-verbal de carence.]—At the time of the dissolution of community by the death of one of the consorts in 1845 the common assets consisted of bare necessaries of small value and exempt from seizure. There was no inventory or proces-verbal de carence made and subsequently the survivor contracted a second marriage. In an action by a child of the first marriage claiming a share in continuation of community:—Held, that there was no necessity for an inventory of property of such insignificant value and that failure to make an inventory or proces-verbal de carence did not, under the circumstance, effect a continuation of communit.

King v. McHendry, 30 Can. S.C.R. 450, reversing 9 Que. Q.B. 44.

—Personal injuries—Community.]—An action for damages in consequence of injuries to a married woman common as to property belongs to the community and can only be taken by the husband or, if he has been interdicted for insanity, by his curator.

Sauriol v. Clermont, 10 Que. K.B. 294.

—Action by wife—Oral pleading—Want of capacity—Requête civile.]—The husband, common as to property, cannot, in an action by his wife, proceed by requête civile against a judgment dismissing the action for want of capacity which claim was only raised by oral pleading.

Lefebvre v. Dominion Wire Mfg. Co., 3 Que. P.R. 417 (S.C.).

—Community—Action for damages for personal injuries to wife.]—The right of action for damages, for personal injuries sustained by a married woman who is common as to property, belongs exclusively to her husband, and where she is joined in the action, she may be dismissed from the case on demurrer.

Troude v. Meldrum, 20 Que S.C. 531 (Pagnuelo, J.).

—Affidavit—Art. 208 C.C.P.]—A wife may swear to the affidavit required by Art. 208 C.C.P. in a proceeding in her husband's name.

Godbout v. McPeak, 20 Que. S.C. 294 (Cir. Ct.).

— Community — Donation by husband — Benefit of child—Fraud.]—A donation of property of the community made by the husband in favour of one of the children, cannot, whatever advantage it may confer on the child, benefited even to the prejudice of the other common children, constitute a fraud against the wife so as to authorize her to demand that it be annulled.

Jodoin v. Birtz, Q.R. 22 S.C. 443 (Ct. Rev.).

—Action for injury—Wife common as to property—Wife and husband as co-plaintiffs.]—1. Where there is community of property the husband alone has the right of action to recover damages resulting from verbal injury caused to his wife. (2) In such case the wife cannot be joined with her husband in the action even if he acts personally and not merely for the purpose of authorizing the wife, and, upon demurrer, the action by the wife will be dismissed.

Caron v. Larivè, 5 Que. P.R. 332.

—Judicial separation as to property—Execution of judgment—Abandonment of community—Registry.]—A judgment for separation as to property is sufficiently executed by the declaration of the wife, which was authorized by the judgment, that she had no rights to exercise nor claims to make against her husband, but the separation takes effect against third parties only from the date of the judgment, and the wife can set up her abandonment of the community only from the time such abandonment was registered. Hence, a contract entered into by the wife before execution of the judgment for separation and registry of her abandonment, is for the benefit of the community, and monies due under such contract may be seized by creditors of the husband.

Berard v. Magnan, Q.R. 22 S.C. 217 (Ct. Rev.).

—Community of property—Wife's right of action—Absence of right, how pleaded.]—1. A wife common as to property has no right of action to reclaim rights which belong to the community. 2. The proper procedure to have an action dismissed as regards her is by demurrer, and not by exception to the form.

Desrouard v. Fortier, 5 Que. P.R. 250 (Davidson, J.).

—Donation of usufruct by marriage contract to surviving consort—Registration Art. 1411 C.C.]—A contract of marriage provided that there should be universal community, and also stipulated a donation to the surviving consort of the usufruct, during life, of all property existing at the dissolution of the community by the death of the consort dying first. No property existed in the community, at the date of its dissolution, which would not have formed part of it by mere operation of law:—Held, affirming the judgment of the Superior Court, Archibald, J., 21 Que. S.C., p. 341), the stipulation, in such marriage contract, of usufruct in favor of the surviving consort, is not a donation but a marriage covenant, and is not subject to the formality of registration. Art. 1411 C.C. Marchessault v. Durand, M.L.R. 5 Q.B., p. 364, distinguished.

Huot v. Bienvenu, 12 Que. K.B. 44.

—Liability of husband for debts contracted by wife before marriage—Evidence—Burden of proof.]—The Married Women's Property Act, R.S. (1900), c. 112, s. 25, makes a husband liable for the debts of his wife contracted by her before marriage "to the extent of all property whatsoever belonging to the wife, which he has acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him" in respect to any such debts, etc. In an action against the defendant R. for goods supplied to his wife before marriage, evidence was given by the plaintiff's solicitor to show that on the examination of the wife before a commissioner, the defendant R. was present and stated, among other things, that he had received from his wife three promissory notes, for

amounts and due at dates which he mentioned:—Held (1), that the evidence was not admissible, the best evidence being that taken down by the Commissioner, and which he was required to return to the Court. (2) That there was nothing in the evidence to bring the notes referred to within the language "property belonging to the wife" which the defendant had "acquired or become entitled to" through the wife, or to discharge the burden resting upon the plaintiff, to show acquisition or title by or in the husband. Semble, where money was received and payments made by the husband, that plaintiff would have to show a balance remaining in his hands, and that he could not put in one side of the transaction without the other.

Bauld v. Reid, 36 N.S.R. 127.

—Wife carrying on business as trader—Husband acting as manager, with general power of attorney—Notes signed by husband.]—Where a wife separated as to property is carrying on business as a trader, and the husband is acting as her manager under a general power of attorney, the wife is liable to bona fide holders for value of negotiable instruments signed or endorsed by the husband for the purposes of such business, and particularly where there is no pretension that the husband appropriated to his own use any part of the funds obtained on such negotiable instruments.

Quebec Bank v. Jacobs, 23 Que. S.C. 167 (Davidson, J.).

—Wife purchasing husband's bankrupt estate.]—An agreement by the wife, separated as to property, of an insolvent trader, to pay one of his creditors $100, and also to compensate any loss he might sustain by the insolvency, in consideration of his assistance in financing the purchase by her of her husband's bankrupt estate, does not come within the prohibition contained in Art. 1301 C.C., where such purchase was carried out, and the wife continued the business in her own name.

Carter v. Walker, 23 Que. S.C. 123 (C.R.).

—Wife common as to property sued as a widow — Exception.] — An action taken against a boarding house keeper, who was held out and declared herself to be a widow will not be dismissed on an exception to the form, although defendant is married and common as to property.

Normandin v. Desrochers, 7 Que. P.R. 93 (Davidson, J.).

—Action by husband and wife—Incidental demand—Grievances personal to husband.]—That in an action taken by both husband and wife for attacks made upon them in common, whereby they jointly suffered, an incidental demand based upon the husband's dismissal, will be rejected upon exception to the form.

Villeneuve v. Anderson, 7 Que. P.R. 290, (Davidson, J.).

—Married woman—Obligation contracted before marriage—Community—Action by husband.]—The right of the husband to sue upon an obligation contracted in favour of the wife before marriage accrues to him solely as administrator of the community and, consequently, in an action based upon such obligation the marriage and the community of property resulting therefrom must be specially alleged. In an action upon such an obligation brought by the husband as if it had been made in his favour, the mere production of the deed and a marriage certificate is insufficient to establish his right to recover the debt.

Massicotte v. Pronovost, Q.R. 28 S.C. 44 (Ct. Rev.).

—Community—Form of action.]—Actions affecting the community must be brought in the husband's name only. Therefore, a saisie revendication by the wife was dismissed on exception to the form though it was authorized by the husband.

Marcotte v. Daoust, 8 Que. P.R. 310 (Fortin, J.).

—Separation a mensa et thoro—Dissolution of community—Effect of judgment.]—(1) Dissolution of community of property among consorts, resulting in consequence of a judgment decreeing separation a mensa et thoro, has reference back to the date of service of summons. Consequently, an accountant named to make the inventory and ascertain the value of the dissolved community, should do so with reference to that date and ought not to take account of property acquired subsequently by either of the consorts. (2) The execution of a judgment of separation a mensa et thoro, in so far as the separation as to property is concerned, may be enforced at any time until it ceases to have force by virtue of the prescription of thirty years, the reconciliation of the consorts, or other legal cause.

Brière v. Marcotte, Q.R. 29 S.C. 301.

—Deed by wife — Authorization.]—The "concurrence of the husband in the deed" required by article 177 C.C., to validate the conveyance of property by the wife must be understood in the common and ordinary sense of the word. Therefore, a sale of an immovable by a married woman alone, though her husband was in an adjoining room separated by a thin partition and heard all that passed, is void. The nullity being absolute, all parties having an actual interest resulting from the transaction can avail themselves of it, among others, those to whom the alleged sale was made.

Fournier v. Gregoire, Q.R. 30 S.C. 527 (Sup. Ct.).

—**Community—Personal injury—Action.**]—The wife in community as to property cannot be joined with her husband as plaintiff in an action for damages on account of personal injury to her; such actions pertain exclusively to the husband as head of the community.

Morin v. Morin, 9 Que. P.R. 221 (Sup. Ct.).

—**Marriage—Property of community—Lex loci.**]—In the absence of an agreement, express or implied, the property of a community as regards nuptial contracts is governed by the law of the country in which the marriage took place.

Peters v. City of Quebec, Q.R. 33 S.C. 361 (Sup. Ct.).

—**Community—Action by wife—Costs.**]—The wife common as to property whose husband is absent may be authorized to bring an action for the community and if it is dismissed the property of the community is liable for the costs incurred.

DeCourcy v. David, Q.R. 33 S.C. 174 (Sup. Ct.).

—**Wife as a witness.**]—In the absence of an allegation to the contrary, husband and wife, when sued together, will be presumed to be common as to property; and when they join in pleading to such action, the wife may be examined as a witness by the opposite party.

Beauregard v. Blanchard, 15 R. de Juris. 208 (Que.).

—**Action by married woman.**]—The right of a wife common as to property, whose husband is absent and who has been authorized by a Judge, to bring an action cannot be made the subject of an exception to the form; the proceeding should be an inscription en droit.

Brazeau v. Lewitt, 10 Que. P.R. 105.

II. SEPARATE PROPERTY AND SETTLEMENTS.

—**Husband and wife—Payments to husband—Authority to receive on behalf of wife—Presumption.**]—In an action against husband and wife for redemption of a chattel mortgage, it was contended by the plaintiff that money received by the husband from the plaintiff should be credited on the chattel mortgage, which was in favour of the wife:—Held, that it was necessary to prove that the husband was the wife's agent, or that she was estopped from denying his agency; the onus was on the plaintiff, and, upon the evidence, neither the agency nor the estoppel had been established. Held, also, that there was no evidence to establish that the wife was the ostensible and the husband the real mortgagee.

Mackay v. Ferris, 14 W.L.R. 107 (B.C.).

—**Liability of wife as guarantor for husband—Fraud.**]—

See PRINCIPAL AND SURETY.

Canada Furniture v. Stephenson, 19 Man. R. 618.

—**Ante-nuptial contract—Sum payable to wife at death of husband.**]—The plaintiff being about to be married to a man resident and domiciled in the Province of Quebec, in 1889, in that Province, entered into a marriage contract with him, whereby, "in the future view of the said intended marriage, he . . . for and in consideration of the love and affection and esteem which he hat for and beareth to the" plaintiff, "hath give, granted and confirmed, and by these presents doth give, grant, and confirm, unto the" plaintiff, "accepting hereof . . . the sum of $25,000 . . . payable unto the" plaintiff "by the heirs, executors, administrators, or assigns of him . . . the payment whereof shall become due and demandable after the death of him . . ." In the contract the plaintiff renounced community, dower, and right of dower, and agreed that she and her husband should each be separated from the other as to property. The marriage took place. The husband was at that time insolvent, but the plaintiff was not aware of it. The husband died in 1907, leaving an estate, but not sufficient to pay all his creditors in full, if the plaintiff was entitled to rank as a creditor of the estate for the $25,000 mentioned in the contract:—Held, that the question of the right of the widow to rank must be determined by the law of Quebec; what that law is falls to be determined upon the testimony of persons skilled in it, but, where the evidence is conflicting and for that reason unsatisfactory to the determining tribunal, it may examine for itself the decisions of the foreign Courts and the statements of the text-writers in order to arrive at a conclusion upon the question of the foreign law. And held, upon the evidence and examination of the provisions of the Civil Code of Quebec and authorities cited, that the contract was an onerous one, and not gratuitous, and the plaintiff was entitled to rank as a creditor.

O'Reilly v. O'Reilly, 21 O.L.R. 201 (C.A.).

—**Crop grown on land of a married woman—Business carried on separately.**]—The execution debtor being in default in payments due on his land and chattels, the owner of the land and the parties from whom he had purchased the same cancelled the contract and repossessed the chattels respectively. Subsequently they made an arrangement for the sale thereof to his wife. She thereafter, though living with her husband, appeared to have entire direction of the farm and though he assisted at times he only did so at her request, and worked at his trade as a blacksmith

whenever he could be spared. The crop grown on the lands having been seized by a creditor of the husband and claimed by the wife:—Held, that unless it can be shown that the husband has been carrying on the farming operations as head of the family or tenant of his wife, the wife is entitled to the crop grown on her land. 2. That the fact that the wife is living with her husband and that he may assist her in her business does not thereby deprive her of her profits therein under s. 4 of the Married Woman's Property Act, unless it be shown that the husband had some legal or equitable interests or right of interference as between himself and his wife.

Moose Mountain Co. v. Hunter, 3 Sask. R. 89, 13 W.L.R. 561.

—Married woman—Judgment summons—Judgment confined to her separate property.]—A married woman against whom a judgment has been obtained under the provisions of the Married Woman's Property Act is not a judgment debtor within the meaning of s. 147 of the County Courts Act.

Greenshields v. Reeves, 15 B.C.R. 19.

—Wife doing business in her own name—Filing husband's consent.]—The effect of the filing of a husband's consent to his wife carrying on business in her own name must be restricted to the terms of the statute. It only protects the wife from having her property seized as belonging to her husband, and the husband from being liable on the contracts entered into by his wife in connection with the business. It is not notice to any one that the business is the business of the wife, except for the purpose of affording protection from the consequences mentioned. In an action by plaintiff to recover an amount claimed for the board of defendant's horse, and for other services, it appeared that the largest amount in controversy was incurred under a contract made with plaintiff's husband, who agreed that defendant was to offset against it a note due by the husband:—Held, that plaintiff could not sue upon the contract for board of the horse, without being subject to any defence that defendant was entitled to in respect to the set-off, but that she could recover for other items incurred by defendant in the ordinary course of business. Also, that there could be no costs of appeal, plaintiff having failed in respect to a material item.

Hirtle v. King, 43 N.S.R. 440.

Disability removed by statute.]—Ordinance No. 20 of 1890, which provides that "a married woman shall in respect of personal property be under no disabilities whatever heretofore existing by reason of her coverture or otherwise, but shall, in respect of the same, have all the rights and be subject to all the liabilities of a feme sole," is intra vires of the legislative assembly. Re Claxton, 1 Terr. L.R. 282, considered.

Turner v. Harris, 3 Terr. L.R. 280.

—Separate business — Certificate — Conditional transfer.]—

Myers v. Webber, 4 E.L.R. 140 (N.S.).

—Husband's property—Lease made by wife—Right of action.]—

Mooney v. McDonald, 7 E.L.R. 221 (P. E. I.).

—Married woman's separate property.]—Interpleader issue between an execution creditor and the wife of the judgment debtor as to the ownership of horses and cattle. The evidence showed the wife had money of her own before she married, that with that money she, after the marriage, bought cattle, that she exchanged part of the increase of these cattle for other cattle and for horses, and that in that way, between purchases, exchange and increase, she had acquired the animals in question. The evidence also showed, however, certain isolated instances of the husband dealing with some of these animals, amongst others that he had given a chattel mortgage on some of them with the wife's consent, and that the farm was the property of her husband:—Held, that the wife was entitled to a verdict upon such evidence, and there would be no estoppel as against her except in favour of the chattel mortgagee.

Simpson v. Dominion Bank, 19 Man. R. 246, 13 W.L.R. 1.

— Wife pledging separate property for husband's debt — Independent advice — Undue inbuence.] — In an action by a wife living with her husband against the appellant bank to set aside a series of transactions in relation to a company spreading over eight years and resulting in her surrendering to the bank all her extensive estate, real and personal, and in her being left without means of her own, it appeared that the plaintiff, who was a confirmed invalid, acted throughout in passive obedience to her husband's directions, had no means of forming an independent judgment, and at the trial repudiated any misrepresentation or undue influence by her husband's distress; and that the solicitor who acted in all or most of the transactions was solicitor to the bank and to the husband, and was a director, secretary, shareholder, and creditor of the company:—Held, affirming the judgment of the Supreme Court of Canada, Stuart v. Bank of Montreal, but for different reasons, that these transactions could not stand, the wife being in fact wholly under the husband's influence and the solicitor in a position in which he could not advise fairly. Cox v. Adams (1904), 35 Can. S.C.R. 393, so far as it holds that no transactions between husband and wife for the husband's benefit can be upheld unless the

wife is shown to have had independent advice, disapproved.

Judgment in Stuart v. Bank of Montreal, 41 Can. S.S.R. 516, which reversed the decision of the Court of Appeal, 17 O.L.R. 436, affirmed.

Bank of Montreal v. Stuart, [1911] A.C. 120.

—Insolvency of husband—Business carried on without change of name.]—The husband of plaintiff with his brother carried on business as Burton Bros. and the firm became insolvent. The brother retired and the husband, with the exemptions, resumed business as Burton Bros. & Co., it being alleged, however, that the business was carried on as the business of the wife. This continued for a great many years, the husband holding a power of attorney, carrying on the business apparently without reference to the wife, nor did it appear that she had contributed anything towards it. A creditor of the husband having seized the stock, the wife claimed the same:—Held, that in such a case it was purely a question of fact as to whether or not the wife was the true owner of the business, and under the circumstances of the case it did not appear that the wife was ever in fact the owner of the business, but that it was really the business of the husband.

Burton v. Merchants Bank, 3 Sask. R. 111.

—Seizure of goods against husband—Claim of wife as owner—Agency of husband.]—

See INTERPLEADER.

—Married Women's Property Act — Summary application for delivery up of title deeds.]—

Re Millar, 2 W.L.R. 17 (B.C.).

—Business carried on by husband in his own name alleged to be property of wife—Seizure.]—

Davison v. Schwartz, 8 W.L.R. 359 (Y. T.).

—Purchase by wife — Presumption as to title.]—

Thereau v. Sabine, 1 E.L.R. 100 (N.S.).

—Land acquired by wife—Separate property—Seizure of crops by execution creditor of husband — Work done by husband on land.]—

Harvey v. Silzer, 1 W.L.R. 360 (N.W.T.).

—Land purchased in wife's name—Rebutting presumption of gift.]—

Henderson v. Henderson, 7 E.L.R. 218 (P. E. I.).

—Husband employed by wife — Creditors—Support of family.]—

Chipman v. Durling, 7 E.L.R. 443 (N.S.).

—Conveyance of equity in real estate by husband to wife—Implied trust.]—

Smith v. Wambolt, 2 E.L.R. 271, 343 (N. S.).

—Debts of wife before marriage — Property of wife received by husband.]—

Lockett v. Cress, 2 E.L.R. 3 (N.S.).

—Marriage contract—Donation of future property.]—The clau e in a marriage contract by which the future husband gives to the future wife all the movables in the residence of the parties after marriage, although acquired by the husband during the coverture, the donation to become void in case of the pre-decease of the wife, constitutes a donation à cause de mort and only confers on the wife actual property in the movables possessed by the husband at the date of the marriage.

Newman v. Desfocas, 17 Que S.C. 477 (S.C.).

—Donation by marriage contract—After-acquired chattels—Art. 1265 C.C.]—Held, by the Court of Review, reversing the judgment of Archibald, J., 16 Que. S.C. 273, 1900 C.A. Dig. 156: A clause in a marriage contract, stipulating that all household effects and furniture which shall at any time be brought into the conjugal domicile by either of the consorts shall belong to the wife, is neither a gift of present property, nor a gift of future property made in contemplation of death permissible in a marriage contract, but purports to be a gift of future property inter vivos, and is illegal and of no effect. Moreover, such stipulation is void inasmuch as it would enable the husband to confer benefits upon his wife during the marriage, contrary to the terms of Art. 1265 C.C. The husband has, therefore, a right, notwithstanding such clause, to oppose the seizure, by a judgment creditor of his wife, of articles of furniture acquired by him after the marriage and brought into the common domicile.

Desrochers v. Roy, 18 Que. S.C. 70.

—Ante-nuptial contract—Registry—Loan to Husband — Insolvency.] — A donation made by the future husband to his future wife in their marriage contract of a sum of money that the latter "shall have and take whenever she sees fit from the first available and convenient property of the future husband" is legal if it was made without fraud, if the husband was solvent at the time the contract was executed and if the debt of the contestant did not then exist; the wife, on the subsequent insolvency of her husband, may claim this sum and rank au mare la livre with his other creditors. The contract of marriage may be set up against subsequent creditors of the husband if it was registered at the domicile the contracting parties had when it was executed, though it was only registered later at the place where the insolvency was

declared. A contract of loan between husband and wife is valid and the wife can claim the sum lent on the husband's insolvency ranking with the other creditors.

In Re Denis, 18 Que. S.C. 436 (S.C.).

—Judicial separation — Abandonment of community—Registry—Droits et reprises.] —The failure by the wife to register the abandonment of the community on judicial separation as to property does not affect the validity of the judgment for separation. In order that the absence of pretakings (droits et reprises) of the wife against her husband can excuse the latter from executing the decree for separation, it is not sufficient that this decree grants no pretakings to the wife, but it is necessary that the absence of such pretakings should be established by a report of a professional man or by a declaration of the wife.

Mailloux v. Brolet, 18 Que. S.C. 567 (S.C.).

—Séparation de biens—Acts of administration — Sale of immovable.] — Although a wife separated as to property can alone enter into all writings and contracts concerning the administration for her property she cannot, without authority from her husband, commission a real estate agent to effect the sale of her immovables, such a contract not constituting an act of administration.

Bourdon v. Bourdeau, 18 Que. S.C. 136 (S.C.).

—Contract by wife—Arts. 1240, 1301 C.C.] —The contractual obligation by a married woman, separated as to property, to pay the debts of her husband is void, even where she had represented to the lender that she was borrowing the money to pay her husband's lawful debts, and he had believed her.

Globenski v. Boucher, 10 Que. K.B. 318.

— Husband and wife — Advantage — Prohibition—Loan by one—Agency of husband.]—The prohibition in Art. 1265 C.C. of consorts to procure advantage during the coverture by deed entre vifs forbids every transaction by which one gives an advantage to or enriches the other at his expense or to the diminution of his property, but does not forbid one of them to lend money to the other in good faith; and a loan so made forms a valid contract which binds the borrower to reimbursement of the loan. The fact that one consort had lent money to the other, in the absence of proof of fraud, cannot taint the transaction with fraud as having been made in contravention of the prohibition against consorts procuring advantage for themselves during covertures. The law does not forbid the husband to act gratuitously as agent for his wife separated as to property in the purchase and sale by her of immovables nor for the administration of her immovable property; and purchases so made, when they are not merely colourable and do not diminish the property of the husband, to his detriment or that of his creditors, do not come within the prohibition contained in Art. 1265 C.C. The husband having become insolvent his curator brought an action to have the deeds and titles of the wife annulled and set aside and the husband declared the owner alleging that the lands had been purchased by his money and placed in his wife's name to secure her a benefit contrary to law:—Held, that the only recourse of the curator is a personal action against the wife to recover the money alleged to have been advanced to her by her husband.

Déry v. Paradis, 10 Que. K.B. 227.

—Séparation de biens—Judgment not executed—Authorization of wife.]—The nullity of a judgment for separation as to property not executed is absolute, and third parties even are unable to take advantage of the fact that in the contract between them and the wife she was described as being judicially séparée de biens. Want of authorization of a wife common as to property is an absolute nullity in the summons; such nullity is one of public order and should be invoked by the court even where the wife has not raised it. An action against a wife common as to property who is erroneously represented as separated as to property in the contract on which the action is based, and who has not pleaded the nullity of the summons by exception to the form will be dismissed, but without costs.

Leclaire v. Robert, 3 Que. P.R. 549 (C.R.).

—Gift by husband to wife—Fraud—Undue influence.]—Where the wife had acquired such an influence over her husband, had inspired him with such a dread of her, and had obtained such a control over him, as to preclude the exercise by him of his free and deliberate judgment, the onus of proving that a gift obtained under such circumstances was the spontaneous offspring of a free and unbiased mind lay upon the defendant, and it was essential to the validity of a gift obtained under such circumstances that the donor should have had competent and independent advice.

Hopkins v. Hopkins, 27 Ont. App. 658.

—Maladministration of wife's property—Séparation de biens—Art. 1311 C.C.]—When the extravagance of the husband or his maladministration of his wife's property make it impossible to provide for the necessities of his wife and childen, or if it is evident that such impossibility will be produced if his administration continues, there is ground for ordering a separation as to property though the corpus of the

wife's property may not really be in peril.

Kavanagh v. McCrory, 3 Que. P.R. 445 (S.C.).

—Action by wife to annul sale of immovable — Intervention — Death of party.] — Plaintiff, a wife séparée de corps, sued to have annulled a sale by her husband of an immovable of which she claimed to be owner. She died pending the action, her succession was declared vacant, and the curator took up the instance. The husband intervened asking that the guardianship be set aside and himself substituted as curator and given possession of his wife's property. The curator opposed the intervention:—1, Because the husband was already in the cause as mis en cause. 2. Because the guardianship could only be set aside by direct action:—Held, without admitting that the intervention was well-founded, that it could not be dismissed on the grounds above stated.

Carrière v. Saint-Pierre, 3 Que. P.R. 299 (S.C.).

—Sale of goods—Undisclosed principal—Judgment against husband and wife—Married Woman's Act, R.S.O. 1897 c. 163.]—A husband, as agent for his wife, purchased goods from the plaintiffs, who were ignorant that she was the purchaser. On becoming aware of it, and the goods not having been paid for, they sued both husband and wife, but on the husband giving a promissory note signed by him for part of the debt, and the wife paying the balance in cash, the action was not further proceeded with. The note not having been paid at maturity, an action was brought in the County Court for the balance due on the goods, being the amount for which the note had been given, and judgment was entered against both husband and wife:—Held, on appeal, that the proper inference was that the husband's note was not taken in satisfaction of the debt, nor was it an election to look to him alone for payment; and the plaintiffs were therefore entitled to sue on the original cause of action, but that they could not have judgment against both husband and wife; and must elect as to which they desired to hold it, and that they could properly hold it against the wife, a recovery against her being now maintainable under "The Married Woman's Property Act," R.S.O. 1897 c. 168. Wagner v. Jefferson (1876), 37 U.C.R. 551, distinguished. Held, also, that the debt was not cognizable by the Division Court, the claim not having been ascertained by the signature of the wife; that the note signed by the husband could not be treated as such, it not having been signed by the husband as her agent, but as his own promise.

Davidson v. McClelland, 32 O.R. 382.

—Separate property of wife — Married Woman's Property Acts (N.S.)—Action by wife against husband.]—Under the Married Woman's Property Acts of Nova Scotia, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband.

Michaels v. Michaels, 30 Can. S.C.R. 547, reversing 33 N.S.R. 1.

—Obligation of wife—Hypothec—Art. 1301 C.C.]—The nullity of the obligation contracted by a married woman in contravention of Art. 1301 C.C. is absolute and may be invoked by a third party holder of an immovable hypothecated to guarantee such obligation.

Globensky v. Boucher, 10 Que. K.B. 321.

—Separation de biens—Execution of judgment—Lease to wife—Authority to sign.] —The absence of execution of a judgment for separation as to property only deprives it of effect as against third parties and does not prevent the latter from setting it up against the wife who has obtained it. A wife separated as to property (séparée de biens) who undertakes to keep a boarding-house (maison de pension) may, without being authorized by her husband, or the court, enter into a lease of a building intended to be used for such purpose.

Parizeau v. Huot, 19 Que. S.C. 379 (S.C.).

—Purchase by husband of wife's property at sheriff's sale—Resale for false bidding.] —The husband separated as to property may validly purchase at sheriff's sale an immovable belonging to his wife, and, if he fails to pay the price of adjudication, is subject to the usual proceedings for folle enchère.

Buchanan v. O'Brien, 18 Que. S.C. 343 (C.R.).

—Damage caused by husband's dog—Responsibility of wife separate as to property.]—A wife, separate as to property, is liable for damages caused by a vicious dog belonging to her husband, and harboured at the common domicile, which is her private property, particularly when it is proved that the dog was so harboured not only without any objection or protest on her part, but with her full consent and approval, notwithstanding that she had full knowledge of the dangerous character of the dog.

Hugron v. Stratton, 18 Que. S.C. 200 (White, J.).

—Séparation de biens—Obligations of wife for husband—Art. 1301 C.C.]—When a wife separated as to property, after registering, on demand of her husband, a declaration to the effect that she carries on business under a certain firm name, contracts obligations under this name for her husband such obligations are absolutely void under Art. 1301 C.C. The fact that the wife has received no personal benefit

from the business carried on under this name, and that the business operations were principally employed to pay her husband's debts, raises a strong presumption that she carried it on for him and incurred liability on his behalf. The wife cannot employ her property to guarantee the obligations of her husband.

Honan v. Duckett, 19 Que. S.C. 418 (S.C.).

—**Authority of wife to carry on business—Goods taken for husband's debt.**]—Under the provisions of R.S.N.S. c. 94, s. 53, when a married woman does, or proposes to do, business on her separate account, in addition to filing her husband's consent thereto in the office of the registrar of deeds for the county, she shall record, in the office of the clerk of the city or town in which she proposes to do such business, a certificate in writing setting forth her name and that of her husband, the nature of the business, and the place where it is or is proposed to be carried on, and giving, if practicable, the street and the number on the street; and where the nature of the business, or the place where it is carried on, is changed, a new certificate shall be filed accordingly. Plaintiff who carried on business as a grocer in the city of Halifax under a license from her husband, enabling her to carry on such business separate and apart and free from his control, filed a certificate giving the particulars required by the Act, except as to the street and the number on the street, as to which it was set out that it was not practicable to do so as the premises had not yet been selected. Goods claimed by plaintiff as her separate property having been levied upon by defendant, as sheriff of the county, under a writ of execution:—Held (1) Affirming the judgment of the trial judge in defendant's favour, that it was incumbent upon plaintiff to select the premises before filing her certificate. (2) The words "the place" mean the place in the city, town, or municipality where it is proposed to do the business, and where the place is changed a new certificate must be recorded.

Pearce v. Archibald, 37 C.L.J. 128 (S.C. N.S.).

—**Action against married woman—Whether necessary to prove separate property.**]—It is not necessary in an action against a married woman under the N.B. Married Woman's Property Act, 58 Vict., c. 24, to allege or prove that she has separate property. Appeal from St. John County Court dismissed with costs.

Jack v. Johnston, 37 C.L.J. 509 (S.C. N.B.)

—**Marriage contracts—Purchase by wife—Hypothec.**]—A husband, by the marriage contract, had agreed to employ, within five years, a sum of $7,000 which he would give to his wife séparée de biens, in the purchase of an immovable in his wife's name, but of which she would have only the revenue and the children the ownership. After the marriage the wife, with her husband's authority, purchased an immovable in her own name, but there was nothing in the deed, nor in any other document, to show that the purchase was made with the husband's money and as an employment of the sum given by the marriage contract, on the contrary, everything indicated the wife as purchaser for herself as sole owner, and with her own money, and it was thus that it appeared on the registry. Later the wife borrowed money from the plaintiff and with her husband's authority, hypothecated the immovable to the plaintiff as her sole property, and he having had it taken in execution against the wife, her children claimed title to it under the marriage contract and proved orally that the intention of both their parents at the time of the purchase was to make it in conformity with said contract, and that the husband had himself furnished the purchase money to fulfil his obligation thereunder. Held, that such oral testimony could not avail as against the plaintiff; that to be of avail it was necessary that the deed or some other registered document should state that the purchase of the immovable was made to serve in employment of the sum given by the husband to his wife. The plaintiff, therefore, had a right to the entire immovable sold as the absolute property of the wife.

Gaudreau v. Tétu, 20 Que. S.C. 402 (Sup. Ct.).

—**Donation—Articles 755 and 777, Civil Code.**]—It is essential to a gift inter vivos that the donor should actually divest himself of his ownership in the thing given; and the following clause in a marriage contract does not constitute such gift:—"En considération dudit futur mariage ledit futur époux fait don à ladite "future épouse d'une somme de $800 courant, à prendre sur ses biens les plus apparents, et avant tout autre créancier." And such sum cannot be attached in the hands of the husband under a writ of saisie arrêt issued by a creditor, upon a judgment against the wife.

Pagé v. Beauchamp, 20 Que. S.C. 220.

—**Donations by marriage contract—Gift of movables and furniture — Conventional dower — Hypothec — Articles 1033, 1034, 1035 and 2042, C.C.**]—1. A gift in a marriage contract by the intending husband to his intended wife, of the furniture and household effects garnishing the common domicile, is deemed to be by gratuitous title, and is invalid as against a creditor of

the husband, donor, who was insolvent at the time of marriage. 2. Dower, whether customary or conventional is not a gift but a debt, and is by onerous title. This rule applies to conventional dower even when it exceeds the customary dower which it replaces. 3. Renunciations to dower are to be very strictly construed in favour of the wife and even where, as in the present case, the marriage contract contains what purports to be a renunciation to dower whether customary or prefix, the stipulation of a life rent payable to the wife, which rent is expressly stated to be in lieu of dower, is in effect a stipulation of conventional dower, and is governed by the same rules which govern dower. Such stipulation cannot, therefore, be set aside by a creditor without proving knowledge by the wife of her husband's insolvency at the date of the marriage. 4. The wife has no legal hypothec to secure the payment of conventional dower, and the registration of a mere notice, as provided for legal hypothec, without description of the property affected does not charge the husband's property with a hypothec in favour of the wife.

Turgeon v. Shannon, 20 Que. S.C. 135 (Archibald, J.).

—Prefixed or conventional dower—Rights of wife who is entitled thereto as regards creditors of insolvent husband—Registration of notice by wife—Article 2029, C.C.] —1, Where by the marriage contract, a prefixed or conventional dower payable in one sum, has been stipulated in favour of the wife, she is not entitled to rank for that sum as a conditional obligation in competition with the creditors of her insolvent husband, before the opening of the dower by the death of the husband. 2. A prefixed dower, or any other right derived from the husband, does not come under the terms of Article 2,029 C.C. The only way in which such rights can be protected is by special conventional hypothec, which must describe the property affected. 3. The curator of an insolvent estate is entitled to bring action for the radiation of the registration of a hypothec affecting the insolvent's immovable property where such registration is illegal without waiting to see whether the estate is sufficient to pay all creditors in full.

Bilodeau v. Benoit, 20 Que. S.C. 240.

—Purchase by husband of real estate in name of wife—Repairs by husband to wife's real estate—Purchase by husband of leasehold interests in wife's real estate—Lien—Intention—Onus of proof.]—Notwithstanding that the common law rights of a husband to the use and income of his wife's real estate are taken away by The Married Women's Property Act, 58 Vict., c. 24, he is not entitled to a charge on such real estate for money paid by him prior to the Act for repairs thereto, and for the surrender of leasehold interests therein, where the expenditure was made solely to improve the property. The onus is upon the husband of establishing a resulting trust in his favour in land purchased by him in the name of his wife.

DeBury v. DeBury (No. 2), 2 N.B. Eq. 248.

—Note made by wife—Art. 1301 C.C.]—A bill or note signed by a married woman made payable to and indorsed by her husband is not, in the absence of proof that it was signed for the husband, a contravention of Art. 1301 C.C. as constituting an obligation entered into by the wife with her husband.

Dupuis v. McTavish, 21 Que. S.C. 455 (Ct. Rev.).

—Authority of wife to carry on business—Goods taken for husband's debt—R.S.N.S. (5th series), c. 94, s. 53.]—Under the provisions of R.S.N.S. (5th series), c. 94, s. 53, when a married woman does, or proposes to do, business on her separate account, in addition to filing her husband's consent thereto in the office of the registrar of deeds for the county, she shall record, in the office of the clerk of the city or town in which she proposes to do such business, a certificate in writing setting forth her name and that of her husband, the nature of the business, and the place where it is, or is proposed, to be carried on, and giving, "if practicable," the street and the number on the street; and where the nature of the business, or the place where it is carried on, is changed a new certificate shall be filed accordingly. Plaintiff, who carried on business as a grocer in the city of Halifax under a license from her husband, enabling her to carry on such business separate and apart and free from his control, filed a certificate giving the particulars required by the Act, except as to the street and the number of the street, as to which it was set out that it was not practicable to do so, as the premises had not yet been selected. Goods claimed by plaintiff as her separate property having been levied upon by defendant, as sheriff of the county, under a writ of execution for the husband's debt:—Held, affirming the judgment of the trial Judge in defendant's favour, that it was incumbent upon plaintiff to select the premises before filing her certificate, the provision being intended to apply not only to towns having streets named and numbered, but to towns which had not streets so named and numbered. Held, also, that the words "the place" meant the place in the city, town, or municipality where it was proposed to do the business, and that where the place was changed a new certificate must be recorded.

Pearce v. Archibald, 34 N.S. N.S.R. 543.

—Suit by one against the other—Married Women's Property Ordinance.]—In an action by a husband against his wife for a declaration that certain real and personal property claimed by both parties belonged to him, and for an injunction to restrain the wife from disposing of the same:—Held, that a husband can sue his wife in respect of both real and personal property as if she were a feme sole. Semble, the law in the Territories is practically the same as that in England, as to suits between husband and wife, except that in the Territories one may sue the other in respect of torts, while in England this is not so.

England v. England, 5 Terr. L.R. 204

—Marriage contract—Usufruct of movables—Use—Replacement of Effects.]—(1) The wife who has the usufruct of household goods furnishing a house has the right of opposing the sale of the same by the creditors of her husband. (2) This usufruct, however, ceases with the disappearance of the goods and does not extend to other goods purchased to replace those which were subject to the usufruct and had become worn out. (3) Where it appeared that a piano had been purchased by the husband of the opposant who gave in payment an old piano the opposant lending her husband the money necessary to pay the difference in price, her opposition to the sale of the piano was rejected. (4) An opposant contending to have been the purchaser of goods of which possession is claimed is bound to prove that the money paid for them actually was the money of the opposant; if she had mixed the funds coming from her parents with those she got from her husband, she could no longer contend that the goods were not the property of her husband.

Walker v. Massey, 5 Que. P.R. 369.

—Marriage contract — Property in movables — Revendication.]—When the plaintiff and defendant were married, the contract provided that all the movables for housekeeping (menage) which shall at any time be brought into the dwelling of the future consorts by either of them should belong to the future wife. A decree en separation de corps having been made, the defendant accompanied by her father, took away from plaintiff's domicile the movables which she claimed as hers under the above clause of her marriage contract, and the same were carried to the domicile of defendant's father where she was living. The plaintiff revendicated the movables from his wife and her father:—Held, the clause in question of the marriage contract provided for a donation à cause de mort of property acquired by the husband after it was executed and the movables remained his property for his lifetime. Under the circumstances of this case the plaintiff could direct his action for revendication against his wife's father and himself

Goyette v. Leclerc, Q.R. 23 S.C. 542 (Ct. Rev.).

—Contract of marriage—Opposition—Gift of goods present and to be acquired hereafter.]—(1) A gift to the wife of furniture and other movables in the future residence of the consorts is a donation of goods owned at present and to be acquired in the future which is not mortis causa and which may take effect at any time and is not a contract forbidden by law nor contrary to good morals. (2) In reply to a contestation of an opposition based upon such a donation, it may be alleged that certain of the goods were purchased by the husband after the marriage, for his wife, to replace similar goods which had been sold, such a reply being an explanation of an allegation of the opposition question in the contestation.

Allan v. Tribey, 5 Que. P.R. 298.

—Loan obtained by wife for the purpose of paying her husband's debt—Art. 1301 C.C.]—(1) Where a loan is obtained by a married woman separated as to property from her husband, with hypothecation of her real estate, it is sufficient to show that the money, although handed to her in the form of a cheque payable to her order, was not used by her, but was given to her husband, in order to bring the contract within the prohibition of Art. 1301, C.C. (2) The law does not require that the party from whom a wife obtains a loan should know that it is for the benefit and use of her husband. It is for the lender to exercise proper caution, and to see to the due employment of the loaned money for the purposes of the wife. Even in the case of a deception by the wife, as to the use to which the money is to be applied, the contract of loan is nevertheless null.

Trust and Loan Company v. Gauthier, 12 Que. K.B. 281 (Full Court).

—Donation by marriage contract to surviving consort, of usufruct—Registration—Art. 1411, C.C.]—A contract of marriage provided that there should be universal community, and also stipulated a donation to the surviving consort of the usufruct, during life, of all property existing at the dissolution of the community by the death of the consort dying first. Nothing existed in the community, at the date of its dissolution, that would not have formed part of it by mere operation of law:—Held, the stipulation, in such marriage contract, of usufruct in favour of the surviving consort, although described as a donation, is not a donation but a marriage covenant, and is not subject to the formality of registration.

Huot v. Bienvenu, 33 Can. S.C.R. 370, affirming 21 Que. S.C. 341.

—Separation de biens—Powers of husband.]—The wife separated as to property, may seize in revendication (saisir-revendiquer) her movable property without being first authorized by her husband. The rights of administration given to her husband by a wife separated as to property does not confer the right to alienate. The husband although he may be in certain circumstances the administrator of the estate of his wife separated as to property has no right to alienate it without express authority.

Beaulac v. Lupien, Q.R. 23 S.C. 88 (Sup. Ct.) affirmed on review Feb. 28th, 1903.

—Judicial separation as to goods—Motion for details.]—Community of goods is the general rule between consorts under our law and separation as to goods the exception; therefore, he who invokes separation of goods judicially ordered should indicate where and how the judgment of separation was rendered, and this under pain of being prevented later from invoking such judgment.

Gravel v. Cardinal, 5 Que. P.R. 165.

—Judicial separation as to property—Failure to execute order—Action for damages by married woman.]—(1) When, in an action by a married woman, the husband is only made a party for the purposes of authorization, conclusions in favour of "the plaintiff" must be construed as if they were asked in favour of the female plaintiff alone. (2) A defendant who invokes want of execution of a judgment ordering separation as to property alleged by the plaintiff is bound to make the necessary proof of such want of execution upon his exception to the form of the action.

Drolet et vir v. Bèlanger, 5 Que. P.R. 312.

—Loan obtained by wife in the form of sale with right of redemption of her real estate—Money given to husband—Art. 1301, C.C.]—Held (reversing the judgment of the Superior Court, Loranger, J., 20 C.S. 320):—A loan contracted by a wife separate as to property—the security for the loan being given in the form of a sale with right of redemption of her immovable property, instead of in the form of a hypothecation—is null and void as contrary to the prohibition contained in Art. 1301 C.C., where the proceeds of such loan are to be used, with the knowledge of the lender, for the exclusive benefit of the husband.

Kerouack v. Gauthier, 12 Que. K.B. 295.

—N.B. Married Women's Property Act, 58 Vict. c. 24—Woman married before the passing of the Act—Conveyance of real estate without husband's concurrence — "Tenancy by the curtesy"—Husband's money expended on wife's property—Presumption of gift—Merger—Property acquired during coverture.]—Held, on appeal, affirming the judgment of the Court below, that where a husband, in the management of his wife's property, of which he was receiving the benefit, purchased certain freehold lots with his own money, with a view of improving his wife's estate, and took the conveyance in her name, the purchase money is not a charge upon the property, and as between husband and wife the presumption is that a gift was intended, unless displaced by evidence necessary to establish a resulting trust in his favour. This onus is upon the husband of establishing a resulting trust in his favour in land purchased by him in the name of his wife. The changed condition in the husband's status brought about by the Married Women's Property Act, 58 Vict. c. 24, by which the marital rights of a husband in his wife's property have been materially curtailed, does not give him an equity to be compensated for the purchase of the surrender of leases of property of which the wife had acquired a reversionary interest, and for moneys expended in making useful and necessary repairs upon the leasehold premises. The effect of the surrender is a merger of the outstanding term of years in the greater estate. A woman, married before the passing of the Act, may make a conveyance, without her husband's concurrence, of her real estate not acquired from him during coverture, subject, however, to his tenancy by the curtesy consummate. A married woman can not during her husband's life-time, transfer either the title or possession of property acquired from her husband during coverture.

DeBury v. DeBury, 36 N.B.R. 57.

—Gift from husband to wife—Possession—Execution creditor—Married Woman's Property Act.]—The defendant purchased certain pictures between 1895 and 1898, and bringing them home handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother, and all were hung up in the house occupied by her and her husband. An execution creditor of the defendant now caused the sheriff to levy on them:—Held, that since the Married Woman's Property Act, 1884, R.S.O. 1897, c. 163, s. 3, a married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband; and that here the subsequent possession of the picture was the wife's, although the house was occupied by her husband and herself. Held, also, that the effect of sub-s. 4 of s. 5 of R.S.O., 1897, c. 163, enacting that a woman married since 1889 may hold her property free from the debts or control of her husband, "but this sub-section shall not ex-

tend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from the husband during marriage liable to the husband's debts.

Shuttleworth v. McGillivray, 5 O.L.R. 536 (D.C.).

—**Gifts to wife—Art. 598 C.P.Q.**]—A man being obliged to furnish clothes for his wife necessary garments given to his wife during coverture do not come within the prohibition as to husband and wife conferring benefits on each other, and these garments from time to time delivered to the wife becomes her individual property, and are therefore not liable to seizure for her husband's debts.

Robertson v. Honan, Q.R. 24 S.C. 510 (Sup. Ct.).

—**Civil Code (Que.), Art. 1301—Construction—Wife's mortgage of separate property for her husband's benefit void—Onus probandi as to husband's benefit.**]—By the true construction of Art. 1301 of the Civil Code of Lower Canada a wife's mortgage of her separate property is void both as to the debt contracted and as to the disposition if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed.

Trust and Loan Company v. Gauthier, [1904] A.C. 94, affirming 12 Que. K.B. 281.

—**Donation—Registry—Action paulienne.**]—A deed of gift (donation) between husband and wife should be registered. Registry of the donation after the prescribed time cannot be set up against creditors who have become such in the interval. Several creditors may join in the action paulienne.

McDougall Co. v. Brisvert, Q.R. 24 S.C. 162 (Ct. Rev.).

—**Wife's property—Agency of husband.**]—Authority to accept surrender of a lease will not be implied from the fact that a husband living with his wife has collected the rents of the property and looked after repairs made.

The King v. Forbes; Ex parte Bramhall, 36 N.B.R. 333.

—**Notes signed by both husband and wife—Presumption — Burden of proof—Art. 1301 C.C.**]—1. Although the obligation of the wife who is separate as to property, when she binds herself with her husband, is not null if the obligation be for her own business and profit, the burden of proof is on the creditor to establish that it was for her business and profit, and in the absence of such proof the presumption is that she bound herself for her husband. 2. The wife separate as to property will not be condemned on notes signed by her, which were either renewals of notes made and signed by her husband alone, or which were given for goods furnished on the husband's order and charged to him in the books of the creditor.

McClatchie v. Gilbert, 24 Que. S.C. 387 (C.R.).

—**Hypothec of wife's property.**]—A hypothec given by a married woman upon her separate property to secure payment of a loan made to her husband to enable him to effect a composition with his creditors of whom the lender was one, is void as being in contravention of Art. 1301 C.C. (Que.). Such nullity being absolute, and of public order, involves the nullity of everything connected with it, and in this case the security given to guarantee the wife's obligation is a subsidiary obligation depending for its existence on the principal and, consequently, the nullity of the principal obligation necessarily comes with it the nullity of the security. An obligation prohibited by law is not a natural obligation and cannot be secured. Such nullity, which is of public order, is inherent in the debt; it is a defect in the debt which the surety may invoke as well as the wife herself.

Sutherland v. Béiard, Q.R. 13 K.B. 128.

—**Wife's suretyship for husband's debt.**

See PRINCIPAL AND SURETY.

—**Wife of insolvent—Void agreement—Profits from insolvent's services.**]—A contract by which the wife of an insolvent is to receive for services to be rendered by her husband, a certain salary and part of the profits of the business of the other party to the contract, is void as made in fraud of creditors. Therefore, the creditors of the husband can attach the salary due under such contract.

Orsali v. Aubry, Q.R. 24 S.C. 320 (Sup. Ct.).

—**Married Woman's Property Act of 1895—Contract under—Whether necessary to allege or prove separate property.**]—In an action against a married woman on a contract, it is not necessary under the Married Woman's Property Act of 1895 to allege on the record, or prove on the trial as a fact, that either at the time the contract was made, or at the time the action was commenced, she had or was possessed of separate property. On an appeal, where the judge in the Court below has trial the cause without a jury and entered a judgment for the respondent, and the return does not contain a statement of his findings on the facts, it will be assumed by the appellate Court that he found the facts in favour of the respondent, and the judgment will not be disturbed if there is evidence to justify such finding. A judgment

will not be reversed on appeal on the ground that evidence was improperly rejected if the record shows that the party offering the evidence could not have been prejudiced by the rejection.

Johnson v. Jack, 35 N.B R. 492.

—Ante-nuptial contract—Donation—Present and future effects.]—A clause in a contract of marriage, providing that "in consideration of the deep and sincere affection borne by the prospective husband towards his prospective wife he donates to her all the live stock and movable effects now in his residence as well as all the live stock and movable effects which he may acquire therein in future" does not constitute a donation operating in favour of the donee during the donor's lifetime, but should be considered as a donation in contemplation of death (à cause de mort) which can only have effect on the decease of the husband; consequently, the property so donated, only becoming the property of the wife from the date of her husband's death, may be seized and sold to satisfy a judgment obtained against the latter.

Préfontaine v. Dorval, Q.R 26 S.C. 301 (Ct. Rev.), affirmed by Court of King's Bench, 27 April, 1905.

—Separation as to property—Intervention—Jurisdiction in vacation.]—The filing of an intervention by a creditor of the husband in an action of separation as to property is equivalent to an appearance of the defendant and ousts the court of jurisdiction to try and adjudicate upon the same in vacation.

Goldstein v. Schwartz, 7 Que. P.R. 221, (Doherty, J.).

—Separate estate of wife—Personal property—Jus disponendi—Matrimonial domicil.]—The law of the matrimonial domicil regulates the rights of the husband and wife as to the movable property of either of them. Held, therefore, where the matrimonial domicil was Ontario that personal property, which by the law of Ontario was the separate property of the wife, remained such on the removal of the parties to the Territories; and furthermore was subject to the provisions of the Ordinances of the Territorial Legislature, subsequently passed relating to the personal property of married women.

Brooks v. Brooks, 2 Terr. L.R. 289, (Richardson, J.).

—Judgment against separate estate of married woman—Life policy.]—The plaintiff was a judgment creditor of the defendant, by virtue of a judgment payable out of her separate estate recovered on Bills of Exchange accepted by the defendant, a married woman engaged in trade, for her trade debts, subsequent to 13th April, 1897. Afterwards, on the death of her husband, she became entitled to the proceeds of a policy of insurance on his life which he had made payable to her as beneficiary:—Held, that the effect of s. 159 of c. 203 R.S.O. 1897 is to create a statutory trust of the money, payable under the policy, in favour of the wife without restraint on anticipation; that on the death of her husband, the absolute right to the money became vested in her, her original interest in the trust being separate property within the contemplation of The Married Woman's Property Act, R.S.O. 1897, c. 163, and that the fruits of the trust must be regarded as separate property and as such liable to satisfy the plaintiff's judgment.

Doull v. Doelle, 10 O.L.R. 411, D.C.

—Married woman—Marchande publique—Separation as to property.]—(1) A wife, common as to property, who is a public trader and as such procures a loan by means of false representations, binds her husband to the payment of the debt. (2) When, under such circumstances, the wife obtains a judgment of separation as to property from her husband, renounces the community and the report of the praticien is homologated, the Court adjudicating on the suit of the lender, has power, so far as may be necessary to give effect to its judgment, to revoke the judgment in separation, the renunciation to the community and the homologation of the report of the praticien.

Samson v. Pelletier, 28 Que. S.C. 394 (Hutchison, J.).

—Separation as to property—Execution of judgment—Inventory—Art. 1908 C.P.Q.]—The wife may, at any time before the death of the husband, execute a judgment ordering separation as to property, unless deprived of that right by a judgment of the Court. (2) Community having been dissolved from the date of the demand for separation, the property to be divided is what existed at that date and it is the inventory of such property which should be homologated.

Brière v. Marcotte, 7 Que. P.R. 376 (Pagnuelo, J.).

—Contract of hiring with husband—Proprietary interest—Separate property.]—A contract by a married woman with her husband to cook in the lumber woods for a crew of men, whom her husband had engaged to get lumber for a third person under an agreement at a fixed price per thousand off the land of the third person, who was to furnish the supplies, is not a valid contract under "The Married Women's Property Act" (Con. Stat. 1903, c. 78), and can not be enforced as a lien under The Woodmen's Lien Act (Con. Stat. 1903, c. 148).

Patterson v. Bowmaster, 37 N.B.R. 4.

—Separate estate—Wife's funeral expenses.]—The husband is liable for the funeral expenses of his deceased wife and cannot claim to be indemnified therefor out of her separate estate.

Re Sea Estate, 11 B.C.R. 324 (Duff, J.).

—Married woman—Judgment summons—Committal.]—

See DIVISION COURT.

—Marriage covenant—Gift of future property—Possession by husband—Ownership—Execution—Opposition to seizure and sale.]—In the marriage contract, the donation to the wife "of all the furniture which the future husband should in future have in his residence" is a donation of future property and, of its nature, made in contemplation of death. Such a donation does not take effect till the death of the husband and, during his lifetime, the wife has no right of property in the chattels affected and can not maintain an opposition to withdraw them from seizure and sale under execution to satisfy a debt due by the husband.

Dorval v. Préfontaine, Q.R. 14 K.B. 80.

—Marriage contract before Civil Code—Dower.]—(1) A stipulation of dower in a marriage contract executed before the Civil Code came into force, of a sum une fois payée et sans retour meant that, if children were born of the marriage, the wife, in case of survival, should have the usufruct and the children the ownership, of the dower money. (2) Children, in order to claim their dower, are not bound to renounce the succession of their father, when it has devolved by his will on a universal legatee who has accepted it.

Kirkpatrick v. Birks, 14 Que. K.B. 287.

—Consent to wife carrying on business—Effect of filing as notice.]—The mere fact of a married woman filing her husband's consent to her carrying on business in her own name will not enable her to recover as an undisclosed principal against a third party who has purchased goods from the husband, believing that he is dealing with the husband alone, and has credited the price of the goods on an account against the husband for goods sold and delivered.

Murray and Lapierre, 41 N.S.R. 122.

—Proceedings against married woman by judgment creditor of husband.]—Plaintiff sought to attach as a debt due the husband, a sum of money deposited in a chartered bank by a married woman in her own name. The evidence showed that the money in question, in whole or in part, was obtained from profits earned in carrying on the business of the husband during his absence, and it appeared that it was received by the wife and deposited in her own name, by arrangement with the husband, for the purpose of protecting it against the creditors of the husband:—Held, under these circumstances, that the amount in question was not a debt due by the wife to the husband, and therefore not attachable under garnishee proceedings by the husband's judgment creditor.

St. Charles v. Andrea, 41 N.S.R. 190.

—Action brought by married woman.]—In an action brought by a married woman separated as to property, it is not necessary to allege whether the separation is contractual or judicial.

Davignon v. Chevalier, 8 Que. P.R. 104 (C.R.).

—Separation as to property—Sale of immovable.]—The nullity of a contract can only be declared in a case in which all the contracting parties are before the Court. The sale of an immovable with a clause for redemption agreed to by a wife separated as to property cannot be annulled in an action by her on the ground that the deed was in reality an obligation contracted on behalf of her husband in violation of Article 1301, C.C., especially if it is shown that the price of sale was employed in discharging debts due by her alone.

Lachapelle v. Viger, Q.R. 15 K.B. 257.

—Proceeding by wife—Saisie-arret.]—When a wife is separate as to property and her marriage contract provides that she shall have entire administration over her own property she can, without authorization from her husband, issue in his name a saisie-arret before judgment which is a conservatory proceeding.

Cyr v. Allard, 8 Que. P.R. 342 (Fortin, J.).

—Wife joining in husband's obligation.]—A contract whereby a wife separate as to property binds herself with her husband is, as regards her, a nullity, and the party who knowingly acquires such an obligation cannot claim to be a creditor in good faith.

Dagneau v. Decarie, 8 Que. P.R. 141.

—Settlement—Contract of marriage—Construction of covenant—Stipulation of dower—Renunciation to succession of father.]—(1) A covenant in a contract of marriage that "the husband, in consideration of the renunciation of legal dower by the wife and of the love and affection he has for her, gives her a sum of money, to be taken from the clear assets of his estate, provided that she survive him, payable immediately after his death, monthly or otherwise as she may require, as a marriage portion in lieu of dower," with a further covenant that "if the wife predecease the husband, without issue, or having had issue such issue, having predeceased herself, her heirs shall have no right to the sum which shall vest in him the hus-

band à titre de reversion," is not a stipulation of prefixed or conventional dower, nor a gift or gratuitous disposition, but a synallagmatical agreement or bargain that the husband shall pay the sum in consideration of the renunciation by the wife of her dower rights. Hence, in the event of the predecease of the wife leaving children issue of the marriage, and of such children being her heirs-at-law, she having died intestate, they have the right to be paid the sum out of their father's estate, not by right of dower (à titre de douairriers), but as the representatives of their mother. They are not bound, therefore, as a condition precedent to the recovery of the sum, to renounce the succession of their father, or any benefit accruing to them under his will. (2) Even in the view that the above marriage covenant is gratuitous or a gift, it is a donation inter vivos and not mortis causa, nor is it subject to a suspensive condition that the donee survive the donor.

Hogan v. Eadie, 30 Que. S.C. 402.

—Marriage contract—Donation of movables and money.]—The stipulation under the title "by way of settlement" in a contract of marriage written in English, by which, following a donation of movables the prospective husband donates to his future wife a sum "to be had and taken by her . . . Sarah Fox . . . from and out of the most available cash assets of the estate of him, the said Carl Schiller, at any time upon her first demand and as her own property. To have and to hold both of said donation and settlement unto her . . . provided always that she shall survive him for, in case she should pre-decease him, said settlement and said donation shall return and belong to him by title by reversion" does not constitute a future succession, but a gift entre vifs to be realized from the property of the husband at the wife's pleasure subject to the condition that, if she should die before him, the movables and money would be returned to the husband surviving her.

Fox v. Lamarche, Q.R. 16 K.B. 83.

—Contract of marriage—Donation.]—The donation of property made to the wife by a marriage contract in case she survives him only takes effect on the husband's death. While he lives his wife has no right to the property nor capacity to make an opposition to seizure thereof by her husband's creditors. The contractual donation of movable property not followed by actual delivery to, and open possession by the donee must be registered. Wedding gifts are deemed to be made to the future wife and belong to her in case of séparation de biens.

Proulx v. Klineberg, Q.R. 30 S.C. 1 (Sup. Ct.).

—Husband serving in wife's business—Creditors of husband — Saisie-arret.] — There is nothing to prevent a husband from giving his time and services gratuitously for the benefit of his wife's business. The relation of debtor and creditor does not arise between them which gives a right to the husband's creditors to garnishee the amount alleged to be due from his wife for value of his services.

Frank v. Lafrance, Q.R. 32 S.C. 438 (Sup. Ct.).

—Autopsy of corpse—Right of widow to recover damages.]—The unauthorized autopsy of a deceased person is a tort to his widow and an action lies in her favour to recover damages therefor.

Philipps v. Montreal General Hospital, 33 Que. S.C. 483.

— Marriage — Death of consort — Funeral expenses—Liability of survivor.]—Funeral expenses are a liability on the succession of the deceased. Not being among the burdens imposed on matrimony the surviving consort is not obliged to pay them.

Funeral Celebration Company of Montreal v. Lefebvre, Q.R. 33 S.C. 296 (Sup. Ct.).

—Mortgage by married woman—Consent of husband—Acknowledgement.]—A purchaser under a mortgage of the property of a married woman, executed by her while living with her husband prior to the Married Woman's Property Act of 1895, 58 Viet. c. 24, not appearing to have been executed with the consent of her husband, and not acknowledged as the statute requires, can not maintain ejectment against the mortgagor. In the absence of any evidence to the contrary, it will be presumed that a married woman is living with her husband.

Everett v. Everett, 38 N.B.R. 390.

—Moneys advanced by husband to enable wife to purchase land—Resulting trust, evidence to establish—Sale of land by wife—Notice by husband to purchaser.]—In an action by a husband against his wife for a declaration of trust, the evidence showed that the wife had received from the husband the money for the purchase of a homestead, the conveyance of which was taken in the wife's name. A purchaser from her received notice that she was not a widow, and notwithstanding that, before completing the agreement for sale, he received notice from the husband's solicitors warning him, he did complete it:—Held, that there was a resulting trust in favour of the husband. A purchaser in the foregoing circumstances, proceeding to anticipate the agreement for sale by accepting an immediate conveyance. Held, that plaintiff should recover from the purchaser

the amount of purchase money which he had paid to secure such immediate conveyance.

Dudgeon v. Dudgeon, 13 B.C.R. 179.

—Separate property—Conveyance during coverture.]—Where land was transferred, as a gift, to a married woman by her husband, during the time that the Married Woman's Act, R.S.M. 1891, c. 95, was in force, the husband being then solvent, and a certificate of title therefore issued in her name under the provisions of the Manitoba Real Property Act, the beneficial as well as the legal interest in the land vested in her for her separate use, and neither the land nor its proceeds can be taken in execution for debts of the husband subsequently incurred, notwithstanding the provisions of the second section of the Married Woman's Act respecting property received by a married woman from her husband during coverture. Douglas v. Fraser, 17 Man. R. 439, affirmed.

Fraser v. Douglas, 40 Can. S.C.R. 384.

—Contract by wife—Separate estate.]—In an action against a husband and wife for goods supplied to the wife before and after marriage, the evidence showed that, at the time of marriage, the wife had a separate estate which she still held, and the only evidence upon which the claim against the husband was founded was that after marriage he cut some timber upon the wife's property, which was sold and the proceeds used to purchase supplies for household purposes:—Held, that this did not constitute an acquiring or becoming entitled to property from or through the wife within the Married Woman's Property Act, R.S. 1900, c. 112, s. 25. Also, that debt due from the wife to the husband before marriage was extinguished by the marriage.

Lockett v. Cress, 41 N.S.R. 400.

—Marriage covenants—Separation as to property—Gift to the wife by marriage contract.]—A wife separate as to property, the donee under the marriage contract of a sum of money payable by her husband on demand, who, for a number of years, receives all his earnings, out of which she is proved to have saved and appropriated an amount exceeding that of the gift, has no further claim therefor upon him or his estate. Any savings the result of her thrift, economy and good management belong to the husband, and can in no manner be the property of the wife, as earnings or otherwise.

Bruneau v. Lefaivre, 34 Que. S.C. 173.

—Ownership of goods in business carried on in wife's name.]—(1) The proceeds of the sale by the husband of a parcel of real estate owned by the wife, though they came into the husband's hands prior to 21st May, 1900, when it was enacted that all property standing in the name of a married woman on that date should be deemed to be her property until the contrary is shown, and although the land had been conveyed to her by the husband during coverture, belonged to the wife; for, apart from s. 21 of R.S.M. 1892, c. 95, which provided that a man might make a valid conveyance or transfer of land to his wife without the intervention of a trustee, a husband may make a gift of property to his wife, which property, if the gift be completed, will in equity be considered as her separate property, provided that the husband is at the time in a position financially to make the gift, and does not do it with any intention of defrauding his creditors: Kent v. Kent (1892), 18 A.R. 352. (2) The profits made in the fur business started with such proceeds and carried on from the first in the wife's name, though managed chiefly by the husband (all goods required for the business having been sold to her and on her credit only as the husband had unsatisfied judgments against him) belonged to the wife and so did all goods purchased out of such profits and put into such business. Dominion Loan, etc., Co. v. Kilroy (1887), 14 O.R. 468, followed. Ady v. Harris (1893), 9 M.R. 127, and other "farm" cases distinguished. (3) Such profits are protected for the married woman by the definition of the word "property" in sub-s. (b) of s. 2 of R.S.M. 1902, c. 106, as meaning "any real or personal property of every kind and description whether acquired before or after the commencement of this Act, and shall include the rents, issues and profits of any such real or personal property," and by s. 5 of the same Act; and such protection is not taken away by the further clause in said sub-s. (b) reading: "and includes also . . . all wages, earnings, money and property gained or acquired by a married woman in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest," although it was admitted that the business was not carried on by the wife separately from her husband. The word "profits" as used in those sections should be held to cover gains arising from a combination of skill or work with the earning property or capital as well as those arising only from investments without such combination.

Douglas v. Fraser, 17 Man. R. 439.

[Affirmed Fraser v. Douglas, 40 Can. S.C.R. 384, supra.]

—Liability for goods supplied to household.]—When goods are ordered by a married woman living with her husband for use in the household, the presumption of law is that the wife is acting as the agent of her husband, and such presumption is not displaced by the fact that the merchant

kept the account in the name of the wife and rendered statements of it from time to time to her instead of to her husband. Paquin v. Beauclerk (1906), A.C. 160, distinguished.

Vopni v. Bell, 17 Man. R. 417.

—**Evidence to prove husband's agency for wife.**]—Held, that a husband's authority to enter into a contract on behalf of his wife, for the construction of stone foundations on four lots of land belnging to her, was sufficiently established by proofs of the following facts: (1) Prior to the date of the contract the wife entered into what was called a building loan agreement in respect of each of the four lots. Each agreement provided, amongst other things, that she would forthwith proceed to erect a frame building with stone foundation on the lot named. These agreements were signed by the wife personally. Subsequently four several applications for loans on the several lots were made. These applications were signed by the husband in the wife's name and the wife acted upon them and recognized the loans made pursuant thereto. (2) During the progress of the plaintiff's work the wife came with her husband and saw the work proceeding but made no objection to it, and she and her husband went frequently to the loan company's office together and gave directions as to the buildings.

Gillies v. Gibson, 17 Man. R. 479.

—**Examination of defendant's wife after judgment.**]—When, after judgment, plaintiff moves for the examination of defendant's wife, he must allege in his motion that defendant and wife are separated as to property, or that defendant's wife has acted as his agent for the administration of property belonging to defendant.

Nadeau v. Boulay, 10 Que. P.R. 217.

—**Voluntary conveyance to wife—Fraudulent purpose.**]—The plaintiff caused the land in question to be conveyed to his wife, the defendant, and registered the deed without her knowledge. His motive was to avoid payment of an anticipated claim against him :—Held, that he could not succeed in an action to compel her to reconvey the land to him.

McAuley v. McAuley, 18 Man. R. 544.

—**Co-sureties for debt of stranger—Liability of wife—Absence of fraud.**]—A married woman, when contracting otherwise than for the benefit of her husband, has all the capacity of a feme sole to bind her separate estate, and there can be no ground for presuming that the husband abused the confidence of his wife by exercising undue marital influence for the benefit of a stranger. Cox v. Adams (1904), 35 S.C.R. 393, distinguished. And, in the circumstances of this case, where the defendants, husband and wife, became sureties for the debt of a third person, and it was found by the trial Judge that the wife became co-surety with full knowledge of the nature of the obligation which she undertook and without anything in the nature of fraud, misrepresentation, or undue influence, she was held liable to the creditors, the plaintiffs, no circumstances being proved which would relieve the principal debtor from liability. There was evidence that threats were used to induce the wife to guarantee the debt, but the trial Judge found, upon consideration of the conduct and demeanour of the witnesses, that no such threats were made:—Held, that the Court could not, upon conflicting evidence, reverse this finding.

Sawyer-Massey Co. v. Hodgson, 18 O.L.R. 333.

—**Separation as to property—Payment of husband's debt.**]—The remittance by a wife separated as to property of a cheque to her husband the proceeds of which he deposits in a bank as collateral security for a debt due the latter, is a valid loan and not within the prohibition of Art. 1301 C.C. against a married woman binding herself, with or for her husband, otherwise than as being common as to property. The nature of the transaction and its validity are not affected by the following indorsement on the cheque by the bank manager: "To guarantee the payment of a draft for $1,027.38 on Linabury, O.K. this cheque will be available only if Linabury does not pay the draft in full or demand a reduction or make a claim after having sold the hay."

Augé v. La Banque d'Hochelaga, Q.R. 34 S.C. 481.

—**Seizure of grain grown on wife's land—Farming operations carried on by wife.**]—The sheriff seized a quantity of wheat grown on land the property of the claimant, a married woman, under executions against her husband. The latter was a farmer and owned a quarter section adjoining that of the claimant. It appeared in evidence that the claimant carried on the farming operations on her own land, hiring the necessary help and that she purchased the seed grain personally. She consulted her husband in regard to the working of the farm and he assisted in working the place; but it was shown that the men hired by her did more work for the husband on his farm than was done by him on the claimant's farm. On trial of an interpleader issue to determine the ownership of the grain:—Held, that as under the Married Woman's Property Act (c. 18 of 1907), the claimant was entitled to hold and deal with real and personal property as if she were a feme sole and as it was not shown that the husband was carrying on farming operations on her land as head of the household

or lessee, she was entitled to the crop grown on her land.

Lindsay v. Morrow, 1 Sask. R. 516.

III. ALIMONY AND SEPARATION.

—Judicial separation—Petition by wife—Omission to aver non-collusion.]—In the affidavit filed by the petitioner for a judicial separation it was not alleged that there was no collusion or connivance between the parties:—Held, that such allegation is a positive statutory requirement preliminary to the issue of a citation. Where the respondent has been served with a citation and has not appeared, service of notice of subsequent proceedings in the cause is not necessary.

Timms v. Timms, 14 B.C.R. 410.

—Judicial separation—Petition for by wife on account of cruelty.]—In a petition by a wife for a judicial separation on the ground of cruelty, the petition should shew specifically the series of acts of cruelty relied upon.

Timms v. Timms, 15 B.C.R. 39, 13 W.L.R. 636.

Alimony — Deserted Wives' Maintenance Act.]—Where plaintiff wife, within a week of the issue of the writ, obtained an order under the Deserted Wives' Maintainance Act, R.S.O. (1897), c. 167, for payment to her by defendant of $3 per week and $4.75 costs, the Master in Chambers dismissed a motion for interim alimony and disbursements, with costs.

Cowardine v. Cowardine, 2 O.W.N. 44, 16 O.W.R. 963.

—Judicial separation—Cruelty—Substituted service of petition.]—A wife petitioned for a judicial separation from her husband on the ground of cruelty, and attempted to establish her right by proving specific acts and a course of conduct amounting to cruelty. The parties were married in 1886 and had 6 children, and lived together until February, 1909, when they separated, but came together again after two months, shortly after which they again separated, and this petition was filed:—Held, that lack of harmony does not justify a judicial separation; there must be some substantial wrong-doing. The question of cruelty is one of fact, and is, whether the husband has so treated his wife as to inflict bodily injury upon her, or cause reasonable apprehension of suffering to her physically or mentally. Here the petitioner had no substantial grievance, or at least none which she had not unequivocally condoned. Striking his grown-up daughter, not in the presence of his wife, was not cruelty of the husband to the wife, within the meaning of the authorities. Recent cruelty set up at the trial, in refusing to supply medical attendance, was not specifically pleaded, and was not in fact proved. On the whole nothing was established which would justify a decree for judicial separation. Where the petitioner relies upon conduct amounting to cruelty, the petition should specifically set out a regular series of the acts relied on to establish the cruelty. The greatest possible care should be taken to see that the proceedings are brought to the notice of the respondent.

Timms v. Timms, 13 W.L.R. 636 (B.C.).

—Separation—Motion by wife for payment of disbursements.]—In an action in separation from bed and board, the wife must be allowed a certain amount for the necessary disbursements. But if the husband is unable to pay, the wife must then ask to be allowed to plea in forma pauperis; she being later granted sufficient money for the summoning and transporting of her witnesses.

Moisan v. Bilodeau, 11 Que. P.R. 248.

—Settlement in anticipation of marriage—Separation.]—The parties to an intended marriage (which was subsequently entered into) executed an indenture of settlement providing, inter alia, as follows: "The trusts and purposes for which the said respective trust funds shall be held as hereinbefore mentioned are as follows: Upon trust to pay the income thereof to the said Hugh Nelson so long as the said parties shall live together as husband and wife. In the case of death of either party in trust for the survivor absolutely, and in case for any reason whatsoever the parties shall cease to cohabit, then upon trust to sell and convert the said trust property and to hold one-half of the proceeds of such sale and conversion upon such trusts as may be agreed upon between the parties for the children of the said marriage (if any) and to divide the other half of the said proceeds between the said parties equally and if there shall be no such child or children then to divide the proceeds of such sale and conversion between the parties equally." The defendant also joined in an instrument creating the plaintiff joint tenant with him in his real estate, which was duly registered:—Held, that the agreement was void as being against public policy.

Nelson v. Nelson, 14 B.C.R. 406.

—Alimony—Reduction.]—If a plaintiff has elected to seek, by a common law action, a reduction of the aliment fixed by a final judgment, he cannot by a motion obtain such reduction pending suit.

Price v. Price, 12 Que. P.R. 32.

Alienation of husband's affections—Cause of action.]—An appeal by the plaintiff from an order of Magee, J., at the trial, striking out paragraph 2 of the statement of claim,

which charged the defendant with enticing the plaintiff's husband from her, was dismissed, following Lellis v. Lambert, 24 A. R. 653.

Weston v. Perry, 1 O.W.N. 155 (C.A.).

— Alimony — Wife leaving husband—Conditional refusal to return — Costs —Disbursements.]—In an action for alimony it appeared that the plaintiff had voluntarily left the house where the defendant was living with his mother, and that she refused to return to him unless he guaranteed her a money allowance, which he said he was not in a position to do and refused to do. He had repeatedly offered in good faith to make a home for her if she would return unconditionally:—Held, that it could not be said that he was living apart from her without her consent; that, while insisting upon a guaranty, she could not be said to be calling upon him to resume marital relations; and that there was no ground for awarding alimony. Held, also, that the plaintiff, although there was no ground for the action, was entitled to have the cash disbursements of her solicitor paid by the defendant.

Forster v. Forster, 1 O.W.N. 93, 419 (D. C.).

— Neglecting to provide necessaries for wife — Previous acquittal on like charge—Lawful excuse — Inability of prisoner.]—The defendant was in September, 1910, tried and convicted on a charge of refusing, neglecting, and omitting, without lawful excuse, to provide necessaries for his wife, by means whereof her health was then and was likely to be permanently injured. In July, 1909, the defendant had been brought before a magistrate on a charge of neglect and non-support of his wife, under the same provisions of the Criminal Code upon which the subsequent prosecution was founded, and, electing to be tried summarily, was, after trial, acquitted by the magistrate. At the trial in September, 1910, evidence was admitted, against objection on the defendant's behalf, tending to show harsh conduct towards and neglect of his wife by the defendant, before the former trial and acquittal, and the effect upon her health, the ground of admission being that such conduct might or would have some bearing on her then (September, 1910) condition of health:—Held, that the evidence was improperly admitted. The defendant gave evidence on his own behalf, and, amongst other matters, deposed as to his ability to earn money and the means at his command to enable him to support or provide necessaries for his wife. Held, that the trial Judge should have told the jury that, in case they were satisfied that the defendant had not the ability to provide necessaries for his wife, they could find him "not guilty," and the question of his ability should have been left to the jury. The question of lawful excuse is to be determined upon all the facts and circumstances, the onus being upon the Crown.

Rex v. Yuman, 22 O.L.R. 500.

— Alimony — Legal cruelty.]—(1) The practice existing in England in the Court for Divorce and Matrimonial Causes is not applicable to the Northwest Territories. (2) The Ordinance confers jurisdiction to grant alimony as an independent relief, notwithstanding that in England such relief could have been obtained only as incidental to a decree for judicial separation or for the dissolution of the marriage, or for restitution of conjugal rights. (3) In considering the question of legal cruelty, the station in life of the parties must be borne in mind. (4) A wife is entitled to her costs of an unsuccessful suit for alimony, unless she has separate means out of which to pay them, or unless her solicitor has been guilty of misconduct in countenancing improper litigation or takes oppressive and unnecessary steps in promoting the case.

Harris v. Harris (No. 2), 3 Terr. L.R. 416.

— Alimony — Jurisdiction — Implied authority of wife in relation to husband's affairs.]—Held, (1) The jurisdiction of the the Supreme Court of the North-West Territories is limited to the powers and authorities exercised by the Courts of Common Law, Chancery and Probate in England on July 15, 1870, and consequently in the absence of express legislation there is no jurisdiction to entertain a suit for alimony. (2) A wife has no implied authority to spend her money on her husband's behalf, and the husband is not liable unless such expenditure was made at his request. (3) A married woman is liable to pay costs in favour of her husband out of her separate estate, this being an incident to her status as a feme sole in respect of such property.

Harris v. Harris (1), 3 Terr. L.R. 289.

—Interim alimony—Quantum—Evidence.]—

Diebert v. Diebert, 7 W.L.R. 458 (Sask.).

—Wife's authority to pledge husband's credit—Presumption—Necessaries.]—

Clayton v. London, 9 W.L.R. 463 (B.C.).

—Alimony—Interim order—Adultery.]—

Cunningham v. Cunningham, 5 W.L.R. 514 (N.W.T.).

—Action by wife against husband for necessaries supplied to children.]—

Park v. Park, 3 W.L.R. 281 (B.C.).

—Contravention of marriage contract.]—An agreement between consorts which contravenes the provisions of their marriage contract, even if made in proceedings to settle an action en séparation de corps is void.

O'Dell v. Gregory, Q.R. 19 K.B. 364.

—Alimony — Cruelty — Refusal to supply clothing—Wife living in husband's house.]—In an action for alimony, the plaintiff charged the defendant with cruelty. She was called as a witness at the trial, and it appeared that she was living under her husband's roof, though not occupying the same bed, and was supplied with food. She did not desire resumption of marital intercourse, but did want more than just her living; and the Court was asked to make an order that the defendant should pay her so much a month or so much a week, she living all the time under his roof, as she had no means of clothing herself, and the defendant had notified the tradesmen in the town where they lived not to supply her with clothing. Upon these facts appearing, and the nature of the claim being explained, the trial Judge refused to go on with the inquiry as to the alleged previous cruelty, etc.:—Held, that, in such circumstances, the wife was not entitled to alimony. The law, so long as a wife remains in her husband's house, enables her to enforce the marital obligation to supply her with clothing, only by a circuitous route, by pledging the credit of her husband for necessities.

Price v. Price, O.L.R. 454.

—Action for alimony—Costs of unsuccessful plaint.]—If an action by a wife against her husband for alimony be dismissed, the wife's solicitor will not be entitled to costs against the husband if it does not appear that he believed on reasonable and proper ground that he was prosecuting a just cause.

Keizer v. Keizer, 2 Alta. R. 354.

—Action by wife—Alimony.]—The husband sued en séparation de crops or for alimony alone should give his wife an alimentary allowance pending the action.

Lafleur v. Gagnon, 11 Que. P.R. 349.

Action by wife for alienation of her husband's affections.] — The plaintiff brought this action against another woman for alienating her husband's affections, committing adultery with him and inducing him to leave the plaintiff and go to the United States, whereby she was deprived of the services and support of her husband and of the exercise of the remedies provided by the Criminal law for the support of wives:—Held, that Lellis v. Lambert (1897), 24 A.R. 653, leaving nothing to be said in support of the plaintiff's action, the same must be dismissed with costs.

Lawry v. Tuckett-Lawry, 2 O.L.R. 162.

—Alimony—Lunatic—Admission to asylum —Removal.]—Held, affirming the decision of Meredith, C.J., 2 O.L.R. 289, that the plaintiff was not entitled to alimony. Held, also, that, upon a motion by the plaintiff for summary judgment under Rule 616, where all the facts were before the court, and the conclusion was against the plaintiff, it was proper to pronounce judgment dismissing the action, instead of merely dismissing the motion.

Hill v. Hill, 2 O.L.R. 541 (D.C.).

—Abandonment of domicile—Aliment.]—The departure of the wife from the conjugal residence and her refusal to live with her husband, constitutes a serious offence against him, and warrants him in demanding séparation de corps with exemption from the obligation to maintain his wife.

Doyon v. Riopel, 17 Que. S.C. 488 (S.C.).

—Mourning expenses of widow—Separation for adultery—Art. 208 C.C.]—The claim by a widow for the value of her mourning depends on her surviving her husband as his wife. Therefore, when there had been a séparation de corps on account of adultery of the wife and the husband died without being reconciled to her, she could not claim the value of her mourning from his heirs.

Bradley v. Ménard, 18 Que. S.C. 382 (S.C.).

—Domicil—Jurisdiction — Alimony — Service out of jurisdiction.]—In an action for alimony the defendant was served with the writ of summons in November, 1900, in the State of California, where he had gone to reside in September, 1899. He was born in the State of Pennsylvania, and was married to the plaintiff in the State of New York in 1889. For seven or eight years before the marriage he had lived in Canada. After the marriage the plaintiff and defendant went to Europe for several months, and afterwards resided for short periods in different States in America. In 1891 they came to Canada, and bought property at a village in Ontario, which was their home from that time on, although during several winters thereafter they went to different places in the United States, where each did something to earn money, but they always came back to the Ontario home in the spring. The plaintiff still continued to reside there, and said she never at any time had any intention of changing permanently her residence or place of abode. The defendant swore that in September, 1899, he sold all the property he had in Canada, and went to the United States to reside, where he had ever since resided, was now residing, and intended to reside, and that he had no property of any kind in Ontario. The defendant had since going to California instituted proceedings there against the plaintiff for a divorce:—Held, that the defendant's domicil of origin was in the United States; that he acquired a domicil of choice in Ontario; that, upon the evidence, he had not abandoned that domicil; and therefore he was still domiciled within Ontario, within the meaning of Rule 162 (c), and service of

the writ upon him out of Ontario was permissible.

Bonbright v. Bonbright, 1 O.L.R. 629.

—Wife a minor—Curator—Séparation de corps.]—Unless for reasons deemed sufficient the husband of a minor emancipated by marriage should be appointed her curator. The right of the husband to the guardianship of his infant wife is a result of the respective obligations of married persons and of their intimate relations. These reasons cease to exist when, for example, the parties are separated in reality and the wife has prepared to bring an action en séparation de corps. In such case the husband loses all right to the guardianship of the wife.

Ex parte Pauza, 3 Que. P.R. 570 (S.C.).

—Separation from bed and board — Provisional allowance—Residence of the wife.] —Held, that a petition by the wife for provisional allowance, in an action for separation from bed and board, will not be granted until the wife's place of residence pending the suit, has been fixed by the court.

Lauzon v. Hebert, 3 Que. P.R. 448.

—Alimony—Action by lunatic—Right to maintain—Summary judgment—Con. Rule 616.]—On a motion to the Court of Appeal for leave to appeal from the judgment of the Divisional Court, reported in 2 O.L.R. 541, affirming the decision of Meredith, C.J.C.P., (1) that the plaintiff in the action was not entitled to alimony, and (2) that on a motion for summary judgment under Rule 616 he could pronounce judgment dismissing the action, the Court of Appeal were of the opinion that the judgment was right, and leave to appeal was refused.

Hill v. Hill, 3 O.L.R. 202 (C.A.).

—Separation from bed and board—Husband interdicted for insanity.]—The plaintiff, common as to property with her husband, alleged that they had been married in 1882, and had been living apart since the year 1884, and that since that time she had supported herself by her own work; that he had recently been interdicted for insanity, and that his curator had obtained a judgment for $3,500 damages for personal injuries suffered by the husband before the date of interdiction. She asked that she be authorized to ester en justice, in an action against the curator in his quality, for separation de corps et biens from her husband:—Held, the inability of a husband interdicted for insanity to receive or provide for his wife is not a ground to support an action by the wife for separation from bed and board, and no legal grounds were alleged for a judicial authorization of the wife to bring such action against the husband's curator.

Deneen v. McLeod, 21 Que. S.C. 54.

—Action for separation from bed and board.]—(1) In an action by the wife for separation from bed and board, in which the plaintiff also asks for an alimentary allowance and the care of the children, allegations in the plea, charging that some of defendant's acts were caused by the misconduct of the plaintiff herself, are not demurrable, although not of a nature to defeat the action for separation, inasmuch as such allegations of misconduct might affect the other conclusions of the plaintiff, namely, as regards the care of the children and the alimentary allowance. (2) Under articles 196 and 197 of the Civil Code the plaintiff in an action for separation from bed and board is not entitled to adduce evidence regarding facts anterior to the last reconciliation between the consorts, without first having proved some fact which, if not of sufficient gravity alone to warrant a separation, should at least strongly support the demand therefor.

Courteau v. Skelly, 20 Que. S.C. 215, (Archibald, J.).

—Evidence—Separation de corps—Arts. 314, 316 C.P.Q.]—In an action en séparation de corps, the husband and wife may be heard as witnesses even in support of the action.

Talbot v. Guilmartin, 10 Que. K.B. 564.

Action for maintenance.]—A wife, common as to property abandoned by her husband, who is abroad, and against whom she has brought an action en séparation de corps which is pending, may, in view of her poverty, and by authority of the Judge, claim from a relation or kinsman who should support her a provision for the maintenance of herself and her children. The wife who, prior to the action by which she claims aliments, has contracted debts to enable her to live, may claim aliments from the past in order the pay the same.

Girard v. Vincent, 21 Que. S.C. 206 (Cir. Ct.).

—Action for separation—Evidence—Arts. 1095, 1099, 1100 C.C.P.]—In an action demanding the forfeiture of matrimonial rights acquired by the marriage contract, proof of these rights will be ordered before the séparation en corps et de biens is decreed. Such proof should be made by producing the marriage contract and the certificate of marriage.

Beauchemin v. Tonquet, 4 Que. P.R. 469. (Sup. Ct.).

—Jurisdiction—Vacation—Art. 15 C.C.P.] —A Judge has no jurisdiction in vacation to grant a temporary alimentary provision in an action en séparation de corps.

Currie v. Cunin, 5 Que. P.R. 56 (Sup. Ct.).

—**Action for separation—Temporary residence of wife—Art. 1101 C.C.P.**]—In an action en séparation de corps et de biens brought by the wife the Judge may, according to the circumstances, instead of assigning to the plaintiff a temporary residence outside of the conjugal domicile, authorize her to dwell within the domicile, and order, in consequence, her husband to leave it.

Herbert v. Michaud, 4 Que. P.R. 297 (Sup. Ct.).

—**Petition to ester en jugement—Action in separation from bed and board.—Art. 202 C.C.**]—If a husband has sued his wife in separation from bed and board, and recovered judgment in his favour, while a similar action by the wife is still pending, the latter, who has demanded a pension alimentaire in her action, will not be permitted to take a new action for alimony, as she can obtain such alimony in the case already pending.

Hainault v. Beland, 5 Que. P.R. 382 (Archibald, J.).

—**Non-support of wife—"Wilfully refusing or neglecting to maintain"—Reasonable ground for believing that liability had terminated.**]—1. To constitute a wilful refusal or neglect by a husband to maintain his wife (Cr. Code, s. 207), there must be an absence of any reasonable ground for believing the refusal or neglect to be lawful. 2. A husband who has been ordered by a civil court in an action brought by his wife for separation to pay to the wife an interim alimentary allowance, is relieved from that liability in the Province of Quebec on proof that the wife is supporting herself by immorality, and a criminal prosecution against him for non-support will be dismissed on the like proof.

Anonymous case (H——. v. H——), 6 Can. Cr. Cas. 163 (Hall, J.).

—**Insanity — Separation.**]—The fact that the husband is insane and unable to receive or provide for his wife is not a ground for a judicial separation from bed and board.

Dineen v. McLeod, 5 Que. P.R. 391, (Davidson, J.)

—**Séparation de corps—Alimony.**]—A married woman who is taking proceedings en séparation de corps is not entitled to alimony from her husband pending such proceedings if, without being judically authorized, she abandons the conjugal domicile and resides elsewhere.

Protain v. Prevost, Q.R. 23 S.C. 8 (Sup. Ct.).

—**Contempt of Court—Abandonment of domicile.**]—A wife, who having been ordered by the Court to resume her marital relations, abandons the conjugal domicile after having returned to it, cannot in consequence of such act, be imprisoned for contempt of Court.

Tessier v. Guay, Q.R. 23 S.C. 75 (Sup. Ct.).

—**Alimentary allowance—Indigent debtor—Art. 167 C.C.**]—A husband who is unable to earn his livelihood and possesses nothing but absolute necessaries of life, is not bound to pay an alimentary allowance to his wife.

Dupuis v. St. Mars, alias Viau, 5 Que. P. R. 404.

—**Custody of child—Costs.**]—Where a wife leaves her husband without justification she is not entitled to her costs of unsuccessfully resisting his application by habeas corpus for the custody of children.

In re C. T. McPhalen, 10 B.C.R. 40, (Hunter, C.J.).

—**Separation from bed and board—Alimentary allowance to the husband.**]—A merchant sued for separation from bed and board may claim an alimentary allowance from his wife, if the latter has obtained possession of the shop so as to deprive the husband of his resources.

Joly v. Garneau, 5 Que. P.R. 137.

—**Separation from bed and board—Dividing the enquete—Reconciliation—Motion to reopen enquete.**]—If in an action for separation from bed and board, the parties have with the assent of the Court divided the enquete to permit the party alleging reconciliation to prove the facts constituting reconciliation, reserving the right to make proof of other facts alleged by the parties after adjudication upon the matter of the reconciliation, the opposite party cannot be permitted to re-open the enquete to make proof of facts against the reconciliation before the adjudication by the Court upon such first question

Christin v. Lafontaine, 5 Que. P.R. 198.

—**Acknowledgment of debt by wife—Evidence.**]—An acknowledgment of indebtedness on a sale of goods for more than $50, by a trader to a non-commercial purchaser cannot be proved by oral testimony if it has not been established that the whole or a part of the goods were delivered. In the absence of special authority a man is only liable for purchases made by his wife of things necessary for his family, such as provisions and clothing. Even in the case of goods bought by the wife for the necessities of the family the husband is not bound by acknowledgment of his wife of the indebtedness therefor, unless the same was made in the course of the sale.

Pichette v. Morisette, Q.R. 25 S.C. 45 (Ct. Rev.).

—Separation from bed and board—Judgment declaring reconciliation proved.]—In an action for separation from bed and board, a judgment declaring that the allegations of reconciliation have been proved, reserving the parties the right to discuss the consequences of the reconciliation upon the proceeding pending between them is not an interlocutory judgment from which an appeal can be permitted under Art. 46 C.P.

Christin v. Lafontaine, 6 Que. P.R. 297 (Hall, J.).

—Interim alimony—Inability of defendant to pay.]—An order for interim alimony will not be made against a defendant where it is not shown that he has the means to comply with such an order if made.

Pherrill v. Pherrill, 6 O.L.R. 642 (M.C.).

—Separation from bed and board—Custody of child—Omission to adjudicate upon plaintiff's demand for—Addition to judgment.]—1. Where the plaintiff, in an action for separation from bed and board, also prays for the custody of a minor child, some order should be made by the Court of first instance, in delivering judgment, with respect to this portion of the plaintiff's conclusions. 2. Where the Court of first instance has omitted to make such order, the plaintiff is not entitled, by motion not served on the opposite party, to ask that an addition be made to the judgment, disposing of the prayer for the guardianship of the minor, it appearing in this case that the omission complained of was not a mere clerical error. 3. On an inscription in review from the first judgment, the Court of Review may either make such order, or, if it seems to be more desirable, may send the record book back to the Court of first instance, for such further proceedings as may be proper or necessary to enable the latter tribunal to adjudicate as to the custody of the minor.

Smith v. Cook, 25 Que. S.C. 14 (C.R.).

—Succession—Judgment for maintenance.]—The obligation to furnish maintenance is not transferable to the heirs as a debt of the succession of the person subject to it even when the latter has, in his lifetime, been condemned thereto by a judgment, in this case a judgment for maintenance in an action en séparation de corps brought by a wife against her husband condemning him to pay for an allowance during his life On this case the costs, even on appeal, were divided on account of the relationship of the parties, and because they had proceeded on a joint factum under Arts. 509 et seq. C.P.Q.

Davidson v. Winteler, Q.R. 13 K.B. 97. Appeal to Supreme Court quashed, 34 S. C.R. 274.

—Séparation de corps—Reference to praticien—Report.]—The practising attorney (praticien) appointed to make inventory of the property appertaining to the community between a husband and wife after judgment granting séparation de corps between them, should confine himself in his report to making a complete and detailed statement of all the property of the consorts without taking upon himself to decide whether the same belongs to the community or should be excluded therefrom as to which the Court alone should determine on the report being presented for homologation.—When the report states that certain property should be excluded from the community and a judgment is given ordering the praticien to amend it by inserting a complete statement in detail of such property, the reason given for such order being that it should come into the community, such judgment is not chose jugée when the amended report is presented to the Court for final adjudication on its homologation.

Stewart v. Cairns, Q.R. 27 S.C. 1 (C.R.).

—Interim alimony—Husband's offer to pay for necessaries.]—It is not a sufficient answer to a motion for interim alimony where cruelty is alleged that the husband has offered to allow the wife to get whatever is necessary for the house, in which both were living but not on friendly terms, and to pay for all such goods. Snider v. Snider (1885), 11 P.R 140, distinguished. Lovell v. Lovell (1905) 5 O.W.R., 401, 640, followed.

Theakstone v. Theakstone, 10 O.L.R. 186 (M.C.).

—Alimony—Interim alimony—Practice.]—1. Under Rule 433 of the King's Bench Act (Man.) an application for interim alimony may be made as soon as the defence is filed or the time for filing one to the original statement of claim has elapsed. 2. Unless the statement of claim makes a demand for a specific sum by way of interim alimony, as contemplated by Rule 601 of the King's Bench Act, it should only be allowed from the date of the order, not from the commencement of the action Peterson v. Peterson (1873), 6 P.R. 150. 3. The merits of the defence set up should not be looked into or considered on an application for interim alimony.

McArthur v. McArthur, 15 Man. R. 151 (Perdue, J.).

- Alimony—Desertion — Offer to receive wife back—Bona fides.]—The defendant in an action for alimony offered to "receive the plaintiff as his wife at any time when she is prepared to come and reside with

him and accept the home he is able to provide for her and conduct herself as a wife reasonably should;'' but the trial Judge, being satisfied upon the evidence that desertion had been proved and that the defendant's offer was not honestly made but solely for the purpose of avoiding a judgment for alimony:—Held, following Rae v. Rae, (1899) 31 O.R. 321, that such offer, under the circumstances, was not sufficient to defeat the plaintiff's claim.

E— v. E—, 15 Man. R. 352 (Perdue, J.).

—Separation from bed and board—Judgment refusing the wife the custody of her children.]—A judgment refusing to the wife the custody of her children pending an action in separation from bed and board, is one from which leave to appeal will be granted, although such an appeal would appear to be unwise.

Lachapelle v. Lacroix, 7 Que. P.R. 307 (Hall, J.).

—Séparation de corps—Description of party—Exception to form.]—In proceedings against the husband en séparation de corps it is not a ground of exception that all the Christian names of the wife are not mentioned especially when the extract from the registry of baptisms is filed and the contract of marriage, also on the record shows that she was known by the name given in her petition for authority to sue (pour ester en justice). The fact that the wife instituting these proceedings describes herself as separated as to property, when the marriage contract which she has omitted to set up, stipulates for exclusion from the community, is not a ground for exception to the form.

Roy v. Quesnel, 7 Que. P.R. 136 (Sup. Ct.).

Interim alimony.]—An order for interim alimony is enforceable only by an order for the payment of money, and the defendant cannot be committed for disobedience of it, as for a contempt of Court.

Galley v. Galley (N.W.T.), 1 W.L.R 155 (Harvey, J.).

—Séparation de corps—Saisie gagerie conservatoire.]—The wife, in community as to property, who sues en séparation de corps should, to obtain saisie-gagerie conservatoire granted her by law, establish by her affidavit the facts which would entitle her to the saisie-arrêt before judgment or to the saisie conservatoire.

Mongeau v. Trudeau, 7 Que. P.R. 70 (Sup. Ct.).

—Nova Scotia Court for Divorce and Matrimonial Causes—Jurisdiction in respect to restitution of conjugal rights and alimony pendente lite.]—The Court for Divorce and Matrimonial Causes in this Province has jurisdiction in respect to a suit for the restitution of conjugal rights and can order alimony for the wife pendente lite. An amendment altering the quorum of the Court of Appeal, making it unnecessary for the Judge Ordinary to sit as a member of the Appeal Court, is within the jurisdiction of the Provincial Legislature. Such intention is clear from reading the Act, as originally printed (Acts of 1866, c. 13, s. 6) and as reprinted in the appendix to the Revised Statutes (4th series) c. 126, appendix A.

King v. King, 37 N.S.R. 204.

—Separation from bed and board—Reconciliation — Deceit—Subsequent Ill-usage.]—A mere general allegation as to deceit or force in regard to a reconciliation which took place between consorts, or as to subsequent ill-usage, is not sufficient to justify proceedings in separation from bed and board within a few days of the reconciliation.

Beauchamps v. Leduc, 7 Que. P.R. 91 (Davidson, J.).

—Necessaries for wife—Omission of husband to provide—Injury to health—Necessity for proof of—Criminal Code, ss. 210 (2) 215.]—Under s. 210, sub-s. (2), of the Criminal Code, which deals with the non-support of a wife by a husband when a legal duty exists on the husband's part to provide necessaries for his wife, the criminal responsibility for the omission to do so only arises when it is proved either that her death has been caused or her life endangered, or her health is permanently injured or likely to be by such omission. When, therefore, the husband was convicted on the charge of having ''unlawfully omitted, without lawful excuse to supply his wife and child with the necessaries of life, whereby the health of each of them became, and was and is likely to become permanently injured,'' and the evidence showed that the wife and child were living with the wife's mother, who supplied all her needs:—Held, that the charge was not sustained, and the conviction was quashed.

The King v. Wilkes, 12 O.L.R. 264 (C. A.).

—Reduction of alimentary pension—Action.]—The proper proceeding to obtain the reduction of an alimentary pension is by action and not by petition in the cause in which it was granted.

McCraw v. Vaillancourt, 7 Que. P.R. 396 (Fortin, J.).

—Alimony—Cruelty—Insufficient evidence of—Non-revival of prior condoned acts.]—The Courts scrutinize very closely retaliatory acts of alleged violence and cruelty on the part of a husband arising out of the wife's headstrong and irritating conduct, and will refuse, unless such acts are

accompanied by intemperate and excessive violence, to call them acts of cruelty, and so effective in reviving prior condoned acts of cruelty and misconduct. In 1895 the plaintiff and defendant, who prior thereto had been living together, were married, but thereafter only lived together at intervals, the plaintiff living apart from defendant, and carrying on what she called a hospital for pregnant women. In 1904, on the defendant insisting on it, the plaintiff returned to the defendant's house, everything going on satisfactorily until the plaintiff desired to carry on the alleged hospital business in the house, which the defendant refused to consent to. The plaintiff then rented a house for herself, and during the defendant's temporary absence, stripped the defendant's house of nearly all the furniture, removing it to her own house. This greatly incensed the defendant, and on the plaintiff using foul and abusive language to him, he committed, as the plaintiff alleged, an aggravated assault on her, and by his conduct rendered it unsafe for her to live with him, and revived prior condoned acts of cruelty and misconduct:—Held, that the defendant's acts were not of such an excessive and intemperate a character as would render it unsafe for the plaintiff to live with him, and revive the prior condoned acts, for not only did it appear that the alleged assault was grossly exaggerated, but was brought on by the plaintiff herself, whose whole object was to goad the defendant into acts of violence which would justify an action for alimony.

Payne v. Payne, 10 O.L.R. 742 (D.C.).

—**Separation from bed and board—Provision for costs of suit.**]—It is only in exceptional cases that the wife can obtain an order to provide for her costs of suit in an action for separation from bed and board, such as the necessity of money to secure a special agent for the discovery of witnesses or to get information in respect to accusations brought against her or to give explanations of circumstances.

Lecavalier v. Labelle, 7 Que. P.R. 472 (Pagnuelo, J.).

—**Separation a menso et thoro—Dissolution of community—Report of accountant.**]—A defendant who has failed to make the inventory of the property of the community at the time of its dissolution is liable for the costs incurred for an accountant subsequently appointed, even where the plaintiff has nothing to be recovered out of the common property.

Brière v. Marcotte, 7 Que. P.R. 405 (Fortin, J.).

—**Divorce—Affidavit of documents—Discovery tending to show adultery.**]—In a petition for dissolution of marriage, the respondent applied for an affidavit of documents:—Held, on the respondent filing an affidavit showing that discovery is not sought for the purpose of proving the adultery of the petitioner, but for the purpose of discovering documents relating to the matters in question, other than the misconduct of the petitioner, that discovery ought to be ordered.

Levy v. Levy, 12 B.C.R. 60.

—**Alimony—Misconduct of wife before marriage—Condonation.**]—(1) Unchastity before marriage and concealment of it from the husband until the birth of a child is not sufficient to make the marriage null and void or to disentitle the wife to alimony. (2) Under s. 30 of the King's Bench Act, R.S.M. 1902, c. 40, a wife will be entitled to alimony if, by the law of England as it stood on the 15th day of July, 1870, she would have been entitled to a decree for the restitution of conjugal rights. By that law nothing but cruelty or adultery on the part of a wife after marriage would be a bar to an order for such restitution or entitle the husband to a judicial separation. (3) Resumption of cohabitation is a necessary ingredient of condonation by the husband of any matrimonial offence committed by the wife, such as would prevent him from relying upon it as a defence to an alimony suit. (4) A wife abandoned by her husband is entitled to the engagement ring which he had given her before marriage, unless she had absolutely surrendered it to him; but she is not, under ordinary circumstances, entitled to demand and recover possession of wedding presents given by friends of the husband at the time of the marriage.

A. v. A., 15 Man. R. 483 (Perdue, J.).

—**Interim alimony—Jurisdiction of Court to grant.**]—The Court has jurisdiction to grant interim alimony pending an action for divorce.

Mellor v. Mellor, 11 B.C.R. 327 (Martin, J.).

—**Separation from bed and board—Proof—Art. 1100 C.P.**)—(1) An action in separation from bed and board by the husband against his wife for desertion, will not lie if taken four days only after the departure of the wife, while she was sick. (2) The Court will then fix a delay within which the wife should return to her husband, and in the meantime, no adjudication will be made for the custody of the child.

Tessier v. Bélanger, 7 Que. P.R. 335 (Doherty, J.).

—**Alimentary allowance—Liability of a stepson.**]—A child, issue of a precedent marriage, cannot be sued for an alimentary allowance by the widow of his father.

Oliver v. Woodfine, 7 Que. P.R. 444 (Davidson, J.).

—Separation from bed and board—Rights of consorts—Mutual recriminations.]—It is no answer to a petition for a writ in separation from bed and board for the husband to allege that his wife is keeping a disorderly house, etc.; every consort is entitled to take such action, and questions of mutual recriminations must be left to the merits of the trial.

Arcand v. Charruau, 8 Que. P.R. 25.

—Separation from bed and board—"Movable effects"—Arts. 204-205 C.C.]—The meaning of the words "movable effects of the community" in Arts. 204 and 205 of the Civil Code is not limited to the furniture which furnishes the common domicile, but includes all the movable property which belongs to the community, of whatever nature it may be. Whether a saisie gagerie conservatoire could have been made under the provisions of Art. 204 of the C.C. or not, if the same is justified by the provisions of law concerning the issue of writs of seizure before judgment, a petition to quash said saisie gagerie will be dismissed.

Lachapelle v. Gagné, 8 Que. P.R. 18 (Archibald, J.).

—Alimentary pension—Provisional allowance.]—While an action for alimentary pension is pending by the wife, she may, on petition, obtain an order granting her a provisional allowance.

Duckett v. Turgeon, 7 Que. P.R. 457 (Fortin, J.).

—Separation as to property—Taking accounts—Prescription.]—An understanding between husband and wife to avoid the appointment of an accountant in an action for separation as to property and a mensa et thoro can have no legal effect.

The right to have accounts taken is prescribed only by the lapse of 30 years.

Brière v. Marcotte, 7 Que. P.R. 352 (Lavergne, J.).

—Separation—Alimentary allowance.]—Where the husband renders life in common impossible, the wife has a right to remove from the conjugal domicile and demand an alimentary allowance without recourse to an action for separation à mensâ et thoro. In order to obtain an order for such allowance it is sufficient to show that the husband does not provide proper lodgings and is not in a position to maintain the wife in a safe and respectable manner.

Gravel v. Lahoulière, Q.R. 14 K.B. 385.

—Alimony—Wife leaving husband—Justification—Legal cruelty—Acts affecting mental condition.]—Legal cruelty, as regards the conjugal relationship, does not necessarily depend on physical acts or threats of violence, but may arise from acts or conduct operating entirely upon the mental condition of the aggrieved party. Where therefore such a course of harsh conduct, treatment and intimidation on the husband's part towards his wife, a woman of delicate constitution, created such mental distress as was sufficient to, and did impair her health; and where his language of threats and menace, and his habitual demeanour, were such as to create a well-founded apprehension that the wife would suffer worse and more injurious treatment and hardship if she did not submit implicitly and submissively to anything the husband might choose to say or do:—Held, that there was such matrimonial cruelty shown as justified the wife leaving her husband, and entitled her to a judgment for alimony. Judgment of the Divisional Court, 11 O.L.R. 547, affirmed.

[Leave to appeal refused, 13 O.L.R. 587.]

Lovell v. Lovell, 13 O.L.R. 569 (C.A.).

—Wife living separate from husband—Alimentary pension—Purchase of necessaries—Liability of husband.]—A wife living in actual separation from her husband and in receipt from him of an allowance for her needs cannot render him responsible for her personal expenses, particularly when they are merely of the character of alimentary necessaries. In such a case, parties furnishing supplies to her are placed upon inquiry as to the actual conditions and should obtain express authority from the husband in order to hold him liable.

Morgan v. Vibert, Q.R. 29 S.C. 297 (Ct Rev.).

—Vacation—Separation de corps—Education of children—Family council.]—Article 15 C.C.P., providing that the Courts shall not sit between the 30th of June and the 1st of September of each year, does not deprive the Judges of the necessary powers and general jurisdiction which can and should be exercised at all times even during the long vacation. A Judge in Chambers may, in vacation, authorize a married woman to take proceedings against her husband en séparation de corps et de biens and to live away from the conjugal domicile. In case of adultery of the husband at of the relatives. Such order may be made the conjugal domicile the Court will permit his wife (if she cannot herself provide for the children) to call a family council to advise upon their custody and will finally give its decision after receipt of the advice by the Court of Appeal suo motu if the order of the Superior Court appears to be insufficient.

Edward v. Belleau, 8 Que. P.R. 257 (K.B.)

—Aliments—Exigibility—Life rent.]—Maintenance moneys are only exigible in proportion to the means of the person liable to pay them. Therefore, the husband, infirm and not capable of earning his

living, who has been condemned by judgment of séparation de corps to pay four dollars per month as maintenance for his wife, is not obliged to realize it out of an annual life rent of $150 his sole resource and not sufficient for his support. A life rent bequeathed on condition of its not being seizable cannot be seized for a debt for maintenance due to a third person.

Dupuis v. Viau, Q.R. 30 S.C. 391 (Ct. Rev.).

—Alimony—Decree nisi for divorce.]—It is no objection to an application for permanent alimony that the wife has obtained a decree nisi for divorce on the ground of impotency.

Brown v. Brown, 13 B.C.R. 73.

—Conviction under Deserted Wives' Maintenance Act—Invalidity—Quashing conviction.]—Where an order was made by two justices of the peace, purporting to act under the Deserted Wives' Maintenance Act, R.S.O. 1897, c. 167, whereby the defendant, described as an Indian of the Six Nations, was directed to pay $1.00 a week for his wife's maintenance; but, it appearing that the information was laid under s. 242 of the Criminal Code, under which all proceedings were had, and that it was only at the last moment, when the justices were drawing up their minutes of the conviction, that they decided to proceed under the first named Act, without any notice thereof to the defendant, the conviction was quashed.

In re Woodruff, 16 O.L.R. 348 (D.C.).

—Separation—Presumption of marital relations—Resumption of condonation.]—The separation of husband and wife followed by renewal of cohabitation gives rise to a presumption of pardon for past offences but the continuation of marital relations after ill-usage does not raise the same presumption.

Labelle v. Lecavalier, Q.R. 16 K.B. 261.

—Alimony—Cruelty and desertion by husband.]—A wife is entitled to alimony when the husband has been guilty of legal cruelty, which is actual violence of such a character as to endanger personal health or safety, or of conduct causing a reasonable apprehension of such cruelty. (2) The Court may refuse alimony to the wife if she has herself been guilty of legal cruelty, or of acts which would justify the husband in leaving her, but may grant alimony in such cases if it should see fit so to do.

Patrick v. Patrick, 1 Sask. R. 44.

—Non-support—Deserted wife supported by relatives—Injury to health—Failure to provide necessaries.]—(1) A charge of non-support made by a wife against her husband is not sustained under Cr. Code s. 242 where the wife was supplied with all necessaries for her support by her relatives and friends during the period for which the charge is laid. (2) The injury to the wife's health which is essential to constitute the offence of failing to provide necessaries to a wife under Cr. Code s. 242, must be due to deprivation of food, clothing, shelter or medical attendance, and an attack of nervous prostration suffered by the wife through mental worry because her husband deserts her and allows her relatives to support her is not sufficient. (3) The refusal of a deserted wife to again live with her husband unless he puts up security in money not to again desert her, is a "lawful excuse" for his omission to support her subsequently to his offer to return and while such refusal continues, unless it is shown that her return would be dangerous to her health.

The King v. Wolfe, 13 Can. Cr. Cas. 246.

—Judicial separation—Cruelty—Residence within jurisdiction.]—The petitioner, owing to acts of cruelty and misconduct, left her husband in Montreal, where the parties were domiciled, and came to British Columbia, bringing her child of the marriage, a girl of eight years, with her. The husband followed and commenced proceedings in British Columbia for the custody of the child. While in British Columbia he renewed the acts of cruelty, and, apprehensive of further cruelty, the wife commenced proceedings for a judicial separation. He opposed the suit, on the ground that there was not jurisdiction in the Court inasmuch as he was not domiciled or resident in British Columbia:—Held, that the husband had established sufficient residence to give the Court jurisdiction to entertain the suit.

Jamieson v. Jamieson, 14 B.C.R. 59.

—Community—Desertion of domicile by wife—Maintenance.]—The wife, common as to property with her husband, who abandons the conjugal domicile when her husband declares his willingness to receive her back and support her but refuses, otherwise, to furnish her with the necessaries of life, is entitled to maintain an action en séparation de corps.

Saultry v. Ferrel, Q.R. 31 S.C. 59 (Ct. Rev.).

—Liquidated demand—Necessaries supplied to wife after desertion by husband.]—Held, that when a husband deserts his wife, or compels her to live apart from him, without properly providing for her, the wife becomes his agent, from necessity, to pledge his credit, and any debts so contracted by her are liquidated demands as against the husband.

Parkin v. Parkin, 1 Sask. R. 206.

—Alimony under foreign judgment—Arrears—Writ of summons—Special indorse-

ment.]—An action lies for arrears of alimony past due upon a foreign judgment, and the claim therefor may be the subject of a special indorsement of the writ of summons under Con. Rule 138 and of a motion for summary judgment under Con. Rule 603. Swaizie v. Swaizie (1899), 31 O.R. 324, applied and followed.

Robertson v. Robertson, 16 O.L.R. 170.

—**Alimony—Adultery on part of wife.**]—Where adultery is proved to have been committed by a wife after her desertion by her husband, she will not be granted alimony.

Leib v. Leib, 6 Terr. L.R. 308.

—**Alimony—Interim disbursements—Counsel fee.**]—Where the counsel to be engaged is not the solicitor for the plaintiff or his partner, it is proper that a counsel fee should be allowed to the plaintiff as part of her prospective disbursements to be paid by the defendant in an action for alimony; and in this case an order was made before the trial for payment of a fee of $40, upon the undertaking of the plaintiff's solicitor that he would not himself act as counsel at the trial, and that he would account for any portion of such sum of $40 not actually and properly disbursed by him for counsel fee. Gallagher v. Gallagher (1897), 17 P.R. 575, followed.

Cowie v. Cowie, 17 O.L.R. 44.

—**Wife common as to property—Action for alimony.**]—A wife common as to property, whose husband is in jail, may, with his authorization, institute an action to obtain alimony.

Connolly v. Connolly, 9 Que P.R. 309.

—**Separation—Temporary pension—Vacation.**]—A husband is bound, at all times, to provide for the maintenance of his wife and permission given to the latter, in case of action en séparation de corps, to live apart from her husband does not do away with such obligation. During the long vacation the Judge can fix the amount of the provisional allowance to which the wife, suing or being sued en séparation de corps is entitled.

Prud'homme v. Goulet, 9 Que. P.R. 397 (Sup. Ct.).

—**Alimony—Jurisdiction of Court to grant.**]—The plaintiff sued the defendant to recover alimony on the grounds of desertion, cruelty and adultery, and on the trial it was established that the defendant had been guilty of cruelty to the plaintiff and of desertion, and also of adultery but whether before or after desertion did not clearly appear. It was also proved that the plaintiff after desertion had herself been guilty of adultery:—Held, that c. 29 of the Consolidated Ordinances of 1898, respecting actions for alimony and which gives jurisdiction to grant alimony; (1) to any wife who would be entitled to alimony by the law of England; (2) to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, and (3) to any wife whose husband refused to support her without any sufficient cause under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights, had reference to the Imperial Act, 20 and 21 Vict. c. 85, and the word "divorce" as used in the Ordinance would have the meaning of "divorce" in the Imperial Act and being a vinculo matrimonii. (2) That the plaintiff, having herself been guilty of adultery would not be entitled under the law of England either to a judicial separation, a divorce or a decree for restitution of conjugal rights and therefore could not recover alimony.

Leib v. Leib, 1 Sask. R. 363.

—**Separation from bed and board—Care of the children.**]—The wife defendant in an action in separation from bed and board is entitled to the care of a child, one year old, whom she has nursed and cared for until shortly before the institution of the action, especially if she resides with her father and shows that the child will be well cared for. But the husband will be given the provisional care of a child, four years old, who is not so dependent upon a mother's care and affection.

Poitras v. Lafrance, 10 Que. P.R. 363.

—**Separation—Defence of husband—Improper conduct of wife.**]—In an action en séparation de corps the husband, defendant, cannot plead (a) that he had had intercourse with the plaintiff several months before their marriage at which latter time she was already enciente (b) that on the very morning of their wedding he saw in her bedroom a young man of doubtful reputation, (c) that she would give no explanation of the presence of this young man in her bedroom at that hour; all such allegations are foreign to the subject matter of the litigation and will be struck out on inscription en droit.

Bolduc v. Archambault, 10 Q.L.R 143.

—**Alimony—Legal cruelty—Condonation—Receipt by husband of income of wife's separate property.**]—Plaintiff and defendant married in 1887. In 1892 an action for alimony brought by plaintiff was settled by the resumption of cohabitation and by defendant agreeing to pay her $3 per week during her life in addition to maintaining her according to his station in life. The parties lived together until April, 1908, and during all that period seemed on the whole to have got along fairly well together. The defendant's conduct towards the plaintiff was, according to the findings of fact, often morose and unkind and he some-

times swore at her and he displayed none of that sympathetic consideration for his wife which a husband ought to show, but the only act of violence charged since the settlement of 1892 was one which had taken place in 1904 and had been provoked by the plaintiff who was quick-tempered and irritable and often made no attempt to control either her language or her actions:—Held, that the plaintiff had not made out a case of legal cruelty, as defined by the decided cases, entitling her to live apart from her husband. When a husband receives the income of his wife's separate estate and disburses it for the purposes of their joint establishment, he cannot be called on for an account, unless the wife can prove that he received it by way of loan. The agreement of 1892 made the payments of $3 per week a charge on the defendant's lands. In 1900, in order to permit him to raise a loan on the land so charged, the plaintiff gave him a quit claim deed on the understanding that another agreement of similar tenor would at once be executed and registered after the mortgage. This was done, but nothing had ever been paid under either of these agreements. Held, that, in the absence of a plea based on s. 24 of the Real Property Limitation Act, R.S.M. 1902, c. 100, the defendant was liable for the arrears of the annuity from the date of the first agreement with interest, however, for the last six years only, the whole being a charge on the lands referred to.

Willey v. Willey, 18 Man. R. 298.

Separation from bed and board—Reconciliation—Taxable costs.]—(1) The costs incurred by the wife in an action in separation from bed and board for the purpose of realizing her share of the community, having been authorized by the Court, can and must be levied upon the assets of the community and the husband must pay them if proceedings are stopped at his request. (2) When a woman is authorized to sue her husband in separation from bed and board, she is only authorized to oblige herself for the taxable costs in the said action; the extra services which she may require from her lawyer must be considered as requested by her without authorization.

Hannan v. Cook, 10 Que. P.R. 159.

—Jurisdiction—Vacation—Alimentary allowance.]—A Judge has jurisdiction, during the long vacation, to fix the amount of alimony which the husband should pay to his wife, plaintiff or defendant, in an action en séparation de corps.

Prud'homme v. Goulet, Q.R. 35 S.C. 88.

— Provisional alimony — Action against wife.]—When a wife sues en séparation de corps and obtains an order for provisional alimony she is liable for debts she contracts for her support. If sued therefor she cannot, by dilatory exception, ask that her husband shall take her fait et cause.

Dandurand v. De Repentigny, 10 Que. P.R. 125.

—Séparation de corps—Professional services to wife.]—The costs for professional services rendered to a married woman in the course of an action for séparation de corps for negotiations brought about by her husband which resulted in a reconciliation, are a debt against the community and an action to recover the amount thereof lies against the husband as head.

Hannan v. Cooke, Q.R. 18 K.B. 127.

—Separation—Action by or against wife—Funds supplied by husband.]—A married woman, plaintiff or defendant in an action en séparation de corps, has a right to receive from her husband the money required for her costs. It must be taken into account in settling the alimony provided for by Art. 202 C.C., but nothing prohibits her from making a special demand for funds ad litem when the alimony is insufficient.

Destroismaisons v. Tellier, Q.R. 35 S.C. 501.

IV.—WIFE'S AUTHORITY TO SUE OR DEFEND.

—Separation as to property—Action for alimony—Authority to sue.]—A married woman, separate as to property, from her husband by mutual agreement who is authorized by a Judge to bring an action for alimony and fails in the Superior Court, cannot inscribe in review without obtaining fresh authority for the purpose.

Bourgelas v. Goulet, Q.R. 37 S.C. 167.

—63 Vict. (Que.) ch. 12, ss. 147, 149—Authorization of married woman—Notice.]—(1) A married woman does not need judicial authorization to institute an action under the provisions of s. 149 of the License Law of Quebec, 63 Vict., c. 12. (2) A notice, not strictly according to the provisions of s. 147 of the same Act, is null and of no effect.

Faulkner v. Faulkner, 4 Que. P.R. 173, (Davidson, J.).

— Wife common as to property—Action by —Removal of executor — Reddition de compte—Art. 1298 C.C.]—Art. 1298 C.C. does not deprive a wife common as to property of the right to take personal actions respecting her movables with authority from her husband. It is necessary, however, that the declaration should show that the movable propery which she claims does not fall within the community. A demand for removal of testamentary executors and a demand en reddition de compte are not incompatible. The fact

that defendants had already rendered an account, and that the plaintiff could only maintain an action for reformation thereof, cannot be made the object of an exception to the form.

Donahue v. Donahue, 4 Que. P.R. 300 (Sup. Ct.).

—Married woman — Minor — Personal action.]—A married woman under age, emancipated by marriage, may ester en justice in a personal action (action personnelle et mobilière) without other assistance and authorization than that of her husband made a party for the purpose, and has no need of the aid of a curator.

Galarneau v. Bertrand, 20 Que. S.C. 283 (Sup. Ct.).

—Hypothecary action against married woman—Absence of husband—Authorization of defendant—Art. 78 C.C.P.—Arts. 86, 177, 180, 183 C.C.]—Plaintiff, by hypothecary action, sued a woman separated as to property from her husband and the husband mis en cause to assist his wife. The action was personally served on the woman at Quebec, on 15th November, 1901, but was not served on her husband. It was entered in Court on November 21st. The same day defendant alone, without the aid of her husband and without any authorization, appeared by attorney. On November 23rd plaintiff served on the attorney a notice of petition to be presented on November 25th alleging that the husband of defendant had left the country not intending to return, that it was impossible to serve him, and asking the Court to authorize defendant à ester en justice as such in the cause:—Held, that a married woman not being able, in an hypothecary action, ester en justice without the aid or authorization of her husband, the plaintiff who had sued the woman assisted by her husband and could not, as the latter had left the country, serve the action on him, should, prior to the action, have obtained judicial authorization. This was refused him in the present cause seeing that the wife was not regularly before the Court, and the service on her, as well as the appearance she had filed by attorney, were radically null. How a married woman can be authorized or served discussed.

Credit Foncier Franco-Canadien v. Dufresne, 21 Que. S.C. 108 (Sup. Ct.).

—Wife separated as to property—Proceedings to protect property—Authorization—Arts. 14, 22, 176 C.C.]—A married woman separated as to property by contract, may take judicial proceedings for the preservation and administration of her movable property without the aid of, or authorization from her husband or from a Judge; therefore, she can alone intervene in an action for the preservation of her movable property, such proceeding being merely an act of simple administration.

Beauchamp v. Beauchamp, 4 Que. P.R. 400 (Sup. Ct.).

—Married woman—Action for personal injuries—Authority to sue—Community.]—A married woman in community of property, authorized en justice on refusal of her husband, may bring an action in her own name to protect her person and honour against acts of violence of which she has been the victim. Although any indemnity she might obtain should fall into the community it is necessary above all to consider the principle of the action which is of a character affecting her person and honour which she has a right to protect even in spite of her husband.

Baker v. Gingras, 20 Que. S.C. 85 (Sup. Ct.).

—Authority to sue—Opposition—Oath—Costs—Community—Chose jugée.]—It is not necessary to allege specially the authorization by a Judge to a married woman to take judicial proceedings if such authorization appears somewhere in the procedure in which it is required. An opposition sworn to before the prothonotary of a district other than that in which it is filed is, nevertheless, sworn to before a competent official: art. 23 C.C.P. Although costs due were incurred in revendication of the property of a married woman, it does not follow therefrom that she is bound to pay them in any other capacity than as a member of the community when the judgment given against her for such costs did not determine the capacity in which she would be bound. Therefore, it cannot be claimed, in opposing an opposition alleging that the wife is only liable for the costs as a member of the community, under the judgment on the principal instance in which she was condemned therefor jointly and severally with her husband, there is chose jugée as to her liability in this respect; and a similar ground of opposition cannot be rejected as frivolous on motion therefor.

Tidal v. Latulippe, 21 Que. S.C. 219 (Sup. Ct.).

—Husband and wife—Ester en justice—Want of authority — Wife passing as widow.]—Want of authority in a wife under her husband's control to enter upon judicial proceedings (d'ester en justice) involves a nullity which cannot be cured and of which every person having an actual interest can take advantage. In this case, although the wife passed as, and represented herself to be, a widow, and had maintained this condition by certain public acts, her absolute incapacity to enter upon judicial proceedings without authority was in no way affected when she testified in the course of such proceedings that her

husband was alive and the plaintiff did not prove that he was dead.

O'Malley v. Ryan, Q.R. 23 S.C. 94 (Ct. of Rev.) reversing 21 Que S.C. 566.

—**Action against married woman—Husband made party but not served.**]—1. Where a married woman has been summoned and her husband, made a party for the purpose of authorizing her, has not been served with the writ and process, she may, upon being judicially authorized to act, cause the action to be dismissed with costs on an exception to the form. (2) In such a case, the plaintiff cannot have leave afterwards to serve the husband who has been so made party to the action.

Jarvis v. Allaire et vir, 5 Que. P.R. 316.

—**Married woman—Action against as widow—Costs.**]—A person whose action has been dismissed because the party sued as a widow was still married cannot claim from such party, by way of damages, the costs of the action so dismissed, and this although said party permitted herself to be regarded as a widow.

O'Malley v. Ryan, Q.R. 23 S.C. 417 (Sup. Ct.).

—**Action against married woman.**]—If a married woman is sued as judicially authorized, it is not requisite that the authorization should appear on the writ; it is sufficient to allege it in the declaration.

Derose v. Derose, Q.R. 25 S.C. 273 (Cir. Ct.).

—**Action against wife—Authorization by conduct of defence.**]—If a married woman separated as to property, is summoned alone before the Commissioner's Court and her husband appears and pleads, not want of authority but other matters of defence, his appearance and pleading are acts authorizing his wife to enter into judicial proceedings.

Rex. v. Warren, Q.R. 25 S.C. 78 (Sup. Ct.).

—**Community—Action by wife.**]—A married woman common as to property, assisted by her husband, or, upon his refusal by the judge, may maintain a personal action to guard her honour, and sue in her own name for defamation. Such action does not pertain solely to the husband as head of the community, and an exception to the form on such ground was dismissed.

Girard v. Tremblay, 6 Que. P.R. 63 (LaRue, J.).

—**Institution of action by divorced wife—Judicial authorization—Divorce—Decree by foreign tribunal—Comity of nations.**]—S. and F., both being domiciled in the State of New York, were married there in 1871 without ante-nuptial contract. Shortly after the marriage F. received his wife's fortune from her trustees. Subsequently F. established a business in the city of Montreal and resided there when the action was instituted. S. followed her husband to Canada, but only resided there a short time. In 1876 S. was granted a decree of divorce from F. by the Supreme Court of New York and, in 1881, brought this action for an account of his administration and management of her property, but without obtaining the authorization of a judge as provided by Art. 178 of the Civil Code. The defence was that the divorce obtained in the United States was invalid in the Province of Quebec, and secondly that S. was not authorized to institute the action. The Superior Court overruled the pleas and held that the divorce alleged in the declaration was good and valid in the Province of Quebec (5 Leg. News 79), but the Court of Queen's Bench reversed this judgment on the ground that the alleged divorce had no force in the Province of Quebec and that consequently S., being still the wife of F., could not institute her proceedings without marital or judicial authorization (6 Leg. News 329). On appeal to the Supreme Court of Canada: Held (Strong, J., dissenting), per Ritchie, C.J., and Henry and Gwynne, JJ., that S., having obtained without fraud or collusion a decree for divorce from the Supreme Court of New York, this decree, upon the principle of the comity of nations, should be recognized as valid in the courts of the provinces of Canada. Per Ritchie, C.J. and Henry and Gwynne, JJ., that F. having submitted to the jurisdiction of the Supreme Court of New York when served with the proceedings in the action, could not now be allowed to affirm that that Court had no jurisdiction. Per Fournier, Henry and Gwynne, JJ.—The fact being established that in the State of New York, where the parties were married, S. could have sued her husband without previous authorization, Art. 14 C.C.P., which to all persons having the right to sue in their own country the like power in the Province of Quebec, had the effect of clothing the plaintiff with the same right to sue as a feme sole in the Province of Quebec as she had in her own country, notwithstanding the provisions for authorization contained in Arts. 176 and 178 C.C.

Stevens v. Fisk, (1885) 1 S.C. Cas. 392.

—**Married woman—Authority to sue.**]—A married woman cannot take judicial proceedings nor make an exception to judgment or to the form without being authorized. When her husband, duly summoned with her to confer authority fails to appear he is deemed to refuse it. In such case the authority must come from the judge.

Charbonneau v. Vendette, 7 Que. P.R. 164 (Cir. Ct.).

—Second marriage before dissolution of the first — Good faith of parties — Civil effects—Authorization of wife by husband to appear in judicial proceedings.]—A second marriage contracted in good faith, before the dissolution of the first, produces civil effects, and, until it is declared null, the wife cannot appear in judicial proceedings (ester en justice) without her de facto husband, or his authorization An action brought by her alone and unauthorized will therefore be dismissed on exception to the form.

Fitzallen v. Rieutard, 27 Que. S.C. 296 (C.R.).

—Woman sued as a spinster—Marriage between issuance and service of writ.]—An action directed against a woman described as a "fille majeure" will not be dismissed on exception to the form because, between the issuance and the service of the writ, the defendant contracted marriage, if the plaintiff was not made aware of her change of status. The Court will, however, allow the plaintiff to call in the defendant's husband as a defendant, as head of the community.

Melloon v. Coffey, 7 Que. P.R. 436 (Lemieux, J.).

—Wife separated as to property—Public trader — Authorization by husband.] — A married woman, separate as to property and a public trader, may, without the authorization of her husband, file a declinatory exception to an action brought against her where it is a matter of mere administration in connection with her affairs.

Bernsteir v. Synch, 7 Que. P.R. 443 (Lavergne, J.).

— Married woman — Right of appeal — Authorization.]—A married woman separate as to property has no right to appeal from a judgment rendered against her in a hypotheeary action without authorization by her husband. An inscription in review from such a judgment made by her alone will be quashed upon motion to that effect.

Renaud v. Lebeau, Q.R. 27 S.C. 360 (Ct. Rev.).

—Married women — Legal community—Right of action.]—The action was instituted by Léocadie Vézina, widow of Napoleon Raymond, deceased, who died from injuries sustained from the neglect of the company. By the action, the widow claimed damages, as well on her own behalf as in her capacity of tutrix to her minor children, issue of her marriage with deceased While the action was pending and before judgment on the merits, she was married a second time to Albert Duguay, became common as to property with him under the law respecting legal community, and she and her second husband were subsequently appointed joint-tutors to the minor children. By the judgment of the Superior Court affirmed on review the defendants were adjudged to pay to the plaintiffs, personally, damages in the sum of $300 for the female plaintiff personally, and in the sum of $2,700 to the plaintiffs in their capacity of joint-tutors to the children. At the hearing of the appeal an objection, not taken in the factum nor raised in the Courts below, was for the first time urged by the appellants, that, upon her second marriage, the female plaintiff was deprived of her right of action for the recovery of the damages claimed by her personally, that in respect to this part of the action there had been no reprise d'instance in the name of her second husband and that, consequently, the judgment appealed from was invalid in so far as it awarded personal damages to her. The appeal was dismissed, but the Court, under the provisions of sections 63 and 64 of the Supreme and Exchequer Courts Act, ordered that the record should be amended so as to show that the amount for which the judgment was rendered is payable to both Duguay and his wife as communs en biens.

The North Shore Power Company v. Duguay, 37 Can. S.C.R. 624.

—Authorization of married woman—Confession of judgment and choice of counsel.] —When a married woman has not been authorized to ester en justice, where such authorization is necessary, she cannot choose a counsel, and a motion served upon said counsel, even after she has been judicially authorized, will be dismissed, but without costs.

Laverdière v. Drouin, 8 Que P.R. 207.

—Action by wife—Exception to form—Art. 83 C.C.]—If a married woman in an action against her on a lease in which she is not described as such, objects that she was not served at her domicile—that of her husband—an objection to the form will be maintained, but without costs

Pattle v. Renaud, 8 Que. P.R. 389 (Mathieu, J.).

—Wife separate de facto—Authority of wife to bind husband for necessaries.]—A married woman separated de facto and living apart from her husband and in receipt from him of a monthly allowance sufficient for her support, has no implied authority to bind him for purchases of clothing.

Morgan v. Vibert, 15 Que. K.B. 407.

—Appearance of the wife without the authorization of her husband.]—When a female defendant whose husband has been made a party to the suit, appeared and filed a plea without the authorization of her husband, the plaintiff may ask that she be authorized to ester en justice, and that

the appearance and the plea already filed be rejected from the record.

Pichette v. Lavallee, 9 Que. P.R. 241.

—Authority to sue.]—Authority to a married woman to bring an action may be validly given by a Judge of the Superior Court between June 30th and Sept. 1st. The Court of King's Bench, sitting in appeal, in confirming a judgment submitted to it has the right and should add to the dispositif of said judgment whatever the circumstances require. Therefore when a judgment en séparation de corps providing only for the custody of one of several children is appealed against the Appeal Court can, on affirming it, order what it deems necessary in this respect as to the other children.

Edward v. Belleau, O.R. 16 K.B. 341.

—Authority to sue.]—When a woman applies for interdiction of her husband she should be authorized to do so by the Judge; the order to convoke a family council will not be regarded as the equivalent of such authorization the want of which involves a nullity which nothing can cover.

Barbier v. Arcaud, 9 Que. P.R. 332 (Sup. Ct.).

—Action against wife—Summons to husband—Failure to appear.]—The failure of the husband to appear on summons requiring his authorization for his wife a ester en justice is equivalent to want of authority. In such case notice of motion to the Court to authorize the wife need not be served on the husband.

Morisette v. Pouliot, 9 Que. P.R. 334 (Sup. Ct.).

—Authorization for suit.]—If the husband refuses to authorize his wife to ester en justice and files of record a declaration to that effect, the Court may grant such authorization.

Levesque v. Fortin, 9 Que. P.R. 423.

—Married woman—Authority.]—An exception to the form is well founded if it asks for dismissal of an action brought by a married woman separée de corps and not authorized by the Court. However, if she applies therefor the Court will grant the authorization on payment of the costs of the exception.

O'Brien v. Clavel, 9 Que. P.R. 217 (Sup. Ct.).

—Action by married woman—Authorization—Costs.]—Want of authorization by her husband for an action by a married woman where such is required by law is a fatal defect and an action against a wife common as to property without the authority and assistance of her husband is an absolute nullity; in such case the plaintiff will not be allowed to amend his writ and declaration. If the wife common as to property pleads to the merits without her husband's authority the action will be dismissed each party paying his own costs.

Martin v. Rankin, 9 Que. P.R. 192 (Sup Ct.).

—Judicial proceedings by wife.]—The authorization by a Judge of a married woman to institute judicial proceedings without proof of the refusal of the husband to give her authority and without previous notice to him of the application is a nullity. The wife may, however, in the course of her proceedings and before judgment is given, on furnishing the proof and giving the required notice, obtain a valid judicial authorization. An exception to the form based on the above irregularity should be rejected, after proper authority has been obtained, but with costs against the wife.

Euglar v. Rosenbloom, Q.R. 35 S.C. 428.

V.—DOWER.

Agreement by husband to convey wife's land—Conveyance by husband—Wife joining to bar dower—Mistake.]—The defendants were husband and wife. The husband, on the 17th October, 1904, being the owner of land, mortgaged it for $2,800, the wife joining to bar dower. On the 4th August, 1905, he executed another mortgage upon the land for $1,000, the wife again joining for the same purpose. On the 16th November, 1906, he conveyed the land, subject to the mortgages, to the wife. This conveyance was registered on the 7th December, 1906. The defendants lived together, occupying the land. On the 13th March, 1908, the plaintiff made an oral agreement with the husband for the purchase of the east half of the land for $3,200. The plaintiff was to assume the $2,800 mortgage and give his promissory note for $400 and interest. Nothing was said about the $1,000; apparently it was to be paid off by the husband. The wife was present during the negotiation and took part in it, not as a contracting party, but as assenting. Upon the same day a conveyance from the husband to the plaintiff, the wife joining to bar dower, was executed by the defendants, and delivered to the plaintiff, and the note signed and given to the husband. This action was brought for rectification of the deed:—Held, by Britton, J., the trial Judge, that, upon the evidence, there was no fraud on the part of either of the defendants; but that, at the time of the negotiation with the plaintiff, the wife had absolutely forgotten the deed of the 16th November, 1906; that she did not stand by and allow her husband to sell, knowing that the land was hers, and she was not, therefore, estopped from setting up any defence that was available to her. Treating the action as one for

specific performance of a contract, it must fail against the wife, the owner of the land; there was no contract with her; the Statute of Frauds was, as to her, a good defence; for the deed signed by her merely to bar dower was not intended by her to authenticate any contract for the sale by her of land to the plaintiff; and there was no part performance by her. Held, also, per Britton, J., that the plaintiff was not entitled to recover damages against the husband for breach of the covenant for quiet possession contained in the conveyance of the 13th March, 1908. Held, by a Divisional Court, affirming the judgment of Britton, J., that the plaintiff could not seek relief on any other ground than that of estoppel; and, no tangible detriment having resulted to the plaintiff, the defendants should not be prevented from proving what was the real transaction. There was a mistake common to both sides—a misunderstanding arising out of ignorant silence on the part of the wife—and it has not yet been decided that a married woman is to be held bound by an innocent misrepresentation. The conveyance not having been registered, the note being returned to the plaintiff, and no loss having been sustained by the plaintiff, or attempted to be shown, neither party had suffered except from the litgation, and the Court should leave them as they were.

Lacroix v. Longtin, 22 O.L.R. 506.

And see DOWER.

—Bar of dower acknowledged before interested party.]—

Malcolm McLeod v. Craswell, 4 E.L.R. 535 (P.E.I.).

—Administration—Division of real estate —Dower.]—

Re Archibald, 5 E.L.R. 510 (N.S.).

—Dower—Partnership lands.]—

Dunn v. Dunn, 4 E.L.R. 15 (N.B.).

VI.—DIVORCE AND ANNULMENT.

—Divorce a mensa et thoro—Suit money on appeal.]—In a suit by a wife for divorce a mensa et thoro the libel was dismissed with costs. Pending an appeal to the Supreme Court an order was made by the Judge of the Divorce Court for alimony, but an application for suit money pending the appeal was refused. The appeal was bona fide and it appeared that the plaintiff had no means to prosecute such appeal:—Held, that the plaintiff was entitled to suit money as well as alimony pending the appeal, and the matter was referred back to the Judge of the Divorce Court to fix the amount of the suit money.

Currey v. Currey, 39 N.B.R. 440.

—Marriage of minor—Domicile.]—The domicile of a minor is that of his parents whatever may be his residence for purposes of education. The residence of a minor for educational purposes cannot become his conjugal domicile from the mere fact of his contracting marriage there. Summons of the wife in an action to annul the marriage can be made at the domicile of her husband when such domicile is that of the plaintiffs can only be made by personal service on her. If, in fact, she lives out of the province she can be summoned in the manner provided by Art. 136 C.P.Q. An action to annul a marriage of a minor for want of consent by his parents may be brought by the latter within six months from the time it came to their knowledge though the minor may have come of age in the meantime. The consent of the parents to a minor's marriage is not a formality within the meaning of Art. 135 C.C. It is an element essential to the capacity of the minor to contract marriage even out of the province.

Agnew v. Gober, Q.R. 38 S.C. 313 (Ct. Rev.).

—Action for declaration of nullity of marriage—Jurisdiction.]—The High Court of Justice has no jurisdiction to declare a marriage invalid and void upon the ground that the parties are related within the prohibited degrees—as, in this case, that the husband is the brother of the wife's deceased husband. The dictum of Boyd, C., in Lawless v. Chamberlain (1889), 18 O.R. 296, is obiter, and is not to be extended to such a case as this. Hodgins v. McNeil (1862), 9 Gr. 305, approved. When the Ontario Legislature, by 7 Edw. VII. c. 23, s. 8, assumed to confer jurisdiction upon the Court to declare that a valid marriage was not effected, in such a case as there specified, it went to the extreme limit, if it did not overstep its powers. Judgment of Latchford, J., dismissing the action, affirmed, upon grounds other than those stated by him. Per Latchford, J.:—Proper service upon the defendant of the writ of summons was not effected; and, the case being heard in his absence, the uncorroborated evidence of the plaintiff, who appeared to be an unreliable witness, did not justify a judgment declaring the marriage void.

May v. May, 22 O.L.R. 559.

Divorce—Disregard by husband of marital duty—Wife's misconduct caused by.]—Where a husband separates from his wife on account of her intemperance, but makes no provision for her, thereby leaving her without any means of support, he is not entitled to a divorce on the ground of adultery committed by her after the separation.

Forrest v. Forrest, 8 B.C.R. 19.

—Nullity of marriage—Impotence in the man—Non-consummation.] — Where consummation of the marriage is, on the part of the husband, a practical impossibility, wife is entitled to a decree of nullity of marriage.

P. v. P., 11 B.C.R. 369 (Martin, J.).

—Appeal—Declinatory exception.]—When, in action to annul a marriage, the defendant pleads want of jurisdiction in the Court before which he is summoned, the Court of King's Bench will allow an appeal from a judgment dismissing such declinatory exception.

Gober v. Agnew, 8 Que. P.R. 198 (K.B.).

—Second action—Costs of discontinued action—Annulment of marriage.]—When the costs of an action which has been discontinued have been tendered to the defendant's attorney and deposited in Court on his refusal to accept them, the defendant cannot object to a second action being brought on the ground that the costs of the first have not been paid. The right of a party to ask that a marriage be annulled can only be brought in question by a plea to the merits. The general allegation of irregularities in a preliminary exception cannot be regarded; it is necessary to show in what respect the summons and description of the defendant are irregular.

Agnew v. Gober, 8 Que. P.R. 217 (Mathieu, J.).

—Divorce in British Columbia—Jurisdiction.]—The Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Province and in respect of matrimonial offences alleged to have been committed therein.

Watts v. Watts, [1908] A.C. 573, reversing 13 B.C.R. 281.

—Divorce—Jurisdiction of Supreme Court of B.C.—Divorce and Matrimonial Causes Act, 1857 (Imperial)—Whether in force in British Columbia.]—The Divorce and Matrimonial Causes Act, 1857 (Imperial), is in force in British Columbia. Watt v. Watt, 13 B.C.R. 281, not followed. The introduction of English law into the colonies of British Columbia and Vancouver's Island, and as it is in force in the Province of British Columbia, considered and reviewed.

Sheppard v. Sheppard, 13 B.C.R. 486 (Martin, J.).

—Marriage — Declaration of nullity—Impotence—Jurisdiction.]—The High Court of Justice has not jurisdiction to entertain an action to have a marriage declared null and void by reason of the alleged incapacity and impotence of one of the parties. Lawless v. Chamberlain (1889), 18 O.R. 296, distinguished.

T. v. B., 15 O.L.R. 224 (Boyd, C.).

—Divorce—Appeal—Jurisdiction of B. C. Full Court.]—The Full Court of the Supreme Court of British Columbia possesses no jurisdiction to hear appeals, final or interlocutory, in divorce matters. Scott v. Scott (1891), 4 B.C.R. 316, followed.

Brown v. Brown, 14 B.C.R. 142.

—Divorce—Foreign, matrimonial—Domicil.]—Petitioner in 1895, when aged about 19, came from Ontario to British Columbia, where he spent some three or four years in different places. In 1899 he married and at once removed to the North-West Territories. In 1907, satisfied of his wife's infidelity, he "made her go away," and after some financial arrangements between the couple, she left for New York, since which time no communication has passed between them. In the autumn of 1908, he came to Vancouver, B.C., and took a position in a mercantile house, and in January, 1909, filed a petition for divorce, alleging that he and the respondent were domiciled in British Columbia:—Held, that he had not acquired a domicil in British Columbia to entitle him to a divorce.

Adams v. Adams, 14 B.C.R. 301.

—Divorce — Damages—Assessment of.]—The parties in an action for divorce consented to an order that the trial should take place before a Judge without a jury. A decree for divorce having been pronounced, the Judge proceeded to assess the damages, when the co-respondent invoked s. 33 of the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85 (Imperial), which provides that the damages to be recovered in any such petition (for divorce) shall in all cases be ascertained by the verdict of a jury:—Held, that, having consented to a trial without a jury, he was estopped from availing himself of this provision.

Williams v. Williams, 14 B.C.R. 313.

—Marriage—Action for declaration of invalidity—Suspicion of collusion.]—The plaintiff, a girl under 19 years of age, brought this action, by her next friend, against a man with whom she went through a ceremony of marriage when only 15, to obtain a declaration that a valid marriage was not effected or entered into. The action invoked the jurisdiction conferred by s. 31 of R.S.O. 1897, c. 162, as added by 7 Edw. VII. c. 23, s. 8 (O.), and by the statement of claim the plaintiff alleged such facts as brought her claim within that enactment. The defendant did not appear or defend, and the plaintiff moved for judgment upon the statement of claim, supported by affidavits of herself, her mother, and the defendant. The defendant stated that he procured a marriage license without obtaining the consent of either of the plaintiff's parents; and it was shown by a certificate that the return of the mar-

riage contained the information that the plaintiff was then 18 years of age:—Held, that, in the circumstances, the motion for judgment was properly refused, and the plaintiff left to proceed to trial in the ordinary way. Per Russell, J.:—No ceremony of marriage should be declared invalid, as a rule, unless the circumstances establishing the invalidity are proven in open Court, coram, populo, by vivâ voce evidence.

Menzies v. Farnon, 18 O.L.R. 174.

—Divorce—Petition for dissolution of marriage signed by solicitor—Petitioner within the jurisdiction.]—Where the petitioner for divorce resides within the jurisdiction, the petition must be signed by the petitioner personally, except when cause is shown to justify the Court in dispensing with that formality.

Plowman v. Plowman, 14 B.C.R. 164.

—Divorce—Petition by husband—Infidelity of wife—Husband also leading an immoral life.]—The Court will not, unless under very exceptional circumstances of excuse or palliation, grant a divorce to a petitioner guilty of adultery.

A—— v. A——, 14 B.C.R. 165.

VII. Form of Marriage.

See Marriage Laws.

VIII. Husband's Liability for Wife's Torts.

Liability of husband for torts of wife.]—Held, affirming the judgment of Street, J., that a husband is still liable for the torts of his wife if the marriage takes place before July 1, 1884. The provisions of the Married Women's Property Act, 1884, 47 Vict. 19 (O.), applicable to persons married before that date, do not relieve him from liability. Earle v. Kingscote (1900), 2 Ch. 585, applied and followed. Amer v. Rogers, 31 U.C.C.P. 195, overruled. Lee v. Hopkins, 20 O.R. 666, approved.

Traviss v. Hales, 6 O.L.R. 574.

—Libel committed by wife—Liability of husband.]—In an action against husband and wife for damages for a libel published by the latter, the jury returned a verdict for $10.00:—Held, by Martin, J., that the husband was liable and that the costs should follow the event.

Mackenzie v. Cunningham, 8 B.C.R. 206.

—Slander by wife—Claim against wife and husband.]—Per White, J., in an action in damages for slanderous words uttered by a married woman, the defendant's husband cannot be jointly condemned unless he is alleged to have become in some way responsible for his wife's statements, and the conclusions against him personally will be struck out on demurrer.

Camiré v. Bergeron, 3 Que. P.R. 281.

HYPOTHEC.

Action paulienne — Transfer fees — Bad faith — Insolvent debtor.] — On December 7th, 1888, the defendant hypothecated in favour of C., mis en cause, lot No. 7, in the 8th concession of Broughton, for $127, and on 27th July, 1899, gave C. a new hypothec on the same lot for $123. On 31st July, 1889, P. also mis en cause, who was in possession of the lot, sold his improvements for $70 to C. On the same day the plaintiff, judgment creditor of P., caused said lot to be seized as against the latter. On August 17th defendant by opposition to the seizure claimed the lot as his property and on the same day sold it for $25 to C., his hypothecary creditor. Plaintiff contested the opposition and set up a sale in writing in 1894 at Stratford, U.S., by defendant to P. of said lot for $500, the receipt of which was thereby acknowledged. As against this defendant claimed that the sale in 1894, being null of a nullity radical and absolute, P. as purchaser not having paid the charges required on a transfer of property by 55 & 56 Vict. c. 17, ss. 2 and 4, and 57 Vict. c. 16, s. 3, said sale did not pass the property to P. but defendant remained its owner. This claim was maintained by the Superior Court in January, 1900. On 9th February, 1900, C. registered in the registry office of Beauce County, the deed of sale of improvements on said lot from P. in July, 1899. Plaintiff attacked the sale of August, 1899, as made in violation of his rights, alleging that his debtor, P., was in possession in good faith of said lot, and even assuming the sale in 1894 to be void, P. having apparently paid the sum of $500 was entitled to demand it back, and plaintiff was within his rights as against him, and that collusion among defendant P. and C. on or about the 17th of August, 1899, had the effect, by a sale made on that day, of fraudulently depriving him of means which he had of reimbursing himself for the outlay of P. Defendant and C. as mis en cause denied fraud and collusion, claimed that the said sale was valid, and the possession of P. in bad faith, and that neither plaintiff nor P. was entitled to compensation:—Held, that the deed of sale in 1894 was void of a nullity radical and absolute, and should be deemed not to exist because the transfer charges were not paid. That such nullity not only prevented the transfer of the property but deprived the deed of all value as evidence of the sale; and that such a deed, having no existence in the eye of the law, was not even proof of payment and receipt of monies mentioned in it. That C. had committed no fraud in buying the immovable from the defend-

ant. That, moreover, the plaintiff, creditor of P., soi-disant original purchaser, alleging in his action that his said debtor had taken on himself with the hypothecary debt of the vendor (defendant) to C. even affirmed thereby the bad faith of his auteur, who, not having paid such debt, could not set up his lien for improvements, the hypothecary debt of C. embracing in law these improvements. It is not unlawful for an hypothecary creditor to pay for improvements on a property for the purpose of protecting his hypothec, even if the person to whom it is paid is insolvent, as it is not fraudulent for a debtor to pay his insolvent creditor.

Nadeau v. Roseberry, 18 Que. S.C. 542 (S. C.).

—Registration of judgment.]—A judgment may be registered and create hypothec on property acquired by the judgment debtor after it has been rendered.

McClure v. Croteau, 18 Que. S.C. 336.

—Judicial hypothec — Registry or judgment—Transfer of title.]—The creditor of the purchaser at a judicial sale of an immovable cannot obtain a judicial hypothec by registering, before the title of the purchaser has been obtained and registered, a judgment recovered against the latter. Therefore, such creditor cannot proceed by action en déclaration d'hypothéque against a third party to whom the purchaser has conveyed his purchase, and who, by virtue of such conveyance, has himself obtained from the sheriff, on payment of the purchase money, a title to the immovable in question.

Lemieux v. Mitchell, 18 Que. S.C. 528 (S. C.).

—Registry — Saisie-arret.] — The right of hypothec or privilege mentioned in Art. 2013 L.C.C. is not subsidiary to the saisie-arrêt mentioned in Arts. 2013h and 2013i, nor made subordinate to the existence and validity of such saisie-arrêt, but is separate and distinct from, and independent of, the same. This hypothec or privilege is only subject to the conditions of notice provided for by Art. 2013g and to registry under Art. 2103.

Maclaren v. Villeneuve, 11 Que. K.B. 131.

—Lien—Privilege—Delegation of payment.] —Although a deed of sale or donation contains no stipulation for an hypothecary guarantee the immovable donated or sold remains burdened with the hypothecary privilege of baillem de fonds for the charges appreciable in money provided for in the deed of donation or for the balance of the purchase money. This hypothec exists either in favour of the vendor or donor or of a third party to whom it was stipulated in the deed that the charges of the donation or the price of sale should be due. The filing with the liquidator of his claim by a creditor to be collocated on the proceeds of the sale of an immovable of which the price is due, as to the creditor named in the deed of sale, constitutes on his part a sufficient acceptance of the stipulation.

Canadian General Electric Co. v. Shipton Electric Light and Power Co., 21 Que. S.C. 83 (Sup. Ct.).

—Registry — Renewal — Irregularities.]—A notice of renewal of registry of a deed of sale, which does not give the date of the original registration, which thoroughly states the number of the registry as well as the register and volume, and which inverts the names of the vendor and purchaser—giving that of the vendor for the purchaser and vice versa—is informal and irregular, and will not suffice to preserve the hypothec created by the deed.

Giard v. Lachance, 19 Que. S.C. 103 (Sup. Ct.), affirmed by K.B. 29, April, 1902.

—School taxes — Registration — Prescription.] — 1. School rates constitute a privileged claim upon immovables (Arts. 2009, 2011 C.C.), and are exempt from the formality of registration (Art. 2084 C.C.). 2. Where, under a specific provision of the law, a hypothec exists without registration, a judgment upon the debt does not need to be registered in order to preserve the hypothec, nor does sale purge the property therefrom. 3. The hypothec also covers interest and the costs of a personal judgment against the debtor, such interest and costs being accessories of the debt (Art. 2017 C.C.). 4. An action and judgment against the principal debtor interrupt the three years' prescription as against those who acquire the property from him.

School Commissioners of Westmount v. Pitts, 24 Que. S.C. 7 (Davidson, J.).

—Issue of bonds — Second issue of bonds without payment of first issue.]—Held (on the inscription of the defendant):—(1) Where a valid issue of bonds has been made by a railway company under the dispositions of the Quebec Railway Act, which at the time of their issue governed the company defendant,—the validity of the bonds so issued not being affected by the bringing of the company under the legislative control of the Parliament of Canada and the Railway Act of Canada by 57-58 Vict. (Can.) c. 84—the company cannot, in view of the dispositions of s. 93, sub-s. 4, of the Act above-mentioned, exercise again the bond-issuing power, unless the bonds first issued have been withdrawn and paid or duly cancelled. (2) (On the inscription of the plaintiff):—The obligation to grant a conventional hypothec constitutes an obligation to do an act (execution of an authentic instrument) which can only be performed by the debtor himself or some person authorized by him, and whereof the Court has no means of compelling specific

performance, and the law nowhere authorizes the substitution by the Court of its own judgment for the authentic act executed by the debtor personally, or his authorized agent, which is essential to the creation and existence of a conventional hypothec. (3) The only hypothec which can result from the judgment of a Court is the judicial hypothec, which results from such judgments only as contain a condemnation to pay a specific sum of money. (4) An order to execute a conventional hypothec, unaccompanied by any alternative condemnation,—no alternative condemnation being asked in the event of failure to obey the order—would constitute a judgment not susceptible of execution, in contravention of Art. 541, C.C.P. (5) Where the plaintiff asks that a property be declared hypothecated, but does not indicate or sufficiently describe the property, either in the allegations or conclusions of his declaration, the Court cannot take upon itself to ascertain and determine what specific property should be declared hypothecated.

Connolly v. Montreal Park and Island Railway Co., 22 Que. S.C. 322 (C.R.).

—Hypothecated ship — Seizure — Consent or order.]—An hypothecated ship cannot, to the prejudice of the hypothecary creditor and without his consent or the order of a competent Court, be attacked at the suit of an ordinary creditor of the owner. The fact that the ordinary creditor had announced the sale of the ship to be subject to all registered hypothecs does not obviate the necessity of obtaining such consent or order.

Daignault v. Brulé, Q.R. 22 S.C. 20 (Cir. Ct.).

--Seizure of immovables — Hypothecary creditor — Registered lease — Opposition to secure lease charge.]—1. The hypothecary execution creditor, whose hypothec has been registered prior to the registration of a lease of the hypothecated immovable may, when the lessee files an opposition requiring that the sale of the immovable should be made subject to his lease as a charge thereon, require security that the immovable shall sell for a price sufficient to satisfy the amount due to him (Art. 726 C.C.P.) (2) This security may be demanded as soon as the opposition is filed and without even admitting that the opposition is well founded.

Desaulniers v. Payette, 12 Que. K.B. 445.

Note.—The Supreme Court quashed an appeal from this judgment on the ground that it was interlocutory only (33 Can. S. C.R. 340).

— Insolvent — Preference—Fraud.]—(1) A judgment, and a judicial hypothec created thereby on the property of the debtor while he was insolvent, and procured for the purpose of obtaining a fraudulent preference over the debtor's other creditors, is a proceeding which must be attacked within the delay provided by Art. 1040 C.C. (2) A judgment is a judicial contract. (3) The delay for contesting the fraudulent deed of a debtor does not run only from the date of distribution of his assets, establishing his insolvency, but from the date of the knowledge by the creditor of the fraud, that is of the prejudice to him which results from the fraudulent deed.

La Banque Nationale v. Common, Q.R. 22 S.C. 284 (Sup. Ct.),

—Hypothec — Subsequent sale a remere — Act of insolvency.] — The debtor having, on 8th May, 1901, placed upon his immovables an hypothecary debt payable at the end of three years, was afterwards obliged, to meet the payment of costs of proceedings of the existence of which his creditor had knowledge at the time of the loan and which were decided against him after that time, to borrow from another person the sum necessary to pay said costs and make to the latter a sale à réméré of the hypothecated land. His first creditor took action against him on the hypothec, payment of which was not due, and for a decree declaring that he had become insolvent and had diminished the value of the security he had given:—Held, that in agreeing to the sale à réméré the debtor did not become insolvent, that it had not affected the guarantee given to the first creditor, and that it did not fall within the provisions of Art. 1092 C.C.

Danjou v. Vaillancourt, Q.R. 22 S.C. 316 (Sup. Ct.).

— Hypothec — Preference.] — An hypothecary creditor is entitled to be paid in preference to chirographic creditors, in accordance to the order in which his hypothec stands, from the proceeds of movables, immovables by destination and hypothecs as such sold judicially as movables separated from land to which they are attached subject to his charge.

McCaskill v. Richmond Industrial Co., Q. R. 23 S.C. 381 (Sup. Ct.), affirmed by Ct. of Rev., 20th May, 1903.

-- Substitution — Deed authorizing — Power to sell property substituted.]—F. Leclaire (deceased) bequeathed his property to defendant charged with a substitution in favour of the latter's children and with a provision against seizure and alienation of the enjoyment of the charge (grevé). The will, however, permitted the executors, of whom the defendant was one, to sell the property and employ the proceeds of sale in the purchase of real estate of the same value as the property sold, which real estate would take the place of the latter. The defendant, in 1869, sold one of the substituted immovables, and in 1873 bought in his own name a piece of land on which he built a house. In 1895 he assigned, and hypothecated the latter im-

movable for benefit of his children to the amount of $10,440, the sum which it cost, to serve and be held, said the deed, as a reinvestment for his children according to the terms of the will to the extent of the price, the sum paid and that remaining due, of sale of the substituted immovable, and of the sale of securities for an equal amount substituted. This deed of hypothecation reserved to defendant the right to discharge the hypotheque and place the said sum elsewhere either by the purchase of real estate or other sufficient securities:—Held, that the hypothec was not a valid reinvestment of the proceeds of sale of the substituted immovable and that the revenge from the immovable acquired by defendant in his own name could be seized by his creditors.

De Serres v. Leclaire, Q.R. 23 S.C. 454 (Ct. Rev.), affirmed by King's Bench, 28th April, 1903.

—Legal subrogation — Registry — Tiers-detenteur.]—F. Boissonnault, on May 13th, 1893, hypothecated for $800 to one Boucher lots of land numbered 87, 119, 130 and 132. A. Boissonnault afterwards became possessed (tiers-detenteur) of lot No. 87 and of the undivided half of No. 130. Later still J. Boissonnault obtained possession of lots 119 and 132 and the other undivided half of No. 130. Neither of the latter appears to have been charged with payment of Boucher's debt. On 22nd April, 1899, and 12th May, 1900, J. Boissonnault borrowed $500 from one Belanger, and mortgaged to him the lots which he held. On November 9th, 1901, in order to obtain a legal subrogation Belanger paid Boucher's debt and the latter gave him a discharge which carried with it the conventional subrogation. On November 23rd, 1901, A. Boissonnault sold the land of which he was possessed to one Morin, who covenanted to discharge, as the price of sale, the claim of Boucher to which Belanger was subrogated. On November 26th, in conformity with his deed, Morin paid to Belanger the Boucher claim and obtained a discharge stating that such payment was made as the price of purchase from A. Boissonnault, and according to the intention of the deed of sale and discharge concluded by saying: "Being a general and final discharge for such purchase money and for radiation of the hypothec." The lots of which J. Boissonnault was possessed were sold by the sheriff and the amount realized is to be apportioned:—Held, (1) that the right and interest of A. Boissonnault (or of Morin) to obtain the legal subrogation for A. Boissonnault being hypothecary debtor, had an interest in making payment to relieve his immovable from the charge upon it. (2) That A. Boissonnault, through the payment of his vendee, in discharge of the price of sale to Belanger had obtained the legal subrogation to Boucher's claim and that notwithstanding the terms of the discharge signed by Belanger. (3) But the immovable of A. Boissonnault sold to Morin being equally charged with Boucher's claim, A. Boissonnault could only demand, on the price of the lands of the other tiers-detenteur, J. Boissonnault, a deduction of the proportion of the Boucher claim for which his lands should contribute, that is, that the lands of A. Boissonnault should contribute with those of J. Boissonnault in payment of the Boucher debt according to their respective value, and that, in the present case, was the extent of the legal subrogation obtained by A. Boissonnault. (4) That Belanger not being a transferee, or subsequently subrogated, could not complain of want of registry of the legal subrogation obtained by A. Boissonnault. (5) That mistakes of the registrar, or his omissions, irregularities or wrong construction of documents properly filed could not injure A. Boissonnault. (6) That to obtain the registration by transcription of the discharge given by Belanger, it is sufficient to file a copy with the registrar, which has been done, and this discharge establishes the legal subrogation.

Belanger v. Boissonnault, Q.R. 22 S.C. 53 (Ct. Rev.).

—Transfer of hypothecary claim — Signification — Acceptance by personal debtor.]—(1) When the transfer of an hypothecary claim has been duly registered and signification of it has been made with delivery of a copy bearing a certificate of its registration to the possessor (détenteur) of the hypothecated property; a tender by the personal debtor to the transferee of a part of the claim as the balance due is a sufficient acceptance by such personal debtor of the transfer under Art. 1571 C.C., and relieves the transferee from the obligation to serve the transfer upon him. (2) When an action is brought by a minor who comes of age pending the suit, and before plea filed, the defendant cannot at the hearing on the merits ask for its dismissal on that ground. The provision of law that the actions of minors are brought in the name of their tutors is for the protection of the minors who can cure such a departure from it by continuing the suit after coming of age. At most, a defendant can take advantage of it by exception to the form; it is too late to do so after issue joined on the merits.

Daoust v. Daoust, 28 Que. S.C. 356.

ICE CUTTING.

See NAVIGATION.

IMMIGRATION.

Of Chinese.]—

See CHINESE IMMIGRATION.

—Of Aliens.]—See ALIEN.

—Canada Immigration Act — Resident of Canada afflicted with disease, returning from abroad.] — A resident of Canada, returning from a visit abroad is not a "passenger" or an immigrant who is subject to the provisions of the Immigration Act.

Re Chin Chee, 11 B.C.R. 400.

—Appeal from decision of immigration officer.] — A proclamation was issued and published in the Canada Gazette, empowering the Minister of the Interior, or any officer appointed by him for the purpose, in pursuance of the amendment to the Immigration Act 1902, c. 14, to prohibit the landing in Canada of any immigrant or other passenger suffering from any loathsome or infectious disease, and who, in the opinion of the Minister, or such officer, should be so prohibited:—Held, on appeal (affirming the order of Morrison, J.), that the statute and the proclamation issued thereunder, merely authorizes the deportation of the diseased person; that it does not take away the right of the Court to decide the question of fact on a proper application, and the Judges are bound to inquire into the matter on an application for habeas corpus. Parliament not having made the examination by the immigration officer final, the statute is not to be construed as ousting the jurisdiction of the Court to examine into the legality of the detention on a proper application. Effect of Cox v. Hakes (1890), 15 App. Cas. 506, discussed.

Ikezoya v. Canadian Pacific Ry. Co., 12 B.C.R. 454.

Carrying diseased immigrants — Prohibition to land — Escape — Negligence of carriers — Habeas corpus.]—

Canadian Lines, Limited, v. Attorney-General for Canada, 6 E.L.R. 222 (Que.).

—Immigration Act, R.S.C. 1906, c. 93 — British Columbia Immigration Act, 1908 — Dominion and Provincial legislation.] — Parliament, by the Immigration Act, R.S.C. 1906, c. 93 having provided a complete code dealing with immigration, the British Columbia Immigration Act, 1908, is inoperative. Costs awarded against the Crown following Regina v. Little (1898), 6 B.S.R. 321.

In re Narain Singh, 13 B.C.R. 477.

—Constitutional law—British Columbia Immigration Act, 1908—Treaty between Canada and Japan, Dom. Stat. c. 50, 1907.]—The provisions of the B.C. Immigration Act, 1908, are inoperative insofar as the subjects of the Japanese Empire are concerned.

In re Nakane and Okazake, 13 B.C.R. 370.

—Immigration Act — Delegation of power.] —The power conferred upon the Governor-General in Council by s. 30 of the Immigration Act, to prohibit the landing of immigrants of a specified class, cannot be delegated to the Minister of the Interior.

In re Behari Lal, 13 B.C.R. 415.

—Chinese Immigration Act—Evading payment of tax.]—Defendant was tried and convicted before the County Court Judge for district No. 7 for violating the provisions of R.S.C. c. 95, ss. 7, 30 (respecting Chinese immigration) in that he being a person of Chinese origin did enter Canada without paying the tax required by s. 7 of the said Act. The learned Judge reserved several questions for the opinion of the Court including the following: "Does the accusation sufficiently charge the defendant with an indictable offence under ss. 7 and 30 of c. 95 of the Revised Statutes of Canada, 1906":—Held, that while the statute imposes a tax upon persons of Chinese origin entering Canada, with certain exceptions, and provides machinery for the collection of the tax, it does not make the entering Canada by such persons without payment of the tax a criminal offence, and that the defendant not being charged with any criminal offence his conviction was unwarranted and must be set aside and that he was entitled to his discharge.

The King v. Sam Chak (No. 2), 42 N.S.R. 374, 12 Can. Cr. Cas. 498.

—Immigrants detained on vessel for deportation—Owners and master of vessel landing them in obedience to writ of habeas corpus—Escape of immigrants — Liability for penalties.] — The owners, master and officers of a vessel on which immigrants are detained for deportation who land them and produce them in Court in obedience to a writ of habeas corpus, are not liable for the penalties imposed by the Immigration Act (R.S.C. c. 93, s. 66), if, in the interval of the landing, the immigrants, or any of them, escape without their aid or abetting.

Sifton v. Balls, 35 Que. S.C. 259.

IMPRISONMENT.

See CRIMINAL LAW; FALSE ARREST; ARREST; HABEAS CORPUS.

IMPROBATION.

Inscription in improbation — Order for production of original deed attacked.] — If an authentic instrument is attacked by inscription in improbation, an order may issue to the depositary of the deed for the production of the same in order that it

may constitute part of the record for all purposes of the inscription in improbation.
Awde v. Charest, 5 Que. P.R. 319.

And see PLEADING.

IMPROVEMENTS.

Patent — Locatee — Improvements — Claim for.]—On an application being made for the patent to certain lands, a claim was made by the defendant, who had married the widow of the locatee, and had improved the land, to be allowed the value of such improvements, whereupon the Commissioner of Crown Lands directed that before the patent issued the amount, if any, payable to the defendant for his improvements and work on the land, after proper deductions, should be ascertained. A consent judgment was obtained referring it to the Master to enquire and report as to what sum, if any, the defendant was entitled to for permanent improvements and work done upon the land; for maintenance of the family of the locatee; and for any advances made to them, after making all proper deductions:—Held, that while the consent judgment was silent as to the principle to be applied in ascertaining the amount payable to the defendant for improvements, etc., having regard to the object of the Crown Lands Department, the proper mode was to award such sum as in foro conscientiæ the defendant ought to reseive.
Highland v. Sherry, 32 O.R. 371.

—Demand of possession — Subsequent improvements — Mistake of title.] — The defendant and a life tenant of certain lands lived together thereon, the defendant bona fide believing that the land was or would be hers on the life tenant's death. After the life tenant's death the defendant continued living on the land and made improvements thereon. About a year and a half after the life tenant's death the defendant was served with a notice demanding possession, and stating that unless possession was given within a reasonable time a writ would be issued. No action was taken upon the demand, and the defendant, who was an illiterate woman, remained in possession, and under such belief of title continued to make improvements; and it was not until some seven years afterwards, when another notice had been served upon her, that an action was brought to recover possession, the bulk of the improvements having been made during the period between the two notices:—Held, that under the circumstances the defendant was entitled to the value of her improvements.
Corbett v. Corbett, 12 O.L.R. 268 (Mabee, J.).

—Claim for improvements — Notice of title being disputed.] — Good faith is the essential condition to the right of the possessor of immovable property to claim the value of improvements upon it. When he claims it by plea to a petitory action, it is a good answer that the improvements were made after notice to him by protest that his title was disputed.
Gervais v. Benjamin, 35 Que. S.C. 480.

INCEST.

Evidence—Proof of blood relationship on charge of incest.]—On a trial for incest, the only evidence against the accused was that of the child, a girl of 11 years, and of a woman who had known accused and the girl living together as father and daughter for some seven or eight months. This evidence was not rebutted:—Held, on appeal, that this was not sufficient proof of relationship to justify a conviction.
Rex v. Smith, 13 B.C.R. 384, 13 Can. Cr. Cas. 403.

INDECENCY.

See WILFUL INDECENCY.

INDEMNITY.

Action en garantie — Contract — Liability of owner to contractor.]—A contractor who has undertaken work for a fixed price, by a contract containing no stipulation for construction of the necessary scaffolding, and when the same had been previously put up by the owner of the premises for other work being carried on at the same time, will be deemed to have contracted on the tacit understanding that he can make use of such scaffolding, especially if he uses it with the knowledge and approbation of the owner. Consequently, if through defects in the construction of such scaffolding an accident happens and an action is brought against the contractor therefor, he has a right to call in the owner in warranty. (2) The cost of constructing new scaffolding compared with the contract price, as well as the uselessness of such a course are elements of proof in such a case.
Tardival v. Les Sieurs Curés, etc., de la Paroisse de St. Jean des Chaillons, Q.R. 13 K.B. 9.

— Procedure — Warranty.] — In proceedings de garantie formelle the warrantee may take part and act in preservation of his rights, but he cannot, after his warrantor has made his fait et cause and pleaded to the action, file a defence absolutely identical.
Dryden v. Yule, Q.R. 24 S.C. 315 (Sup. Ct.).

—Landlord and tenant — Warranty.] — When a tenant has brought an action against another tenant of his landlord, in consequence of an act of violence committed to his injury, and the defendant pleads

that the plaintiff has not the right in the land which he claims under his lease, but that he (defendant) has the sole right of enjoyment thereof, the plaintiff may bring in his landlord in warranty to defend him against the defendant's claim.

Hamilton v. Royal Land Co., Q.R. 24 S.C. 411 (Ct. Rev.).

—Joint tort-feasors — Action maintained as to the one and dismissed as to the other.] — A party sued jointly with another in damages for a tort, who is condemned alone, the action being dismissed as to the other, and who pays the plaintiff the amount of the judgment, has an action against his co-defendant to recover the whole or part of the amount so paid, accordingly as it is proved at the trial of such action that the tort was caused solely or in part by such co-defendant. The judgment in the original suit is not chose jugée between the joint tort-feasors and their liability to one another is not affected by it, nor by the payment made by the one against whom it was rendered.

Mills v. Cox, 28 Que. S.C. 375 (Curran, J.).

And see INSURANCE, PRINCIPAL AND SURETY; THIRD PARTY; WARRANTY.

INDIANS.

Property vested in trust for benefit of Indians—Right of their chiefs to sue.]—A statute passed before the abolition of the feudal tenure in this province, to vest a fief or seigniory in an ecclesiastical corporation, in trust, "for the instruction, and spiritual care of the Algonquin and Iroquois Indians," does not give the chiefs elected by them, a right of action against the corporation, on the ground that it grants lands of the fief to "whites," or others than Indians, and that it interferes with the exercise, by the Indians, of pretended rights of pasturage and to cut wood in the seigniory.

Corinthe v. Seminary of St. Sulpice, 38 Que. S.C. 268.

Selling liquor to Indian — Appeal — Rehearsing on new evidence.]—

R. v. Russell, 4 W.L.R. 16 (N.W.T.).

Property exigible under execution against Indian.]—The primary debtor, who was an Indian, a member of the St. Regis band of Indians, sent his milk out of his reserve to the factory of the garnishees. The garnishees were to manufacture the milk into cheese, sell the cheese, and after deducting charges of manufacture and sale, were to account to the Indian for the value of the milk. Primary creditor issued garnishing summons, attaching this milk money. Garnishees paid the money into Court, and primary debtor made application for payment out to him, claiming that the money was not exigible under execution:—Held, that the milk money in question was not personal property outside the reserve liable to taxation, and therefore was not exigible under the Indian Act, s. 102. Action dismissed; money to be paid over to primary debtor.

Simkevitz v. Thompson, 16 O.W.R. 865.

—Notice of appeal served on one justice only—Condition precedent — Costs.]—By the Indian Act, R.S.C. 1906, c. 81, s. 135, jurisdiction to try offences against the Act is given to two justices of the peace. Section 750 of the Criminal Code provides that notice of appeal shall be given by serving the respondent or the justice who tried the case with a copy thereof. By s. 2 (18), of the Criminal Code, "justice" includes two or more justices if two or more justices act or have jurisdiction:—Held, therefore, where a conviction for an offence against the Indian Act was made by two justices of the peace, and notice of appeal from the conviction was served upon only one of the justices, that there was no jurisdiction to hear the appeal, the provisions of s. 750 being imperative, and compliance therewith being a condition precedent which could not be waived; and the appeal was dismissed, but without costs, because, by s. 755 of the Code, costs should only be allowed upon proof of notice of the appeal having been given to the person entitled to receive the same.

Rex v. Edelston, 15 W.L.R. 279.

—Indian lands.]—See CONSTITUTIONAL LAW.

—Indian Act—Vendor's lien.]—Indians in Canada are British subjects and entitled to all the rights and privileges of such, except so far as those rights are restricted by statute, and, notwithstanding sub-sec. 24 of s. 91 of the British North America Act, 1867, they are subject to all provincial laws which the province has power to enact: Reg. ex rel. Gibb v. White, 5 P.R. 315, and Rex v. Hill, 1907, 15 O.L.R. 410. An Indian has the same right to sell or dispose of land which has been allotted to him by the Dominion Government as his own individual property as any other British subject has and neither section 102 of the Indian Act, R.S.C. 1906, c. 81, which prevents any person acquiring any lien or charge on real property of an Indian not subject to taxes under the last three preceding sections, nor any other provision of the Act imposes any restriction on the right of selling outright any of his individual property. The Estoppel Act, R.S.M. 1902, c. 56, applies to conveyances made by Indians as well as others and, where an Indian has given a deed of his land with the covenants mentioned in that Act, the subsequent issue of the Crown patent to him vests the title in the grantee

in fee simple. Dismissal of petition following caveat under the Real Property Act delayed to enable petitioners to take proceedings to establish a vendor's lien for unpaid purchase money under prayer for general relief.

Sanderson v. Heap, 19 Man. R. 122.

Indian Act — Half-breed — Meaning of "Indian."] — The Indian Act, R.S. (1886), c. 43 defines (s. 2 h) "Indian" as meaning inter alia "any male person of Indian blood reputed to belong to a particular band":—Held, (1) Against the contention that "of Indian blood" means of full Indian blood, or at least of Indian blood ex parte paterna—that a half-breed of Indian blood ex parte materna is "of Indian blood." (2) Against the contention that the defendant having been shown to have actually belonged to a particular band, this disproved, or was insufficient to prove, that he was reputed to belong thereto—that the intention of the Act is to make proof of mere repute sufficient evidence of actual membership in the band. (3) Against the contention that by virtue of s. 11 the mother of the defendant by her marriage to his father, who was a white man, ceased to be an Indian, and that therefore the defendant was not a person of Indian blood—that while the mother lost her character of an Indian by such marriage, except as stated in that section, it did not affect her blood which she transmitted to her son.

The Queen v. Howson, 1 Terr. L.R. 492.

— Indian lands — Sale or lease—Nullity— 61 Vict. c. 34, s. 2 (D.).]—The nullity of sales or leases of property on an Indian reserve, authorized by 61 Vict. c. 34, s. 2 (D.) is only relative and can only be invoked by the Indians; those who have dealt with the Indians cannot avail themselves of it.

Boucher v. Montour, 20 Que. S.C. 291 (Sup. Ct.).

—Indian Act — Sale of liquor to half-breed —Mens rea.] — S. 94 of the Indian Act (R.S.C. 1886, c. 43) provides that, "Every person who sells, exchanges with, barters, supplies or gives to any Indian or non-treaty Indian, any intoxicant . . . shall on summary conviction . . . be liable to imprisonment for a term not exceeding six months . . .":—Held, following Regina v. Howson, 1 Terr. L.R. 492, that a half-breed who has "taken treaty" is an Indian within the meaning of the Indian Act. A conviction of a person, licensed to sell liquor, for the sale of an intoxicant to such a half-breed was, however, quashed because the licensee did not know and had no means of knowing that the halfbreed shared in Indian treaty payments. Mens rea must be shown.

Regina v. Mellon, 5 Terr. L.R. 301.

—Indian lands — Sale of timber — Registration — Notice.] — The locatee of Indian lands is, except as against the Crown in the same position as if the land had been granted to him by letters patent, and can assign his interest in the land or in the timber. Actual notice of such an assignment, even though the assignment has not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority. Judgment of Ferguson, J., 6 O.L.R. 370, affirmed.

Bridge v. Johnston, 8 O.L.R. 196 (D.C.).

—Indians — Mississauga band — Claim for restitution of moneys to trust fund — Declarations of right — Discretion of Superintendent-General — Crown as trustee.] — A claim against the Crown based upon the 111th section of the British North America Act, 1867, and upon Acts of the Legislature of the Province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada" within the meaning of clause (d) of s. 16 of the Exchequer Court Act. Yule v. The Queen, 6 Ex. C.R. 123; 30 S.C.R. 35, referred to. (2) Where the Court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the Court depends upon statute and not upon common law. Barraclough v. Brown [1897] A.C. 623, referred to. (3) It does not follow that because the Crown is a trustee the Court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority, if it exists, must be found in the statutes which give the Court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the Court has any jurisdiction with respect to the execution of the trust. (4) While under the provisions of certain treaties and of certain statutes of the Legislature of the Province of Canada, and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent-General of Indian Affairs having, under the Governor-in-Council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians is administered the Dominion Government and the Superintendent-General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the Court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz.:

that the Crown is not bound by estoppels, and no laches can be imputed to it; neither does it answer for the negligence of its officers. (5) Under the treaty of February 28th, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands. (6) Under Treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this treaty is concerned the Crown is not a trustee, but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties.

Henry v. The King, 9 Can. Exch. R. 417.

—Indian Act — Selling liquor to Indian — Sentence of imprisonment in absence of prisoner.] — An adjudication of imprisonment made against a prisoner in his absence, by a County Court Judge, on appeal from a summary conviction under the Indian Act, at a time when he was confined in jail under the conviction appealed against, held void and the discharge of the prisoner ordered.

The King v. Johnston, 41 N.S.R. 105, 11 Can. Cr. Cas. 10.

—Proof of status of Indians—Real and personal property exempt from seizure.]—(1) The status of an Indian as such may be proved by his certificate of birth, his general reputation, his residence in the reserve or his election as municipal councillor. (2) The real and personal property of Indians inside the reserve is exempt from seizure.

Charbonneau v. De Lorimier, 8 Que. P.R. 115.

—Indian, sale of liquor to—Person following Indian mode of life.]—A quarter-breed is as much entitled to purchase liquor as a white man, provided he does not come within the purview of the amendment to the Indian Act enacted by section 6, chapter 32, 1894. In this case, there being nothing to show that the defendant knew or had cause to suspect that the person to whom he sold the liquor was reputed to belong to a particular band, or followed the Indian mode of life, the defendant only acted reasonably in the circumstances.

Rex v. Hughes, 12 B.C.R. 290.

—Jurisdiction of Indian agent—Committal for offences under the Indian Act.]—An Indian agent, acting in a magisterial capacity, in committing an accused person for an offence under the Indian Act, must show on the warrant of commitment, the district in which such Indian agent is acting.

Rex v. McHugh, 13 B.C.R. 224, 13 Can. Cr. Cas. 104.

INDUSTRIAL DESIGN.

Cook stove — Imitation — Infringement —Injunction—Cancellation of conflicting design.]—The plaintiffs were registered owners of an industrial design for a cook stove, called the "Royal Favorite, 9-25," which, as a special article of their manufacture, had become well known to the trade. The defendants procured one of the said stoves, caused a model to be made of it, and with some minor alterations, chiefly in the ornamentation, manufactured a stove called the "Royal National, 9-25," and subsequently registered it as an industrial design. In an action by the plaintiffs for infringement and for an order to expunge defendants' design from the register, the weight of evidence established that the defendants' design was an obvious imitation of that of the plaintiffs:—Held, that the defendants should be enjoined from infringing the plaintiffs' design, and that the registration of that of the defendants should be expunged from the register.

Findlay v. Ottawa Furnace and Foundry Co., Ltd., 7 Can. Exch. R. 338.

INDUSTRIAL DISPUTES.

Longshoremen's wages — Arbitration — Award — Industrial Disputes Investigation Act.]—

Martin v. Shipping Federation, 4 E.L.R. 341 (Que.).

See TRADE UNION.

INFANT.

Infant—Contract—Fraudulent representation as to age.]—The judgment of Mulock, C.J., 19 O.L.R. 1, was affirmed.

Jewell v. Broad, 20 O.L.R. 176 (D.C.)

Natural children — Maintenance by father.]—The father who voluntarily acknowledges his natural children is bound to support them and the mother, appointed tutrix, may maintain an action for the cost of such support. It is the tutor's duty to attend to the education of the minor and to bring an action to recover the cost of the latter's maintenance. The father against whom such an action is brought cannot rely, as a defence, on grounds calling for the removal of the tutor from such position. He must bring an action expressly for such removal.

Picard v. Gadoury, Q.R. 38 S.C. 65 (Sup. Ct.).

Custody of—Children's Aid Society—Foster parent.]—An infant duly committed to the care of the Children's Aid Society of Vancouver under the provisions of the Children's Protection Act of British Columbia, was by such society placed with P. as a foster parent. Subsequently another society, upon notice to the Children's Aid Society of Vancouver, but without notice to P., applied to the magistrate who made the order originally, and, under s. 39 of the Act, obtained an order for the surrender of the child, on the ground that it was of a different religion from the society with which it was first placed. Upon said application the fact was ascertained that the child had been placed in a foster home, but its whereabouts was not disclosed by the officer appearing for the society. Later the second society, on obtaining this information procured an order for and served a writ of habeas corpus on P., directing him to produce the child. He appeared and moved to set aside the writ and the order: —Held, that although the first society was the legal guardian of the child when the second order was made, yet P. could not be deprived of his legal rights without notice and without an opportunity of being heard, that under s. 7 of the Act, the contract placing the child with P. divested the society of any authority to interfere with his rights unless the child's welfare demanded that it should be withdrawn from his care.

Re Pilkington, 15 B.C.R. 456.

—Custody—Paternal rights—Agreement to surrender.]—An agreement to surrender his paternal rights cannot bind or relieve a father. The Queen v. Barnardo, 23 Q. B.D. 305, followed. Upon an application by a father for the custody of his infant son, 11 years of age, nothing was alleged against the applicant beyond the fact that his circumstances, without fault on his part, had caused a separation between the boy and himself; and an order was made for the restoration of the boy to the father by those who had the custody during the separation.

Re Porter, 15 B.C.R. 454, 15 W.L.R. 228 (B.C.).

Employer and workman — Employment of children—Protection.]—The owner of a factory who employs children in it should take all necessary precautions to protect them from the consequences of acts which, though imprudent on the part of adults, are such as might be expected from children, but he is not responsible for accidents that the prudent restraint that could be looked for from a child would have prevented.

Robitaille v. White, 19 Que. S.C. 431 (S.C.).

—Guardian appointed by Surrogate Court —Passing accounts—63 Vict. c. 17, s. 18 (O.).]—The Judge of a Surrogate Court has no authority to pass the accounts of the guardian of an infant appointed by such Court. S. 18 of 63 Vict., c. 17 (O.), does not apply, such guardian not being a trustee within the meaning of the section:—Held, also, that under the circumstances of this case, six per cent. interest was a fair rate to charge the guardian on the moneys in his hands.

Murdy v. Burr, 2 O.L.R. 310.

—Habeas Corpus — Adjournment — Expenses.]—When the officer or other person to whom a writ of habeas corpus is directed has obeyed it by bringing up the body and making his return, the Judge or Court may make an order for payment by the applicant of the expenses of such officer or person. Dodd's Case (1857), 2 DeG. & J. 510, followed. The costs of proceedings by habeas corpus are governed by s. 119 of the Judicature Act, R.S.O. 1897, c. 51, and are therefore in the discretion of the Court or Judge. Regina v. Jones, [1894] 2 Q.B. 382, followed. Where, in obedience to a habeas corpus, the person to whom it was directed produced the body of an infant before a Judge in Chambers, and filed certain affidavits in answer to the writ, making his return thereto, and the applicant thereupon applied for an enlargement, which the Judge granted upon condition of the applicant paying to the respondent a sum for counsel fee and expenses, and the applicant appealed from the order embodying such condition to a Divisional Court, which dismissed the appeal, giving the applicant leave, however, to have her original application heard upon payment of the sum already ordered to be paid and a further sum, the Court of Appeal refused the applicant leave to appeal from the order of the Divisional Court.

Re Weatherall, 1 O.L.R. 542 (C.A.).

Intent to deprive parent of possession.]—(1) Where a divorce decree of a Court of competent jurisdiction in the United States has awarded the custody of a child to the father as against the mother, and the mother thereafter removes and conceals the child for the purpose of evading the decree, a prima facie case for extradition is thereby made out against the mother upon a charge of child-stealing. (2) Semble, the offence of child-stealing under the Criminal Code, s. 284, may be complete against the child's mother, although the father, to whom the child's custody has been awarded, has never had any actual separate possession of the child.

Re Lorenz (Que.), 9 Can. Cr. Cas. 158.

—Neglected children — Provincial legislation.]—(1) A warrant of commitment of a child to a public orphanage under the powers conferred by the Nova Scotia provincial statute as to neglected children, R.S.N.S. c. 116, is sufficiently definite as to

time if it specifies that the child is to be kept until he is sixteen years of age without stating the year and day when the term of detention expires. (2) Where the conviction of the child's mother is a prerequisite to the jurisdiction of a magistrate to order the child's detention in an orphanage, an existing conviction in fact will suffice for that purpose, even if it be objectionable on the ground of duplicity.

Ex parte Yates, (N.S.), 9 Can. Cr. Cas. 359.

—Detention in reformatory schools on father's order—School authorized for imprisonment of youthful offenders.]—(1) A father, having under the law of the Province of Quebec the care of his minor children, may, with the consent of the management of the school, place his child in a reformatory school authorized for the commitment under Cr. Code, s. 956, of youthful offenders; and the detention of the child for purposes of discipline and subject to release by the father at any time, will not be interfered with by habeas corpus issued on behalf of the child by his mother. (2) A writ of habeas corpus to test the legality of a child's detention is not irregular because issued on the petition of the child himself who is under disability to bring action in respect of civil rights.

Re A. B., (Que.), 9 Can. Cr. Cas. 390.

—Custody of—Mother of illegitimate child.]—Application on return to a writ of habeas corpus by the mother for the custody of an illegitimate child, a boy of twelve years of age. The mother who was only seventeen years old when the child was born was unable to support him and arranged with one Setter to take the child and a formal document was drawn up and executed by which the mother released and abandoned the child and all her right and title as his mother to the custody, control and possession of the child to Setter forever, and Setter on his part agreed to maintain, care for and educate the child. The mother married in 1893 and there are now five children of the marriage. She never interfered with the control of the child by Setter and his wife, or manifested any interest in him until a few weeks before the application when she made a demand upon Setter for his custody. He had in the meantime been maintained and brought up by Setter and his wife as their own. They had no other children and were in fairly comfortable circumstances. The reason given by the mother for now wanting to take back the child were that he was made to do work too hard for his age and that Setter had not educated him; but the Judge found that although the boy had never attended any school it was because there was no school near enough, and that Mrs. Setter had herself taught him and his education had not been neglected, also that there was no foundation for the charge of his being overworked. The Judge also found that the Setters had brought up the child with the same care and affection that they would have bestowed on a child of their own, and expressed himself as satisfied that if he had a discretion to exercise in the matter it would be in the best interests of the child to leave him with the Setters:—Held, following Reg. v. Nash, 10 Q.B.D. 454, and Barnardo v. McHugh (1891), A.C. 388, that although the mother of an illegitimate child has prima facie a right to his custody notwithstanding any agreement she may have made to the contrary, yet the Court has a discretion to refuse to accede to her wishes if it is shown that it would be detrimental to the interests of the child to return him to her control, and that under the circumstances in this case such discretion should be exercised by leaving the child with the Setters.

In re Stalker, 39 Can. Law Jour. 799 (Bain, J.).

—Adoption — Parent's right to custody — Liability of parent for maintenance.]—Held, that a father, who has given his child to another to adopt and rear, has, notwithstanding, the right to retake the custody of the child at any time. Held, further, that a father so retaking his child is liable for maintenance during such period of adoption only by virtue of a contract express or implied.

Farrell v. Wilton, 3 Terr. L.R. 232.

—Natural child — Obligation of parents—Debts for maintenance—Seizure.]—The obligations resulting from the birth of a natural child do not extend to the ascendant relatives of the parents. Debts for maintenance, for the payment of which the legacy for maintenance may be levied upon under execution, are those due to the creditor who has furnished necessaries (aliments) to the titulary of the pension and his family, and not those which such titulary is bound to furnish to his natural child.

McAulay v. McLennan, Q.R. 23 S.C. 419 (Sup. Ct.).

—Contract of hiring—Parent's right to sue for wages.]—A parent suing for the wages of an infant cannot stand in any better position than the infant could if the infant were himself suing.

Noble v. Wiggins, 3 Terr. L.R. 318.

—Appointment of agent — Void appointment incapable of ratification — Action to enforce contract.]—

Johannson v. Gudmundson, 11 W. L. R. 176 (Man.).

—Illegitimate child under seven years — Custody — Rights of mother — Rights of father—Welfare of infant.]—

Re Bestwick and Auston, 11 W.L.R. 73 (Sask.).

—Custody — Parental right — Adoption—Habeas corpus.]—
Re Gray, 6 W.L.R. 374 (N.W.T.).

—Custody—Application of father against stranger — Agreement for adoption —Alleged criminal misconduct of father—Moral rehabilitation.]—
Re Gray, 6 W.L.R. 674 (Sask.).

—Appointment of agent — Void appointment, incapable of ratification.]—
Johannsson v. Gudmundson, 10 W. L. R. 254 (Man.).

—Money in Court — Application for payment out for maintenance — Persons interested to be notified.]—
Re Green, 9 W.L.R. 630 (Sask.).

—Parent's agreement to relinquish custody —Agreement in consideration thereof to pay annual allowance not enforceable.]—
Chisholm v. Chisholm, 2 E.L.R. 207 (N. S.).

—Contract — Conditional ratification.]—
Lynch v. Ellis, 7 E.L.R. 14 (P.E.I.).

—Bond—Void or voidable—Ratification—Breach.]—To secure the plaintiff against loss by reason of his purchase, upon the defendant's representations, of 55 shares of company stock, at $10 per share, the defendant gave the plaintiff his bond in the penal sum of $1,100 conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock, and conditioned also that at any time after the date of the bond the defendant should at the request of the plaintiff purchase from plaintiff or find him a cash purchaser for 11 of the 55 shares at $50 per share, less expenses of sale, not to exceed 10 per centum. The defendant was an infant when he executed the bond:—Held, that the bond was not void ab initio; that it was only voidable; and, upon the evidence, that it was adopted and ratified by the defendant after he had attained full age. (2) That the shares held by the plaintiff not being of any value, the plaintiff's damage by reason of the breach of the bond was $495, the price of the 11 shares, less 10 per centum. (3) That the recovery was not for a debt or liquidated demand, and the plaintiff was not entitled to interest, the amount not having been ascertained until judgment.
Beam v. Beatty, 3 O.L.R. 345 (Ferguson, J.).

—Married woman — Minor — Personal action.]—A married woman under age, emancipated by marriage, may ester en justice in a personal action (action personelle et mobilière) without other assistance and authorization than that of her husband made a party for the purpose, and has no need of the aid of a curator.
Galarneau v. Bertrand, 20 Que. S.C. 283 (Sup. Ct.).

—Infant—Bond—Ratification.]—The bond, with a penalty, of an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant is void and not merely voidable, and cannot be adopted and ratified by the obligor after he has attained his majority. Judgment of Ferguson, J., 3 O.L.R. 345, reversed.
Beam v. Beatty (No. 2), 4 O.L.R. 554 (C.A.).

—Examination for discovery.]—An infant suing by a next friend may, in the absence of special incapacity, be examined for discovery. Arnold v. Playter (1892), 14 P.R. 399, approved. Judgment of Meredith, C.J.C.P., affirmed by Divisional Court. An order for the examination of an infant for discovery should not give to the examiner a discretion to determine the capacity of the infant; the proper manner of raising any question as to the capacity of the infant is by motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be considered by the Court itself.
Flett v. Coulter, 4 O.L.R. 714.

—Hypothecation of the property of minors —Liability of minors for debts due by their deceased father.]—Xavier Rosseau gave his property to his son on condition that he would pay the donor's then existing debts. The donee died shortly afterwards, leaving a widow and two children (minors). The widow and children went to the United States to live. A tutor ad hoc was appointed to the children and he retroceded the property to the donor, who borrowed $500 from plaintiff, hypothecating the property as security. The widow of the donee remarried and she and her husband took possession of the property as tutors of the children. The donor subsequently died and the plaintiff sued the donee's children, as represented by their tutors, to recover the $500 with interest:—Held, (reversing the judgment of the Superior Court at Montmagny, Pelletier, J.) 1. The retrocession of the property of the minors to the donor and its hypothecation by him were illegal. 2. The donee's minor children were not liable to plaintiff for the repayment of his loan to the donor. 3. The payment of the $500 to the donor did not enrich the minors, but simply operated a change in their creditor. 4. The plaintiff's remedy is an action against the representatives of the donor, and an attachment in the hands of the defendants, as tutors of the children, of what they may owe to the donor who paid debts for which they were liable.
Beaumont v. Lamonde, 23 Que. S.C. 139 (C.R.).

—Habeas corpus—Infant of fourteen years —Pauper parent.]—Where a father in indigent circumstances has caused a writ of habeas corpus to issue for the purpose of recovering the custody of his daughter, aged fourteen years, who is actually residing with her grandfather and desires to continue to reside there, the writ will be quashed.

Robert v. Veronneau, 5 Que. P.R. 426.

—Mortgage by infant—Voidable contract—Repudiation of—What amounts to—Infants' Contracts Act.]—A mortgage executed by an infant before the passing of the Infants' Contracts Act, is not void, but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age. R., in 1896, being then an infant, executed a mortgage in favour of S. R. came of age on 27th January, 1900, and at that time, on account of default having been made in the payment of the loan, S. was proceeding to sell under power of sale in the mortgage. R.'s solicitors, on 13th February, 1900, wrote S., saying that no valid mortgage had ever been executed by R., and threatening proceedings to protect their client's interests, and on 2nd March they issued a writ on behalf of R. against S., claiming a declaration that the mortgage was null and void, and an injunction restraining sale. On cross-examination on an affidavit made by R. in support of a motion for an interim injunction, he said in substance that the reason he did not pay was because he couldn't, and that he had never repudiated his contract, and in October, 1900, he discontinued his action. On 2nd November, 1900, S. commenced his foreclosure action, and in defence R. pleaded infancy:—Held, that the solicitor's letter and the writ in Russell v. Saunders did not constitute repudiation, as they were qualified by R.'s statement that he did not intend to repudiate. Judgment of Irving, J., dismissing the action, reversed.

Saunders v. Russell, 9 B.C.R. 321 (Irving, J.).

—Removal of tutor — Guardianship of infants.]—A tutor cannot be removed from the guardianship of infants, even temporarily, save for grave reasons.

FitzAllan v. Rieutord, 5 Que. P.R. 387.

—Action against—Appointment of tutor.]—An action against a minor will be dismissed on exception to the form, and a verbal application to suspend proceedings pending the appointment of a tutor will not be entertained.

Deslauriers v. Farmer, 6 Que. P.R. 401 (Curran, J.).

—Substituted property — Education of children.]—A grevé de substitution will not be allowed, even on advice of the family council and with the consent of the executors, to borrow on property substituted to provide for the expense of educating the appelé when it appears that the revenue of those bound in law to provide for such education are sufficient for the purpose.

Ex parte Barron, 6 Que. P.R. 126 (Mathieu, J.).

—Minor — Contract — Lesion — Nullity.]—Shares of stock in a joint stock company, belonging to a person deceased, and in which stock his minor children, after his death, were entitled to a share, were irregularly transferred to the widow individually, without any authorization having been obtained for the transfer. The widow, however, used the shares in good faith, and to the best advantage of the minors, in settling debts of the estate, which was virtually insolvent:—Held, that the children having benefited to the full value of the shares, or more, and having made no offer of restitution of such benefit, had no claim against the transferor, or against the company itself, to recover the shares or their value (Arts. 1011, 1139, 1144 C.C.).

Acer v. Percy, 24 Que. S.C. 378 (Trenholme, J.).

—Tutor — Opposing interests — Tutor ad hoc.]—If a minor has interests opposed to those of his tutor, a tutor ad hoc may be appointed for him in the district in which the property affected is situated and where the original tutor was appointed, and that although, since such appointment, the tutor and minor had gone to reside elsewhere.

Trappier v. Birabin, 6 Que. P.R. 103 (Rochon, J.).

—Minor—Appointment of curator—Absence of advice from the family council.]—Where a family council has been duly summoned, to advise as to the appointment of a curator to an emancipated minor, to assist her in a suit about to be instituted against her, and the council refuses to tender any advice to the Judge as to the appointment, the Court is bound to appoint a curator notwithstanding the absence of such advice.

Ex parte Wood, 24 Que. S.C. 277 (Fortin, J.).

—Infant, custody of—Right of mother of illegitimate child.]—Although the mother of an illegitimate child has prima facie a right to his custody, notwithstanding any agreement she may have made to the contrary, yet the Court has a discretion to refuse to accede to her wishes if it is shown or appears to be likely that it would be detrimental to the best interests of the child to return him to her control. Under the circumstances set forth in the judgment, it was held that such discretion should be exercised by leaving the child where the mother had originally placed him.

Re Slater, 14 Man. R. 523 (Bain, J.).

—Boy of nine years — Contributory negligence.] — See RAILWAYS.

Tabb v. Grand Trunk, 8 O.L.R. 203.

—Obligations of parent.] — See PARENT AND CHILD.

—Appointment of curator—Refusal of family council to advise.]—If the family council, duly summoned, refuses to give advice on the opportunity of having a curator appointed to an emancipated minor, the Judge or Court may make such appointment.

Ex parte Wood, 6 Que. P.R. 70 (Fortin, J.).

—Habeas corpus — Infant—Custody.]—The interest of a child of tender age should be the only consideration for the Judge in a matter of habeas corpus for his custody, and it is not necessary to allege in the petition the desire of the child who is too young to express it himself.

Bleau v. Petit, 6 Que. P.R. 353 (Sup. Ct.).

—Child of tender years—Removal from legal custody—Habeas corpus.]—1. In the case of a minor of tender years unauthorized removal from legal custody is equivalent to confinement and restraint; 2. Our Courts will entertain a petition for habeas corpus by a non-domiciled against parties detaining his child within the jurisdiction, where by the decree of a foreign Court of competent jurisdiction the guardianship and possession of said child have been given to the petitioner and the Court is otherwise satisfied that said measure is for the future welfare of the child.

Lorenz v. Lorenz, 7 Que. P. R. 186 (Davidson, J.).

—Costs—Action by infant.]—Where an action is dismissed on the ground that the plaintiff is a minor he may be ordered to pay the costs.

St. Laurent v. Fortier, Q.R. 26 S.C. 463 (Sup. Ct.).

—Maintenance—Contingent legacies — Interest as maintenance.] — A testator bequeathed to his two infant sons $4,000 each, contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate:—Held, affirming the decision of Street, J., reported 7 O.L.R. 548, that these legacies carried interest from the death of the testator, and that a certain sum should be paid annually out of such interest to their mother for the purposes of their maintenance, and the executors should set apart the full amount of $8,000 to provide for the payment of such legacies at the time provided, but that the question of the proper amount to be allowed, having regard to the income from the infants' shares in the residue should be now settled by the Master unless otherwise agreed upon. In such cases the amount to be allowed for maintenance must be governed by a consideration of the other circumstances, and a due regard to such other sources or funds as may be properly resorted to for such purpose.

Re McIntyre and London and Western Trusts Company, 9 O.L.R. 408.

—Master and servant—Dangerous machinery—Minor — Admission.]—An employer is at fault when he puts a young workman at a planing machine without providing the necessary appliances for covering the knife and protecting the hand of the workman which is liable at any time to slip and fall on the knife; therefore the employer will be liable to the workman for the loss of his fingers cut off in such a manner if he was engaged at the time in work assigned to him by his employer. The admission of the workman, a minor, as to the manner in which he sustained personal injury while operating dangerous machinery for his employer binds him and may be used against him.

Desrosiers v. St. Lawrence Furniture Co., Q.R. 26 S.C. 535, (Sup. Ct.). Affirmed on Review, 28 February 1905.

—Minor—Industrial school.]—A writ of habeas corpus may issue for the release of a minor detained in an industrial school, when the order for his detention, signed by the Recorder, was not demanded by the Mayor as provided by Art. 3140 R.S.O.

Avon v. Ladies of the Good Shepherd's Asylum, 7 Que. P.R. 207 (Sup. Ct.).

—Action by tutor.]—An action on behalf of a minor must be brought by and in the name of his tutor, and an action brought by one who alleges that he claims as trustee on behalf of a minor certain property alleged to belong to the minor, will be dismissed on defence en droit.

Binmore v. Sovereign Bank, 7 Que. P.R. 171.

—Next friend out of jurisdiction—Security for costs.]—Where an infant, and his father, who sues on his behalf as next friend, reside out of the Province, either security for costs must be given, or a next friend within the jurisdiction appointed.

McBain v. Waterloo Manufacturing Company, 8 O.L.R. 620, M.C.

—Avoidance of bill of sale given to secure loan — Action for conversion of goods.]—Defendant advanced to plaintiff, who, to his knowledge, was an infant under the age of 21 years, a sum of money to be employed in the purchase of a horse, taking as security for the loan a bill of sale, which was properly executed and filed in the office af the Registrar of Deeds. Defendant, hearing that plaintiff was about to sell the horse, took possession under the bill of sale and sold to a third party:—Held, affirming

the judgment of the County Court Judge, that plaintiff was entitled to recover in an action for conversion; that the repudiation of the bill of sale by the infant avoided it, and that defendant had no protection under it for the act which he committed. Also, that the ownership of a horse by one in plaintiff's circumstances did not come within the term "necessaries." Also, that the fact that plaintiff stood by and allowed the horse to be sold without objection did not assist defendant, as an infant could no more estop himself by conduct of this sort than he could contract. Also, the trial Judge having deprived plaintiff of costs, on the ground that he had sworn falsely during the course of the trial, that his discretion in this particular should not be interfered with.

Meyers v. Blackburn, 38 N.S.R. 50.

—Agreement for custody of child.]—Section 2 of the Imperial Act, 36 Vict. c. 12, passed subsequent to the 15th July, 1870, is not in force in the Territories. Under the common law a contract by which a father surrendered the custody of his children was against the policy of the law, and the plaintiff relying entirely upon such a contract could not succeed in an action against her husband, to obtain the custody of their infant daughter.

Barrett v. Barrett (N.W.T.), 4 W.L.R. 7.

—Habeas corpus — Parental authority — Power of discipline and confinement over child.]—(1) A minor has a right to petition foro habeas corpus. (2) Paternal authority over a child as to discipline and the choice of a school or institution in which to educate, or even temporarily confine it, is absolute and the Courts will not interfere with it by habeas corpus.

Macdonald and Macdonald, 14 Que. K.B. 330 (Hall, J.).

—Contract by minor — Engagement of personal service.] — A minor may legally enter into a contract of engagement for personal services without the assistance of his tutor, father or mother, in such a case the minor has recourse only in the case of lesion. An application for a writ of certiorari, in such a case, which does not allege or make proof of lesion must be dismissed.

Verrier v. Mulvena, 7 Que. P.R. 414 (Lemieux, J.).

—Custody — Rights of father — Fitness — Religious faith.] — Upon an application by the father of a girl of eleven years for an order against the maternal grandmother for delivery of custody, it was shown that the mother of the child was dead, that the child had lived with the grandmother since she was three years old, and had been brought up as a Protestant, while the father had become a Roman Catholic and desired to educate the child in that faith:—Held, upon the evidence, that the applicant was not an unfit person to have the custody of his daughter; that there was no agreement that the child should remain with the grandmother always or until her death, and the father had not abandoned his parental rights; that the child herself had no serious religious convictions; that she would have a better home and a better education in her father's house than with her grandmother; that it would be for her advantage to be brought up in the same home with her only brother; and that no case had been made out which would justify a refusal to give effect to the father's right to the custody of his child. While the welfare of the infant is in one sense paramount, the paternal right to custody and control is supreme, unless a very extreme case can be made out showing that it is imperative for the protection of the child that the Court should interfere with that right. The reluctance of the Court to separate brothers and sisters is very great. It is the duty of the Court to enforce the wishes of the father as to the religious education of his children, unless there is strong reason for disregarding them. The Court has jurisdiction to interfere, even against the father's wishes, to prevent the religious convictions of his child being interfered with; but the circumstances must be such as to satisfy the Court that there has been an abandonment or abdication of the paternal right, or at least that the training of the child has imbued it with such deep religious convictions that to disturb them would be clearly dangerous to its moral welfare. The Children's Protection Act, R.S.O. 1897, c. 259, has no application to the case of a child situated as this one was.

Re Faulds, 12 O.L.R. 243 (D.C.).

— Custody of minor child — Removal from legal custody — Right of minor to choose guardian.] — (1) The unauthorized removal of a minor of tender years from legal custody is equivalent to confinement and restraint of liberty, and habeas corpus will lie to restore it to its proper guardians. (2) A girl of nine years of age is too young to exercise a controlling right of choice between her father and mother who live apart, and it lies within the discretion of the Judge to hand her over to whichever of the parents he thinks it best in her interest.

Lorenz v. Lorenz, 28 Que. S.C. 330 (Davidson, J.).

— Guardian — Married woman.] — A married woman will not be appointed sole guardian of the person and estate of an infant in New Brunswick.

Re Freeze, 3 N.B. Eq. 172.

— Guardian — Removal.] — It is a ground for the removal of the guardian of the

persons of infant children that he has removed out of the jurisdiction of the Court.

Re Lawton Infants, 3 N.B. Eq. 279.

— Liability of father for infant's tort — Possession as evidence of title.] — A father is not liable for negligence in allowing his fourteen-year-old son to go out alone with a gun to shoot game, if the boy has been carefully trained in the use of a gun and ordinarily exercises great care in handling it; but the son will be liable in damages for the consequences of carelessness in firing the gun so as to start a prairie fire which destroys the plaintiff's property. Part of the plaintiff's claim was for the loss of a stable on land which he had agreed to sell. The stable had been placed on the land by the purchaser, but the plaintiff had taken possession of the stable and was using it at the time of the fire:—Held, that the plaintiff's possession of the stable was evidence of title as against a wrongdoer, and that the defendant could not rely on the purchaser's rights as against the plaintiff, but was liable to the plaintiff for the value of the stable as well as of the other property destroyed by the fire.

Turner v. Snider, 16 Man. R. 79 (Richards, J.).

— Loan to minors — Purpose of loan — Payment of debt to tutor — Petition for authorization.] — A contract of loan to minors for the purpose of paying a debt due by them to their tutor, effected with the authorization of the prothonotary on the petition of the tutor, but without their separate representation by a tutor ad hoc, is null and void.

Hyde v. Mount, 28 Que. S.C. 385 (Doherty, J.).

—Infant's lands — Ejectment by guardians — Appointment by Probate Court.] — In an action of ejectment the plaintiffs claimed title as the guardians of infants appointed by the Probate Court. At the time the action was brought the infants, who were each over fourteen years of age, were living with the defendant who occupied the premises in question with their consent and approval:—Held, that the defendant could not set up as a defence, that on equitable grounds he was entitled to possession for the infants as against the plaintiffs, and that the plaintiffs had no title, the Probate Court having acted without jurisdiction in appointing them guardians.

Furlotte v. Lapoint, 38 N.B.R. 140.

— Action against, for price of goods — Acknowledgment — Ratification — Repudiation.] — Held, affirming the judgment of Riddell, J., 14 O.L.R. 532, that the letter relied upon by the plaintiffs as a ratification, after majority, of the defendant's contract made when he was an infant, was not sufficient; but, in this reversing the judgment, that the defendant was liable for the value of the goods which he had in possession at the time he repudiated the contract; and the plaintiffs were allowed to amend by setting up an alternative claim for such value, and to enter judgment for the amount thereof without costs.

Louden Manufacturing Co. v. Milmine, 15 O.L.R. 53 (D.C.).

— Family council.] — When it does not appear that the emancipation of a minor for the present would be of any practical benefit to him, such emancipation, granted by a family council out of Court will be set aside.

Ex parte Désy, 8 Que. P.R. 347.

—Tutor — Movables — Minor residing out of province.] — A second tutor will not be appointed for custody of the movable property in the Province of Quebec of a minor domiciled in Ontario, who is already provided with a tutor or guardian under the provisions of the law of that province.

Ex parte Charette, 8 Que. P.R. 353.

—Liability of father for damage done by infant son.] — When in an action against a father to recover compensation for injuries caused by his infant son there is proof that such injuries were the result of accident, without any malicious intention, while the child was playing with the victim, an habitual playmate, within sight of the latter's mother at a time when his parents had reason to believe that he was sufficiently under surveillance, and also that this infant child, though turbulent, had no evil propensities and had been brought up in a proper manner, such evidence suffices to establish that the father, defendant, could not have prevented the act complained of and, therefore, to relieve him of liability.

Deschamps v. Berthiaume, Q.R. 30 S.C. 135 (Ct. Rev.).

—Property of minor — Order for sale — Domicile.] — When property bequeathed to minors is situated in one district and the minors reside in another the petition for authority to sell it should be presented to the Superior Court of the district in which the minors reside.

Ex parte Sasseville, 8 Que. P.R. 368 (Fortin, J.).

—Default judgment — Defendant an infant.] — A judgment recovered in default of appearance against an infant before a guardian has been appointed under Rule 88 of the Judicature Ordinance, will be set aside even if the plaintiff was not aware of the infancy of the defendant.

Westaway v. Hamer, 1 Sask. R. 50.

—Guardianship — Family arrangement — Public policy.] — Where a widow, whose husband left no estate, agrees to give up her natural right of guardianship over her

daughter and transfer the same to the latter's grandfather who, on his part, agrees to educate her, provide for her afterwards and allow as full intercourse as possible between her and her mother, the fact that the arrangement includes an allowance to the mother for her maintenance does not necessarily make it void as against public policy.

Chisholm v. Chisholm, 39 Can. S.C.R. 115.

—Minor domiciled out of province—Action against minor — Refusal to accept charge.] —A tutor may be appointed by proceedings in the Province of Quebec to minors domiciled in Ontario if said minors have property in Quebec. A tutelle to property or special tutelle cannot be created for the sole purpose of suing a minor when a tutor has already been appointed as it is always on the tutor properly so-called and not on a pro-tutor that the action must be served. The person appointed tutor to property can refuse to accept the charge and ask to have the order set aside by petition to quash without resorting to an appeal.

Boucher v. Boucher, 9 Que. P.R. 296 (Ct. Rev.).

— Judgment by default against — Execution — False imprisonment.] — An execution issued out of a magistrate's Court on a judgment by default against an infant on his promissory note is a good answer to an action for false imprisonment under the execution. An infant can not maintain trespass for taking property held by him under a contract of sale with the defendant which stipulated that the property should not pass until payment, where there has been a default in payment of part of the purchase money.

McGaw v. Fisk, 38 N.B.R. 354.

— Nomination of guardian or tutor.] — A tutor aux biens assimilates to a tutor ad hoc and cannot be appointed unless there exists a tutor to the person.

Cullen v. Daly, 9 Que. P.R. 404.

— Custody of child — Father contracting himself out of rights — Illegality.] — An agreement between a husband and wife whereby the former contracts himself out of his right to the custody of the children of the marriage is against the policy of the law, and will not be enforced.

Barrett v. Barrett, 6 Terr. L.R. 274.

—Custody — Proceedings for — Irregularity — Writ of habeas corpus.] — An application for the custody of an infant must be by way of motion, summons or petition. Where the only relief sought in an action commenced by writ of summons was the issue of a writ of habeas corpus, the action was, on application by the defendant, dismissed.

Gray v. Balkwell, 6 Terr. L.R. 283.

—Tutor — Action in forma pauperis.] — A tutor is under no obligation to disburse his own monies in an action on behalf of his pupil; he will be granted leave to sue in forma pauperis if the latter has not the necessary funds.

Bell v. Montreal Lithographing Co., 9 Que. P.R. 90 (Sup. Ct.).

—Habeas corpus — Custody of child.]—The custody of a child eight years old will be given to the father a sober workman capable of bringing him up properly even though the father had previously entrusted him to the care of another person, who was, moreover, dissipated, quarrelsome and a subject of scandal.

Proulx v. Proulx, 10 Que. P.R. 131.

—Tutor—Domicile—Appointment of second tutor.] — The appointment of a father as tutor of his infant children though they may all be domiciled out of the province is valid. The appointment of a tutor to the property of infants, who are already provided with one and who have no property in the district where such appointment is made is a nullity.

Boucher v. Boucher, Q.R. 34 S.C. 215.

—Domicile — Minor—Action for damages.] —When a minor, through intervention of his tutor, sues in damages for the death of his father by negligence, the defendant cannot, by exception to the form, allege that the minor lives in a foreign country with his mother if it is proved that, at the time of the accident, the father resided in the city of Montreal with the intention of residing there permanently and bring his family there.

De Sambor v. Montreal Rolling Mills Co., 10 Que. P.R. 279.

—Purchase of goods — Repudiation.] — When an infant has, during his minority, expressly repudiated a contract for the purchase of goods, and abandoned possession, and there is no clear evidence of subsequent ratification after attaining majority:—Held, reversing 1 Alta. R. 11, that the contract is not binding; and the seller can recover neither the price nor the value of the goods. Loudon Manufacturing Co. v. Milmine, 14 O.L.R. 532, distinguished.

Great West Implement Co. v. Grams, 1 Alta. R. 411.

—Custody—Adoption—Rights of parent.]—The law of this province knows nothing of adoption; and an agreement by parents to deprive themselves of the custody of their child is not legally binding upon them. By R.S.O. 1897, c. 259, s. 12, where the parent of any child applies to the Court for an order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right

to the custody of the child, the Court may, in its discretion, decline to make the order:—Held, that "abandoned" and "deserted" involve a wilful omission to take charge of the child, or some mode of dealing with it calculated to leave it without proper care; and leaving a child with those who had contracted to take proper care of it could not be called "abandonment" or "desertion," nor could the subsequent act of giving up all claim to the child. Therefore, where the parents of an infant placed her in charge of a stranger, agreeing to pay for her maintenance, and afterwards signed an agreement to give up all claim to the child, an order was made, upon the father's application, for delivery of the child to him, upon an undertaking to pay to the person who had assumed to adopt the child the expense incurred by that person.

Re Davis, 18 O.L.R. 384.

—Tutor — Domicile.] — When the tutor of a minor has his domicile in another district than that in which the minor resides with his mother and stepfather the Court having jurisdiction over the tutor can, on his reaching the age of seventy years (Art. 274 C.C.) appoint another to replace him.

Lacasse v. Hardy, Q.R. 34 S.C. 247.

—Contract — Fraudulent representation as to age.] — Unless for necessaries, the contract of an infant is not binding on him, nor is he liable for a fraudulent representation that he is of full age whereby the plaintiff is induced to contract with him; and he is entitled to plead infancy in order to escape from a contract procured by his fraud when an infant. The defendant, being the father of an illegitimate child, entered into a contract with the child's mother, the plaintiff, to pay for its maintenance. The plaintiff's solicitor, before the defendant executed the agreement, inquired of the defendant whether he was of full age, informing him that if he was not, an affidavit of affiliation, already sworn to by the plaintiff, would be filed in order to preserve her rights under the statute. The defendant falsely assured the solicitor that he was of full age, and executed the agreement; and, in consequence of the representation, the solicitor did not file the affidavit; and, the time for filing it having expired, the plaintiff sued upon the contract:—Held, that the defendant obtained nothing under the contract; the benefit accruing to him from the non-filing of the affidavit was not obtained as a term of the contract; but because of his fraudulent conduct dehors the contract; and the plaintiff was not, therefore, entitled to equitable relief; nor was the defendant estopped by his fraud from pleading infancy.

Jewell v. Broad, 19 O.L.R. 1.

—Custody of — Children's Protection Act—Religious persuasion of parent—Order of magistrate awarding custody — Change of such order.] — A magistrate made an order under the provisions of the Children's Protection Act of British Columbia awarding the custody of an infant to the Children's Aid Society of Vancouver, an undenominational society, but, upon further evidence being submitted, made a second order committing the child to the care of the Children's Aid Society of Our Lady of the Holy Rosary, a Roman Catholic institution:—Held, on appeal, that the magistrate had power to make the second order in the circumstances.

In re Howard, 14 B.C.R. 307.

—Sale of land — Tutrix — Married woman —Creditors.] — The declaration by a married woman tutrix to her infant children that an immovable sold to her had been paid for by their money and is their property is equivalent to alienation and, if made without authority from her husband is a radical nullity. It is also without effect as against creditors of real rights, duly registered, in the immovable notwithstanding that the property was accepted for the minors by a tutor judicially authorized on advice of a family council.

Martin v. Hébert, Q.R. 35 S.C. 148.

—Tutor—Acquisition of minor's property.] —The prohibition in Art. 390 C.C. against a tutor purchasing or leasing under rent the property of the minor is absolute, and the appointment of a tutor ad hoc, the approval of a family council and its homologation by the prothonotary in order to effectuate the location of the minor's immovable in the tutor and the lease prepared for the purpose are all radically null.

Bélanger v. Beauchamp, Q.R. 36 S.C. 1.

—Contributory negligence—Common fault —Measure of damages.] — The negligence of the victim which contributes to an accident becomes a fortuitous event when such victim is an infant too young to know the consequences of his actions. It is taken into account in the same way as common fault in assessing the damages. Thus, when a child three years old was injured by a tram car through his own fault combined with that of the motorman who was not looking ahead at the moment, and did not see the child in time to apply the brakes the damages should be divided and the company only can demand for half. (See Winnipeg Elec. Ry. Co. v. Wald, 41 Can. S.C.R. 431, and cases there cited.) In awarding damages in a case of the civil liability provided for by Art. 1053 C.C. the Court should have regard to the gravity of the fault and apportion them accordingly. Cf. Parker v. Corp. of Hatley, Q.R. 33 S.C. 520.

Champagne v. Montreal Street Railway Co., Q.R. 35 S.C. 507.

INJUNCTION.

Motion to commit for contempt—Injunction till certain date or disposition of motion to continue.]—Plaintiffs applied for and obtained an interim injunction order restraining the defendants from, among other things, interfering with the crop on certain land "until the 27th day of September or until the disposition of the motion to continue the same." With this injunction was granted a summons, returnable on the 24th day of September, to continue the injunction until the trial of the action. The order and summons were served on the defendant personally, and he retained a solicitor to appear and oppose the motion, which the solicitor did. An order was, however, on the 25th of September, made to continue the injunction. The order was served on the defendant's solicitor on the 16th of October, and on the defendant on the 21st of October. In the meantime the defendant, on the 20th of October, went to the land in question, and, finding the plaintiff's servants gathering the crop, drove them off and removed it himself. The plaintiffs then moved to commit him for contempt, and an order for committal was made. The defendant appealed, contending that the order was made in error (a) because he had not received notice of the injunction, and (b) that there was no evidence that the crop removed was the crop grown in the year 1909, which he was enjoined from removing. Per Lamont, J.:—The plaintiffs, to secure committal for breach, must show beyond a reasonable doubt that the defendant knew of the existence of the injunction when he committed the breach, and the facts in this case were not sufficient to charge the defendant with such notice. 2. That, involving as it does the liberty of the subject, the plaintiff in this motion should establish strictly the breach complained of, and the Court should not infer from the facts that the crop removed was the crop which the defendant was enjoined from removing, but such facts should have been affirmatively established. The material filed on the motion to commit showed that the affidavits in support thereof were not actually filed until after the order for committal was made: —Held, per Johnstone, J., that a motion of the kind involving the liberty of the subject is strictissimi juris, and as the strict practice requires that all affidavits for use on a motion be filed before the hearing, the order should not have been made, and should now be set aside, notwithstanding that no objection was made on this ground.

Moose Mountain Lumber and Hardware Co. v. Paradis, 3 Sask. R. 312.

Defamation—Libel — Injunction.]— The Court cannot grant an interim injunction restraining the publication of libels generally. The most that can properly be asked for in any case is an injunction restraining further publication of particular libels.

Natural Resources v. Saturday Night, 2 O.W.N. 9, 16 O.W.R. 927.

Interim order — "Just and convenient"—Distress for rent—Remedy by replevin.]—Before the Judicature Act, when a tenant desired to dispute his landlord's right to distrain, his only remedy, if he desired to prevent a sale, was to replevy the goods; he could not resort to equity for an injunction. And even since the Judicature Act, although the Court has the power, by s. 58 (9), to grant an injunction when "just and convenient," it will only do so when formerly the Court of Chancery would have done so. Shaw v. Earl of Jersey (1879), 4 C.P.D. 120, and Walsh v. Lonsdale (1882), 21 Ch. D. 9, are not now to be regarded as authoritative upon the right to an injunction. North London R.W. Co. v. Great Northern R.W. Co. (1883), 11 Q.B.D. 30, and Kitts v. Moore, [1895] 1 Q.B. 253, specially referred to. Of the grounds stated for continuing an interim injunction restraining a landlord from proceeding with a distress, the first depended upon a disputed question of fact, the second was as to an omission which the landlord could remedy, and the third rested upon a legal proposition which was not clear or indisputable:—Held, that in these circumstances, it would not be "just and convenient" to grant an injunction and deprive the landlord of his security, unless some other equally good were substituted; replevin was a cheaper, more just, and more convenient remedy. Quære, whether there is a right to distrain when the rent is not payable at a time certain.

Neal v. Rogers, 22 O.L.R. 588.

—Restraining public corporation — Statutory trust — Interference with public utilities.]—An injunction will not lie to restrain a public corporation, such as the Harbour Commissioners of Montreal, from carrying on statutory works in discharge of their trust, even though such works should interfere with, or obstruct, the operation of a public utility (v.g., drainage) by the municipality in which they are performed. More particularly will such be the case, if it be made to appear that any immediate danger of ill consequences is obviated by the consent of the commissioners to allow the municipality to operate the utility (v.g., to extend its sewers), through their works, in any manner approved of by their engineers.

Town of Maisonneuve v. Harbour Commissioners of Montreal, 39 Que. S.C. 36.

—Balance of convenience — Restraint of trade.]—

Covert v. Lewis, 1 E.L.R. 319 (N.S.).

—Sale by sheriff—Withdrawal by execution creditor.]—

Silver v. Rudolf, 1 E.L.R. 138 (N.S.).

—Building wharf—Mandatory order.]—
Huntley v. Jeffers, 1 E.L.R. 434 (N.S.).

—Sheriff's title — Adverse claimant — Balance of convenience.]—
Kaulbach v. Boylan, 1 E.L.R. 136 (N.S.).

—Application for interim order — Mining operations—Injury to neighbouring claim.]
Galligher v. Bonanza Creek Gold Mining Co., 6 W.L.R. 142 (Y.T.).

—Restraining payment of money — Dissolving injunction—Costs—Indemnity.]—
Townshend v. Coleman, 2 E.L.R. 276 (N. S.).

—Disobedience by defendant during the appeal.]—When plaintiff has obtained the injunction asked for, and an appeal is pending, he cannot ask for a new interlocutory injunction, if the defendant infringes or refuses to obey the judgment, pending the appeal; his remedy is pointed out in article 971 C.P.
Standard Sanitary Manufacturing Co. v. Standard Ideal Co., 11 Que. P.R. 100.

—Injunction—Contract to play hockey—Breach of contract.]—The breach of a contract to render personal services to another will not be enjoined except when the services are of such a special, unique or unusual character that their loss cannot be reasonably compensated for in damages. So an injunction will not be granted against a hockey player for breach of contract, if he is not a player of such prominence that he could not be replaced by other players equally as expert in hockey as himself.
Pitre v. National Athletic Association, 11 Que. P.R. 336.

—Interlocutory injunction—Blasting operations.]—It is not necessary to issue a writ of summons in the province of Quebec before applying for an interlocutory injunction. 2. An interlocutory injunction will be granted to enjoin the respondent from so conducting his blasting operations as to allow rocks and stones to be hurled on petitioner's property.
Rhéaume v. Stuart, 11 Que. P.R. 434.

—Motion to continue—Withholding material facts.]—Plaintiff obtained an interim injunction restraining defendant from dealing with certain land, and by the order leave was given the plaintiff to move on notice on a certain day to continue the injunction. On the motion it appeared that the plaintiff had previously filed a caveat against the land in question, but the right set out in the caveat and that in the statement of claim were not identical. This fact did not appear in the material on which the injunction was obtained. It was objected that the application to continue could only be made by summons, and that the injunction should be dissolved, on account of suppression of material facts:—Held, that when leave is reserved in the order granting an injunction to move by way of notice to continue it, a motion to continue may properly be entertained upon notice. 2. That, while withholding of a material fact on an ex parte application for an interim injunction may be ground for refusing to continue it, still it is a matter in the discretion of the Court, and the fact here alleged to have been withheld did not so affect the case as to justify refusal to continue the injunction.
Bashford v. Bott, 2 Sask. R. 461.

—Disobedience—Contempt of Court—Leave to appeal.]—Defendant had been committed to prison for contempt of Court by disobeying an order forbidding him to interfere with the crop on certain lands. He applied for leave to appeal from the order of commitment:—Held, that while in a case of wilful disobedience the Court will not entertain any application on behalf of the person in contempt, yet, if there are any facts which might lead to a conclusion that he had not wilfully disobeyed the order, the Court will give leave to appeal from the order of commitment. 2. That disobedience of an order in a civil proceeding is not a criminal act so as to preclude any appeal in respect of the order for commitment.
Moose Mountain Lumber and Hardware Co. v. Paradis (No. 2), 2 Sask. R. 457.

—Restraining disposition of personal property—Fraudulent conveyance.]—Plaintiff claiming as creditor under a bond conditional upon delivery of certain grain to them, which, it was alleged, had not been done, brought action to set aside a conveyance of that grain. In the claim it was alleged that the plaintiff sued on behalf of all creditors of defendants, but it was not alleged that there were creditors other than plaintiff, nor was it alleged that defendants were insolvent. An injunction was obtained from the local Master restraining the party to whom the grain had been sold from disposing of same, and restraining the defendants from dealing with any securities given in respect of the purchase price thereof. There was no allegation in the claim that the plaintiff did not have an adequate remedy on the bond. On a motion to continue the injunction:—Held, that an injunction should not be granted to restrain actionable wrongs where there is an adequate remedy at law, and as there was nothing to indicate that the plaintiff had not an adequate remedy on the bond, the injunction should not be continued. 2. That a simple contract creditor, who has not obtained a judgment and issued execution thereon, cannot maintain an action to set aside a fraudulent con-

veyance unless he sue on behalf of all creditors. 3. To support such an action it should appear and be alleged that there are other creditors of the defendant.

Lankin v. Walker, 2 Sask. R. 453.

—Restraining order—Disobedience—Motion for attachment for contempt.]—An order was made in this action restraining the defendant from interfering with the crop on certain land until further order, and a summons was granted with the order calling on the defendant to appear and show cause why the injunction should not be continued until the trial of the action. A copy of this order was served upon the defendant personally, and he appeared by counsel on the return, and after hearing the injunction was continued until trial. The defendant afterwards entered on the land, drove off the plaintiffs' servants who were threshing the crop, and removed it. On a motion for attachment it was objected by the defendant that no memorandum under Rule 330 of the Judicature Ordinance was indorsed on the copy of the order served; that it did not appear that a copy of the original order was exhibited to the defendant when service was affected, and that, as the order continuing the injunction was made on the 25th of September and was not served until the 21st of October after this alleged contempt, there was undue delay on the part of the plaintiff:—Held, that it is not necessary to indorse the memorandum required by Rule 330 of the Judicature Ordinance on a restraining order, the provision only applying to mandatory orders. 2. While inclining to the opinion that it was necessary to exhibit the original order when making service, yet as it appeared that the defendant was aware of the terms of the injunction order, and as in such circumstances there may be a contempt without service, the objection was not a valid one. 3. That while the plaintiffs had been guilty of undue delay in serving the order continuing the injunction, yet, inasmuch as the original order restrained the defendant until further order it was the duty of the defendant to ascertain if the order was still in force before interfering with the property.

Moose Mountain Lumber and Hardware Co. v. Paradis, 2 Sask. R. 382.

—Acquiescence—Prejudice.]— An interlocutory injunction will be refused if it is proved that the applicant has authorized the commisssion of acts similar to those which he wishes to prevent. Nor will it be granted if it is likely to cause considerable damage to the public and to certain neighbouring municipalities and if it is not shown that the applicant will suffer prejudice if it is refused.

City of Montreal v. Montreal Street Ry. Co. 11 Que. P.R. 142.

Interlocutory injunction — Appeal from refusal to dissolve — Trial pending when appeal brought on to be heard.]—Where a motion to dissolve an interlocutory injunction has been refused and notice of appeal given before trial, but not brought on to be heard until after the trial has commenced, but not concluded, the Full Court refused to interfere, but ordered that the costs of the appeal should be costs in the cause.

Dunlop v. Haney, 7 B.C.R. 455.

—Municipality — Injunction against carrying out illegal contract — Ultra vires.] — The city of Winnipeg having by resolution of its council proposed to enter into a contract of purchase of certain land to be paid for in five yearly instalments, notwithstanding the provisions of s. 396 of the Municipal Act, R.S.M. c. 100, this action was brought by a ratepayer and a motion made for an injunction to prevent the proposed purchase. After several adjournments of the motion, and before it finally came on for hearing, a new arrangement was entered into so far varying the original proposition that the injunction was not pressed for on the argument, and the only question for decision was as to the disposition of the costs:—Held, following Hoole v. The Great Western Railway Co., (1867) L.R. 3 Ch. 262, that a suit for an injunction was proper in such a case and that the defendants should pay the costs. It is not necessary that such a suit should be brought in the name of the Attorney-General. Smith v. Raleigh (1882), 3 O.R. 405; and Wallace v. Orangeville (1884), 5 O.R. 37, followed.

Shrimpton v. City of Winnipeg, 13 Man. R. 211.

—Stay of proceedings—Order for security for costs.] — An order for security for costs made pursuant to Rule 1199, and issued according to Form 95, has the effect of staying all further proceedings until security is given; and while such order stands it is not competent for the plaintiff to proceed with a pending motion for an injunction against the defendant who has obtained the stay, but such motion should be enlarged till the security is perfected.

Weeks v. Underfeed Stoker Co. of America, 19 Ont. Pr. 299.

—Injunction against persons not parties to a suit.] — 1. Injunction proceedings can be taken against parties to a suit only. 2. Such suit may be instituted simultaneously with the application for the injunction. 3. The service of a petition or notice of any kind, without a writ, does not suffice to constitute the person upon whom such service is made a party to the suit.

Paradis v. Paradis, 19 Que. S.C. 375 (Andrews, J.).

—Leave to appeal — Interlocutory injunction.] — The judgment granting an interlocutory injunction does not fall under

Art. 46 C.P. and leave to appeal therefrom will not be granted.

Wright v. City of Hull, 4 Que. P.R. 52.

—Electric railway—Malice — Irreparable damage.]—The plaintiff had obtained the right to operate a line of electric railway in certain streets within the limits of the municipality defendant, under a by-law of the town council and under a contract passed between plaintiff and defendant. The defendant, by the contract, reserved the right to take possession of the streets used by the plaintiff, for the purpose of changing the level and the performance of other necessary work. It was acting under these powers when the work was stopped by a temporary injunction order: — Held (affirming the judgment of the Superior Court, Archibald, J.):—1. Where one of two parties to a contract is doing a thing which, by the terms of the contract, he has specially reserved the right to do, the other party to the contract is not entitled to an injunction to restrain the doing of the thing, on the ground that the work is proceeding in a way which inflicts more damage than would be caused if another method, more expensive, had been adopted. So, in the present case, the municipality defendant, which had granted certain powers to the plaintiff, but had reserved the right to take possession of the streets when necessary for road operations, was not bound to adopt a more lengthy and expensive though less injurious method of performing the work. 2. In order to obtain an injunction in such circumstances where there has been no invasion of a legal or equitable right, it must be established that irreparable injury will be caused if an injunction be not granted. 3. A temporary interruption of traffic and an injurious method of removing the rails, causing a damage in the nature of a pecuniary loss, do not constitute an irreparable injury. 4. Although difficulties had existed between the parties, and defendant may have derived satisfaction from the thought that the exercise of its rights would cause the plaintiff damage, yet malice alone does not open any right of action, where, as here, there was a real intention to accomplish the work, and defendant was acting within its right.

Montreal Park and Island Ry. v. Town of St. Louis, 17 Que. S.C. 545.

—Ex parte restraining order.]—An ex parte injunction order made by a local Judge restraining from certain acts must be obeyed until set aside.

LeBerry v. Braden, 7 B.C.R. 403.

—Infringing trade mark.] — See TRADE MARK.

—Interim injunction — Bail — Time for proceeding.] — Where a party has obtained an interim injunction on the condition of furnishing bail, the Court may, by a subsequent judgment, fix the time within which such bail shall be furnished, on pain of nullity of the injunction granted.

Moore v. Bullock, 5 Que. P.R. 464.

—Discretion of Court of first instance as to refusal.] — Although the Court of King's Bench sitting in appeal has power to overrule the discretion exercised by the Court of First Instance in refusing a petition for an interim injunction, it is a power which will be used only in an extreme case, where the right of the petitioner is clear and unmistakeable, and where there has been manifest error in refusing his application.

The South Shore Railway Company v. Grand Trunk Railway Company, 12 Que. K.B. 28.

—Breach of contract to sell bricks to plaintiff only — Remedy by action for damages.] —Appeals from orders restraining defendants until the trial from delivering bricks manufactured by them except in accordance with the terms of a contract between the plaintiff and the defendants and other brick manufacturers who had severally agreed to sell to the plaintiff the outputs of their respective brickyards for the present season and not to sell any of such bricks to any one else. The contract recited that the plaintiff, in conjunction with others, was forming a company to be incorporated and that the plaintiff was desirous of purchasing the bricks for the benefit of the proposed company, and set out the intention of the plaintiff to assign all his interest in the contract to the company upon its incorporation, and stipulated that, upon such assignment, the company should be substituted for the plaintiff in the contract, and the evidence showed that the defendants did not intend to enter into such an agreement for the benefit of the plaintiff and his associates personally, but that the formation of the company and its interest in the proposed purchases were material parts of the arrangements. The orders had been only formally made, without argument, to facilitate the appeals, upon the understanding between counsel for all parties and the Court that they were not to be taken as made in the exercise of a judicial discretion, but were to be fully open to appeal on all points, as it was admitted that the trials of the actions could not, in the ordinary course, take place till after a great part of the brick-making season would have elapsed and the continuance of the injunctions would have been equivalent to granting orders for actual specific performance of the contract during that period. The statement of claim in each case alleged that, relying upon the contract and upon the supply of bricks under it, the plaintiff, together with others, entered into a number of building contracts requiring the use of bricks, that the plaintiff would require for the purposes of his business during the

present year all the bricks called for by the said contract, that the plaintiff and the said company were tendering for and expected to obtain a large number of other building contracts requiring bricks, that the plaintiff expected to sell bricks to other builders at a profit, and that, unless the defendants supplied the bricks called for by the contract, it would be impossible for the plaintiff to get bricks in time to carry out these contracts, or to complete the works in the manner and within the time mentioned in said contracts. The evidence adduced supported these statements in the main, but did not show that the contracts referred to had been made for the benefit or on behalf of the company, or that the company had acquired any interest or incurred any liability in respect of them. Held, that the plaintiff should, under the circumstances, be left to his claim for damages, if any arising from the alleged breach of the contract and that the injunctions should be dissolved.

Cass v. Coutre, 14 Man. R. 458 (Killam, C.J., Dubuc and Richards, JJ.).

—Damage to building caused by blasting operations on adjoining land—Non-disclosure of material facts.] — 1. When evidence is given to the satisfaction of the Judge that there is a strong probability of injury to the plaintiffs' building by the continuance of blasting operations for the loosening of frozen earth on adjoining land, it is proper, on motion to continue an ex parte injunction, to grant an interlocutory injunction restraining the contractor until the hearing of the action from carrying on such blasting in such a manner as to injure the plaintiffs' building, although there is no proof that any actual injury to such building has already resulted. 2. There is a discretion in the Judge on the hearing of such a motion to allow affidavits in reply which contain statements going merely to strengthen the original case; and, when an opportunity is given to the defence to answer the affidavits in reply, the Full Court on appeal will not interfere with such discretion. 3. The non-disclosure of material facts on the application for an ex parte injunction for a limited time, although a ground for discharging it, will not necessarily disentitle the plaintiffs to succeed on a motion to continue the expiring injunction when both sides present their cases fully, and the Court is not bound to specifically discharge the interim injunction or to award costs to the defendants. 4. An offer or suggestion on the part of the plaintiffs, before commencing the action, to accept a bond to secure them against damages caused by the operation complained of, even if distinctly proved, would not necessarily preclude them from claiming an injunction afterwards, though it would be a fact to be taken into consideration in determining whether a remedy by action for damages would not be adequate.

Miller v. Campbell, 14 Man. R. 437 (Killam, C.J., Dubuc and Richards, JJ.).

—Debtor disposing of property — Status of creditor—Verdict for damages—Fraud.] —The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment had been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the defendant enjoined from disposing of his property, even where the plaintiff shows upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property.

Burdett v. Fader, 6 O.L.R. 532, affirmed; 7 O.L.R. 72.

—Contempt of Court—Breach of injunction order.] — Where, in a suit for a declaration that the plaintiff and defendant were partners, the defendant, in breach of an interim injunction order, collected debts due the alleged firm, but which, subsequently to the service of a notice of motion for his commitment, he paid to the receiver in the suit, he was ordered to pay the costs of the motion.

Burden v. Howard (No. 2), 2 N.B. Eq. 531.

— Interlocutory injunction — Dismissal for want of security.]—An interlocutory injunction, subject to the giving of security within a certain delay, will be dissolved on motion if such security is not given.

Moon v. Bullock, 6 Que. P.R. 59 (Doherty, J.).

—Noise—Teaching music — Nuisance.] — Defendant hired rooms in a business part of the city, and gave lessons in music to a large number of pupils between the hours of 9 a.m. and 10 p.m. The plaintiff was an occupant of rooms on the opposite side of the hall, in the same building, taken by him subsequently:—Held, on the evidence, on a motion for an injunction, that the noise made in giving music lessons, to which objection was taken by plaintiff, was reasonably connected with and incidental to the teaching, and the defendant's use of the premises not an unreasonable one; that teaching music in such premises must, in order to afford ground for granting an injunction, be done in a manner which, beyond fair controversy, ought to be regarded as unreasonable; and that an injunction would break up defendant's business, while the plaintiff could be compensated in damages if entitled to recover. Injunction refused.

Pope v. Peate, 7 O.L.R. 207 (Britton, J.).

—Motion for return.] — Except under extraordinary circumstances a motion asking that a writ of injunction be ordered to be

returned into Court before the day fixed will not be granted.

Tétrault v. Corp. of Wickham, 6 Que. P. R. 157 (Choquette, J.).

—Special remedy by law.] — An injunction will not be granted when the law provides a special remedy for the injuries complained of.

Beauregard v. Corp. of Roxton Falls, 6 Que. P.R. 155 (Lynch, J.).

—Writ of summons — Service with interlocutory injunction.] — It is not necessary for the writ of summons to precede the request for an interlocutory injunction; it is sufficient if it is issued immediately after the injunction is granted, so that the two can be served together.

Wilder v. City of Quebec, Q.R. 25 S.C. 128 (Sup. Co.).

—Infringement of statute.]—See MINING.

—Possession of immovables — Art. 957 C.P. Q.]—An interlocutory injunction will not be granted to put the plaintiff in possession of land on which the defendant has agreed to construct buildings for the plaintiff if the possession of the land which defendant claims the right to retain is one of the objects of the pending action.

Canada Radiator Co. v. La Société Anozine de Construction, 6 Que. P.R. 354 (Sup. Ct.).

—Municipal by-law—Contestation.]—An interlocutory injunction may be granted to prevent the enforcement of municipal by-laws which, apparently in good faith, are being contested in pending proceedings.

Jodoin v. Village of Beloeil, 6 Que. P.R. 430 (Sup. Ct.).

—Interlocutory injunction—Costs.] — The costs of an interlocutory injunction will be taxed as of an action of the same class as the action to which the petition is incident.

Jodoin v. Beloeil, 7 Que. P.R. 222 (Davidson, J.).

—Interlocutory injunction — Suspension — Works commenced — C.P. 967.]—If works were commenced by a proprietor on premises leased, and subsequently stopped by injunction at the lessee's request, the injunction may be suspended if it is proved that the city, in virtue of its by-laws, would be obliged to terminate the work itself, if it remained unfinished.

Haycock v. Pacaud, 7 Que. P.R. 270 (Robidoux, J.).

—Prejudice of creditor—Varying injunction order — Title of cause in order.]—Where an ex parte injunction order restrained a trader, who had obtained goods from the plaintiff under an agreement that the property therein was to remain in them, with liberty to them to take possession, from, inter alia, making an assignment for the general benefit of his creditors, it was ordered to be discharged in that respect. It is not a ground for setting aside the service of an ex parte injunction order that the order is not entitled in the cause, where the defendant has not been misled.

Gault Brothers Company v. Morrell, 3 N.B. Eq. 123.

—Interlocutory injunction — Undertaking as to damages — Order for assessment.] —Claims for small damages by some defendants were ordered to be included in an order for assessment of damages of other defendants under an undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts the injunction was obtained to prevent from being done.

Wood v. LeBlanc, 3 N.B.Eq. 116.

—Interim injunction — Receiver — Balance of convenience — Incorporated company.]—An application to continue until trial an interim injunction granted ex parte, and to appoint a permanent receiver, was dismissed, where the plaintiff's right of action was not entirely free from doubt, and it appeared that the injury that would be occasioned to the defendants by the granting of the injunction and the appointment of a receiver, if the plaintiff ultimately failed, would be very great, while that which would result to the plaintiff by its refusal, if he ultimately succeeded, would be comparatively small. Application of this principle to an incorporated company.

Reynolds v. Urquhart, 5 Terr. L.R. 413 (Scott, J.).

—Price restrictive agreements—Interlocutory injunction—C.P. 957.] — An interlocutory injunction will be granted to enforce an agreement whereby the respondent purchased certain goods at a specified price, with the condition that he would not sell at less than a certain other price, which agreement he deliberately violated.

Ozone Co. v. Lyons, 7 Que. P.R. 65 (Robidoux, J.).

—Agreement with proviso as to damages for breach — Restraint of trade.]—(1) An injunction will not be granted to restrain a defendant from doing an act in breach of an agreement in which a sum is covenanted to be paid as liquidated damages in such a case. (2) A covenant "not to promote or aid in promoting, or carry on a trade or business for a period of three years," is null and void as being in restraint of trade and unlimited in space.

Hamilton Powder Co. v. Johnson, 28 Que. S.C. 450 (Taschereau, J.).

—Expulsion of member of association — Right of property.]—To give jurisdiction to the Court to interfere by way of an in-

junction to restrain the expulsion of a member of a club or association it must appear that he has some right of property therein. The right to use the club or association rooms, property and effects, on payment of a subscription, without any right to participate in the assets, if distribution ensued, is merely a personal one. The only remedy in such case, if the expulsion is wrongful or injurious, is by an action for damages. Where, therefore, an injunction was granted restraining a hockey association from expelling one of its members, whereby he would be debarred from playing in a specified game, there being no allegation or proof of his having paid any subscription, or that he had any right of property in the association, the injunction was set aside and the action therefor dismissed with costs.

Rowe v. Hewitt, 12 O.L.R. 13 (D.C.).

—Writ issued on petition — Time for service—Motion for costs.] — A party who has obtained the right to issue a writ of injunction upon a petition, has the same time for serving the writ that he would have had in the case of obtaining it de plano. (2) Before presentation of a motion for an adjudication as to costs reserved upon a petition for a writ of injunction, the defendant is obliged to proceed. under Art. 150 of the Code of Civil Procedure, to compel the plaintiff to serve the writ of injunction.

Gauvreau v. Hauterive, 7 Que. P.R. 483 (Fortin, J.).

—Jurisdiction of Judge on application.] — The Judge who grants an interlocutory injunction under Art. 957 C.P.Q., remains seized of the matter in issue until such time as the necessary bond for its execution has been furnished. Consequently, he can suspend its effect, re-hear the parties, allow a contestation and revoke the order. (2) Proceedings commenced before one Judge may be continued before another.

Wampole v. Lyons, Q.R. 14 K.B. 53.

—Suppression of material facts—Affidavit denying collusion.]—The rule that on an application for an ex parte injunction order a full and truthful disclosure must be made of all material facts, must be strictly observed. Where, in an interpleader suit, an ex parte injunction order was dissolved for suppression of material facts, leave was granted to move again for the order, together with the right to file an affidavit denying collusion.

Canadian Pacific Railway Company v. Nason, 3 N.B. Eq. 476.

—Discretion — Inconvenience.] — The injunction is a proceeding temporary and auxiliary to the main action and a Judge has discretionary power to grant or refuse it according to circumstances. He should consider, in the exercise of this power, any inconvenience which could result to either of the parties, or even to third persons, and when the issue of the writ may cause more harm to any of these than the refusal to issue it would to the applicant the demand should be refused.

La Société Anonyme des Théatres v. Lombard, Q.R. 15 K.B. 267.

—Requete civile.] — When an interim injunction was set aside on documentary evidence afterwards discovered to be false a requête civile asking that the judgment setting it aside be annulled will be granted and the parties will be restored to the position in which they were before the injunction was dissolved.

Yaphe v. Canadian Pac. Ry. Co., 8 Que. P.R. 383 (Mathieu, J.).

—Pending appeal — Application in High Court — Jurisdiction.] — In an action for a declaration that a partnership existed and for a dissolution and an account, in which judgment was obtained by the plaintiff, and in which an appeal to the Court of Appeal was pending, the usual security therefor having been given:—Held, that an application to a Judge of the High Court for an injunction to restrain the defendant from dealing with partnership moneys was "a further proceeding . . . other than the issue of the judgment or order and the taxation of costs thereunder," under Con. Rule 829, which a Judge of the High Court could not entertain.

Embree v. McCurdy, 14 O.L.R. 284 (Britton, J.).

—Cost of complying with order—Liability of plaintiff — Discontinuance of suit.] — A plaintiff, in an action of damages for a wrongful publication against the author of it, who obtains an interlocutory injunction ordering the publisher, mis en cause, but not as a joint tort-feasor, to suppress the publication, and who, having attained his object by the execution of the order, discontinues his suit and pays the costs, is further liable to the publisher for the expense of so complying with the injunction.

Bell Telephone Company v. Canada Asbestos Company, 29 Que. S.C. 104 (C.R.).

—Interim injunction restraining disposition of property before judgment — Extending statutory remedies — Fraudulent dispositions of property.]—Semble, per Richardson and Wetmore, JJ., that a plaintiff is not entitled before judgment to an interim injunction to restrain a disposition of property by a defendant. To obtain any relief of that nature before judgment, a plaintiff must make out a case within the statutory provisions dealing with garnishee and attachment proceedings:—Held, by the Court, that in this case the material was in any event insufficient and that no injunction should be granted upon it.

Pacific Investment Co. v. Swan, 3 Terr. L.R. 125.

—Appeal to—Stay of execution of injunction — Disobedience of injunction — Contempt of Court — Stay upon terms.] — The rule that a party to an action guilty of contempt can take no step, is subject to several exceptions, and one of these is that the party is entitled to prosecute an appeal from the order or judgment which it is alleged he has been guilty of disobeying. Upon an application by the defendants to a Judge of the Court of Appeal, under Con. Rule 827 (1) (d), for an order staying the execution of an injunction awarded by a judgment of the High Court, pending an appeal from that judgment to the Court of Appeal, where it is alleged that the defendants are in contempt for disobedience of the judgment, but they have not been so adjudged, the Judge will not determine whether a contempt has been committed. Where the defendants were appealing in good faith, execution of the injunction was stayed, upon terms, pending the disposition of the appeal.

Copeland-Chatterson Co. v. Business Systems, Limited, 14 O.L.R. 337.

—Copyright — No irreparable injury.]—An interlocutory injunction will not be granted in a copyright action when serious questions are raised in regard to the validity of the plaintiff's copyright and when the sale of the alleged infringement will not inflict such injury as cannot be cured by a final judgment.

Canada Newspaper Syndicate v. Montreal News Co., 9 Que. P.R. 78.

—Interlocutory motion — Costs.] — A motion for an interim injunction is an interlocutory motion or application and, although an appeal from an order granting it is taken to the Court of Appeal and there allowed with costs, such costs and all other costs of the action payable by the opposite party are limited to $300 and actual disbursements by s. 1 of the Act 7 & 8 Edw. VII. c. 12. S. 2 of the Act only applies to appeals to the Court of Appeal from the final disposition of an action or proceeding in the Court of King's Bench and therefore does not apply to an appeal from an order granting an interim injunction.

Traders Bank v. Wright, 17 Man. R. 695.

—Interlocutory injunction — Status quo.] —The object of the interlocutory injunction is to maintain the statum quo of the parties until otherwise ordered by the Court; the law does not authorize its issue to change the relations between the parties.

Houle v. Beaumier, 9 Que. P.R. 110 (Sup. Ct.).

— Interim injunction — Undertaking as to damages — Party applying non-resident.]—Held, that an applicant for an interlocutory injunction must in all cases as a condition of obtaining the injunction give an undertaking to be answerable in damages, and when the party so applying is a non-resident such undertaking must be given by his counsel personally, or by some responsible person within the jurisdiction.

Kent v. Clarke, 1 Sask. R. 146.

INJURIES.

—Assault.]—See ASSAULT.

—To employee.]—See MASTER AND SERVANT.

—On railway.]—See RAILWAY; ELECTRIC RAILWAY.

—By negligence.]—See NEGLIGENCE.

INLAND REVENUE.

Excise—Distillery—Grain in mashtubs.] —Revenue statutes are not to be construed strictly against the Crown and in favour of the subject, but are to be interpreted the same way as other statutes; and if on a proper construction of the statute the defendant in a proceeding by the Crown is liable, the Court has nothing to do with the hardship of the case. The duty must be assessed and levied on the quantity of grain so determined, in the proportion of one gallon of proof spirits to every twenty and four-tenths pounds of grain:—Held, that defendant R., having accepted his license with a knowledge of the provisions of the Inland Revenue Act was not entitled to relief from the method of assessment fixed thereby.

The King v. Robitaille, 12 Can. Exch. R. 264.

Illicit still — Jurisdiction of stipendiary magistrate to convict — Misdemeanour.] The defendant, in this case, was convicted for a like offence, committed at the same time, as that referred to in the case of The King v. Brennan, ante. In addition to the grounds relied on in the Brennan case, in support of the application to set aside the conviction, and for the prisoner's discharge, the further objection was taken that the jurisdiction of the magistrate, by s. 113, was limited to cases where the penalty, or forfeiture was not in excess of $500, whereas, reading ss. 124, 159 and 160 together, the penalty, in this case, would be in excess of that amount. Also, that, under the commitment, the prisoner was required to be detained until he paid a larger amount than he was adjudged to pay. It being admitted that there was a good conviction:—Held, that ss. 886, 896 of the Criminal Code applied, and that the

objections taken afforded no ground for the prisoner's discharge. Held, also, that calling the offence a misdemeanour would not affect the jurisdiction of the stipendiary magistrate, which was clearly given under the Inland Revenue Act, R.S.C. c. 34, s. 113. Held, also, following The Attorney-General v. Flint, 16 Can. S.C.R. 707, that the Dominion Parliament had power to create such a Court.

The King v. Kennedy, 35 N.S.R. 266, 6 Can. Cr. Cas. 29.

Responsibility — Revenue officer acting in good faith in the execution of his duty—Search.]—1. An officer of Inland Revenue, acting in good faith in the execution of his duty, and under competent authority, is not responsible in damages for entering a private house and making a search therein. 2. A writ of assistance, signed by a Judge of the Exchequer Court of Canada, as provided by the Inland Revenue Act, R.S.C. c. 34, s. 74, constitutes legal and sufficient authority for a search in a private residence. 3. Inquiries of, or consultations with, official or other persons in the neighbourhood, by a revenue officer with a view to obtaining information, are privileged. 4. The words "any building or other place," in the Inland Revenue Act, s. 75, include a private residence.

Duquenne v. Brabant, 25 Que. S.C. 451 (C.R.).

INNKEEPER.

See LIQUOR LICENSE; HOTELKEEPER.

INSANITY.

See LUNACY.

INSCRIPTION.

Inscription without production of copy of pleadings — Art. 295 C.P.]—The copy of pleadings required by C.P. 295 is for the use of the Judge alone, and where the Judge of the district had informed the advocates and prothonotary of that district that he did not require this copy, an inscription made without was held valid.

Menier v. Whiting, 18 Que. S.C. 113.

—Inscription ex parte—Consent—Attorney —Art. 115 C.C.P.]—When a party has appeared by an attorney ad litem the documents in the proceedings should be served on such attorney and the action inscribed on the merits ex parte. An inscription consented to by the opposite party personally and not served on his attorney ad litem will be struck out of the délibéré.

Gauvreau v. Laporté, 4 Que. P.R. 462 (Sup. Ct.).

—Insufficiency of details in an answer to plea — Inscription in law by defendant — Arts. 174, 191 C.P.]—(1) An inscription in law does not lie against an answer to plea in which the details are insufficient. An exception á la forme is the proper recourse. (2) An allegation of an answer to plea, insufficient in itself to dismiss the plea, but which tends to prove the truth of the plaintiff's action, will not be dismissed on an inscription in law.

Vipond v. Kilburn, 4 Que. P.R. 376 (Mathieu, J.).

—Inscription in law — Dilatory exception— Arts. 177, 191, 195, 200 C.P.]—(1) That a dilatory exception, and not an inscription in law, is the proper remedy to compel a party to optate between different paragraphs of his pleading. (2) That in a plea to an action in damages for slander, the words: "et qu'il dit á la prière de son curè," are irrelevant and in no wise constitute a legal justification in respect of an action of this nature, and on an inscription in law, will be struck from the plea, with costs.

Bourget v. Lefebvre, 4 Que. P.R. 328.

—Inscription for hearing — Delay — Art. 293 C.C.P.]—A document in the procedure of a case has value only from the day on which it is filed and made part of the record. An inscription for proof and hearing, made before the expiration of three days after issue joined, will be struck from the record on application by the opposite party.

Lachance v. Casault, 4 Que. P.R. 223 (Sup. Ct.).

—Accounting — Maladministration.]—See PRINCIPAL AND AGENT.

Blackwood v. Mussen, 4 Que. P.R. 432.

—Inscription in law—Reasons of demurrer not pleaded.]—In adjudication upon an inscription in law the Court will not consider any reasons other than those specified in the demurrer.

Marshall v. Macdougall, 5 Que. P.R. 186.

—Inscription en droit — Exhibits in evidence.] — The inscription en droit is directed to the failure of the facts alleged to primâ facié establish the claim and the documents put in evidence cannot be considered.

Lewis v. Cunningham, 7 Que. P.R. 238 (Sup. Ct.).

—Of appeal.]—See APPEAL.

INSOLVENCY.

See BANKRUPTCY.

INSPECTION.

Order for.]—See MINING.
Star Mining v. White, 9 B.C.R. 422.

—Of documents.]—See DISCOVERY.

INSURANCE.

I. FIRE.
II. LIFE.
III. ACCIDENT.
IV. SICK BENEFIT.
V. MARINE.
VI. EMPLOYERS' LIABILITY.
VII. CASUALTY.
VIII. FIDELITY.
IX. LIVE STOCK.

I. FIRE.

Seller's obligations respecting the property sold—Premium of insurance—Divisibility.]—A premium of insurance, though paid in advance, is a debt that accrues day by day during the period of insurance and, therefore, is divisible into as many parts as there are days during that period. Hence, a purchaser who agrees to discharge the obligations of his seller respecting the property sold, is bound to refund him the proportion of a premium of insurance for the current year, paid before the sale, which represents the number of days during which he, the purchaser, is owner by virtue of the sale.

Metrakos v. Thomas, 37 Que. S.C. 237.

—Condition in policy as to subsequent insurance—Consent of insurer.]—(1) A condition in a policy of fire insurance that the insurer will not be liable for loss if further and subsequent insurance on the same property is affected without his consent, express or implied from his not expressing dissent after notice, is binding, and a breach of it is a bar to a claim by the insured under the policy. (2) A representation in an application for insurance against fire, or a clause in the policy, that there exists concurrent insurance on the property insured, does not involve a warranty that such insurance is absolute and will be effective in case of loss. Hence, a party insured in two companies, under policies that lapse in case of subsequent insurance effected without their consent, who, in his application to a third one, declares that he has concurrent insurance, makes no false representation although his failure to obtain the consent of the two first companies to insurance with the third, should relieve them from liability in case of loss.

Stevenson v. North British & Mercantile Insurance Co., 38 Que. S.C. 350.

Statutory conditions — Gasoline on premises — Illuminating oils insured — Notice of loss.]—By the Manitoba "Fire Insurance Policy Act" (R.S.M. (1902) c. 87, sch.), an insurance company insuring against loss by fire is not liable "for loss or damage occurring while . . . gasoline . . . is stored or kept in the building insured or containing the property insured unless permission is given in writing by the company." Insurance was effected "on stock consisting chiefly of illuminating and lubricating oils, etc., and all other goods kept by them for sale." A quantity of gasoline was in the building containing the stock when destroyed by fire:—Held, that gasoline, being an illuminating oil, was part of the stock insured and the above statutory condition could not be invoked to defeat the policy. Held, per Anglin, J., that if gasoline was not insured as an illuminating oil it was within the description of "all other goods kept for sale." By s. 2 of the Act "where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with . . . or where from any other reason the Court or Judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions," the company shall not be discharged from liability. By statutory condition 13 (a) in the schedule to the Act every person entitled to make a claim "is forthwith after loss to give notice in writing to the company." Held, Fitzpatrick, C.J., dissenting, that the above clause applies to said condition and under it, in the circumstances of this case, the insurance should be held not to be forfeited by reason of the failure to give such notice. Judgment appealed from (19 Man. R. 720) reversed, Fitzpatrick C.J., dissenting.

Prairie City Oil Company v. Standard Mutual Fire Insurance Co., 44 Can. S.C.R. 40.

—Premises "occupied as a sporting house" —Public policy — Higher rate charged — Increased risk — Variation — Change in situation of insured building.]—Defendant company issued a fire insurance policy to H., loss, if any, to be payable to W. The latter assigned his interest to plaintiffs. The policy covering a building situated, detached, 100 feet from any other building, "while occupied as a sporting house." The rate charged for insurance on dwelling-houses in that locality was one per cent., while on the class of houses such as that in question the rate charged was two and a half per cent. After the issue of the policy a building was erected within 30 feet of the premises insured. It was provided in the policy that any change material to the risk should be communicated, in writing, to the local agent. The insured men-

tioned to the local agent the fact of the new building being put up, and was informed by him that it made no difference as he had charged a rate sufficient to cover the increased risk. There was also a provision that no agent could waive any condition in the policy, except by a document in writing, signed by him. On a claim arising under the policy, the company set up illegality on account of the premises being used for immoral or unlawful purposes, and also that the policy became void by reason of the construction of the new building and the omission to communicate the fact, in writing, to the local agent. At the trial an amendment was allowed making H., the assured, a party plaintiff:—Held (Irving, J.A., dissenting), that the policy was not void merely because it was issued in respect of premises used as those in question had been; that the insurance of property against loss is one of the things useful and necessary for the ordinary purposes of life, and that the owner of such property is just as much entitled to protection from loss by means of a fire policy as by other means. Per Martin and Galliher, JJ.A., that the plaintiffs were not entitled to sue on the contract of insurance, there being no evidence of privity of contract between them and W., their assignor, and that H. had not been properly added as a party.

Trites-Wood Company, Limited, v. Western Assurance Co., 15 B.C.R. 405 (C.A.).

—Sale of property insured—Property passing — Insurable interest — Statutory conditions — Change material to the risk.]—

Trotter v. Calgary Fire Insurance Co., 12 W.L.R. 672 (Alta.).

—Insurance moneys — Mortgagee's claim.] —See MORTGAGE.

—Delivery of policy — Effective contract—Non-payment of premium — Acceptance by insurers of agent's liability for premium—Estoppel — Statutory condition — Variation.]—

Trotter v. Western Canada Fire Insurance Co., 9 W.L.R. 664 (Alta.).

—Wearing apparel — Household furniture — Loss before policy issued — Interim receipt — Premium paid — Proofs of loss — Valuation—Fraud—Evidence.]—

Gauthier v. Union Assurance Society, 4 E.L.R. 331 (Que.).

—Arbitration as to loss—Award made in wrong basis — Subsequent award by one arbitrator and umpire without concurrence of other arbitrator.]—

Hall v. Queen Insurance Co., 1 E.L.R. 37 (N.S.).

Premises occupied as a "sporting-house" — Statutory conditions — Variation.]—In an action on a fire insurance policy the first defence was that the policy was void because the building insured was, at the date of the policy, being used as a bawdy-house, being described in the policy as "occupied as a sporting-house":—Held, that the rule established by Clarke v. Hagar, 22 S.C.R. 510, is that any instrument purporting to pass title and any instrument purporting to secure purchase money are respectively void, if there was in the mind of the vendor the intent and purpose that the property should be applied by the transferee in the accomplishment of the illegal or immoral purposes; but mere knowledge on the part of the transferor of the intent or purpose of the transferee to use the property for an illegal or immoral purpose is insufficient. And a contract for the insurance of a building cannot fairly be taken to be a participating in the purpose for which the thing is used—the purpose being a matter of indifference to the insurer, and one not induced or furthered by the fact of the creation or existence of the insurance. The question of insurance or no insurance upon the building can have no bearing by way of encouragement or otherwise upon the business carried on in the building insured—the insurance is wholly collateral to and independent of the immoral business—and the policy was valid as against this objection. Distinction as to policies of marine insurance pointed out. The second defence was, that, in breach of the 3rd condition of the policy, the building was vacant and unoccupied for a period of 30 consecutive days prior to the fire. Held, that the addition made to the 3rd statutory condition was not binding on the assured, not being printed in accordance with the provisions of the statute with reference to variations; and, assuming that there was a vacancy, that fact was not material to the risk within the meaning of the 3rd statutory condition; and the circumstances of the case did not make it so. Boardman v. North Waterloo Insurance Co., 31 O.R. 525, followed. The third defence was, that, in breach of the 3rd condition, there were changes material to the risk within the control or knowledge of the insured, namely, agreements for the sale of the premises. Held, that this would not be a breach of the 4th statutory condition, nor a change material to the risk under the 3rd statutory condition.

Morin v. Anglo-Canadian Fire Insurance Co., 13 W.L.R. 667 (Alta.).

—Statutory conditions—Notice of loss—Effect of notice by company's agent.]—Plaintiffs insured certain property with defendant company against loss by fire. The policy contained the usual statutory

conditions, among them a provision that the insured should forthwith, after a loss, notify the company in writing. It was also provided that none of the conditions of the policy could be deemed to be waived by the company, unless the waiver should be in express terms in writing signed by the secretary. The property insured was destroyed by fire. The plaintiffs gave no notice of loss, but the company's agent gave notice. On receipt of the notice from the agent the company furnished forms for proof of loss, and also participated with other companies in making an adjustment. The company refused to settle, and the plaintiffs brought action:—Held, that the condition requiring notice was equivalent to a stipulation that before anyone could make any demand against the company or bring any action to recover thereunder, he must forthwith give notice of loss, and such notice was a condition precedent to right to recover. 2. That the notice given by the company's agent was not a compliance with the condition which required notice by the assured or in his absence by his agent, and only such notice could satisfy the terms of the policy. 3. That waiver could not be relied upon by the plaintiffs, inasmuch as the policy itself provided that the conditions could not be waived, except in writing signed by the secretary. 4. That sec. 2 of the Fire Insurance Policy Ordinance did not assist the plaintiff, as this related only to the proof of loss, and the notice was not a part of the proof.

Bell v. Hudson Bay Insurance Co., 3 Sask. R. 219.

[Reversed by Supreme Court of Canada, April 3, 1911.]

—Misdescription in application—Correction in policy—Rate of premium.]—The furniture in the plaintiff's hotel, consisting of a brick building and a frame addition, was insured by the defendants for $2,000. The application was dated the 2nd March, 1907, and an interim receipt was issued by the agents on the same day for the premium of $48 for one year from the 20th February, 1907. In the application the building was described as "the brick building only." A policy was issued by the defendants from their branch office at Winnipeg, dated the 6th March, 1907, in which the building was described as "the three-storey brick metal-roofed building and two-storey frame addition," and other changes were made in the description of the property insured, etc., corresponding changes being made in pencil in the application, at the defendants' Winnipeg office. On the 11th February, 1908, a renewal receipt was issued, signed by the Winnipeg manager, for $50, being for the renewal of the policy for 12 months from the 20th February, 1908. The local agent called attention to the fact that the premium should be only $48, and that was the amount actually paid by the plaintiff. With regard to the rate and a proposed change in the policy there was correspondence between the local agent and the manager at Winnipeg, and the former called on the plaintiff, and suggested that the insurance should be allowed to stand on the furniture in the brick part only, and the agent said that the plaintiff agreed to that. The plaintiff denied it, however. No change was made in the policy, and shortly afterwards a fire occurred; the damage was adjusted at $650, made up of $155 on furniture in the brick building and $495 on furniture in the frame addition:—Held, that the policy was not invalid by reason of the misdescription in the application; there was no mistake on the part of the defendants, and the policy was exactly what was intended by both insured and insurers. Held, also, that the validity of the policy was not affected by what took place between the local agent and the plaintiff, and at the time of the fire it remained effective as regards all the furniture in both parts of the building.

Malin v. Union Insurance Society, 13 W.L.R. 653 (Alta.).

—Assignment of policy for benefit of creditors.]—Plaintiff company assigned a policy of fire insurance for the benefit of its creditors. Loss occurred and defendants set up the defence that clause 4 of the statutory conditions voided the policy. That clause provides that "If the property insured is assigned without the written permission of the company, the policy shall be void," but this condition does not apply to a change of title by succession or by the operation of law, or by reason of death." There was no consent and the assignment did not come within the exception:—Held, that the words of this condition must be construed strictly and all that they prohibit is an absolute assignment which divests the insured of all his property in the goods, and by which he does not retain to himself an insurable interest. That here there did remain a beneficial and insurable interest in the assignor, his debts were to be paid and the residue was to be held in trust for him. Judgment for plaintiff for $2,402 and interest from time when it became payable, and costs.

Wade v. Rochester German Fire Ins. Co., 2 O.W.N. 59, 16 O.W.R. 1004.

—Contents of dwelling-house—Ownership of property—Wearing apparel.]—In an action upon a policy of insurance issued by the defendants by which they insured the household goods, etc., of the plaintiff contained in a certain dwelling-house, against loss or damage by fire to the amount of $1,000:—Held, upon the evidence, that the household goods destroyed or injured by fire were the property of the plaintiff.

The plaintiff claimed for the loss of furs and wearing apparel of a woman who lived in the house with him, and was said to be his wife; there was some doubt about this; and the defendants alleged that the articles belonged to the woman, and that she kept a house of ill-fame. The plaintiff swore that he was her husband, and that he supported her:—Held, that the Court was not concerned as to the validity of the plaintiff's marriage, and that the plaintiff had an insurable interest in the articles. Semble, that allegations as to the character of the woman should have been stricken from the record as scandalous and irrelevant. Held, on the evidence, that, although there were peculiar and suspicious circumstances connected with the fire, the defendants had failed to establish that it was caused by the wilful act or procurement and connivance of the plaintiff. Held, also, that proofs of loss were duly furnished; and that inflation of the value of the goods destroyed was not fraudulent to the extent of vitiating the policy. Held, also, that keeping a small quantity of gasoline upon the premises for domestic purposes did not avoid the policy under statutory condition 10. Held, also, that a clause in the policy providing for arbitration in the event of a difference as to the amount of the loss did not make an arbitration a condition precedent to the bringing of an action. Quantum of loss computed at $400.

Patterson v. Central Canada Insurance Co., 15 W.L.R. 123 (Man.).

—Premium notes of mutual fire insurance companies—Venue.]—The provisions of the Ontario Insurance Act, R.S.O. 1897, c. 203, relating to the venue of actions on the premium notes of mutual fire insurance companies, are not repealed or affected by 6 Edw. VII. c. 19 (Ont.), s. 22.

Waterloo Mutual Fire Insurance Co. v. Bindner, 16 O.W.R. 299.

—Fire insurance policy—Liability while gasoline is stored or kept in the building insured—"Stored or kept."]—In an action upon a fire insurance policy the company relied upon a statutory condition protecting from liability "for loss or damage occurring while gasoline is stored or kept in the building insured." It appeared that the fire was caused by a small quantity of gasoline in a stove which was being used for cooking purposes, no other gasoline being in the building:—Held, that, whatever precise signification of the words "stored or kept" there was no infringement of the condition having regard to the ordinary meaning of the words used.

Equity Fire Ins. Co. v. Thompson, 41 Can. S.C.R. 491, reversed, and decision in Thompson v. Equity Fire, 17 O.L.R. 214, restored.

Thompson v. Equity Fire Insurance Co., [1910] A.C. 592.

—Premium—Payment by bill of exchange—Default—No notice of loss.]—Plaintiffs insured in the defendant company against loss by fire a stock of goods for $2,000. The application contained a clause that if the premium was not paid as agreed the insurance should be void until "such settlement is made." The premium was never paid in cash, but a bill of exchange was drawn upon plaintiffs and accepted by them, but this was never paid. The property was shortly afterwards destroyed by fire. The policy contained one of the statutory conditions, namely, that the insured should forthwith after loss give notice to the company in writing. No such notice was given by the insured, although the company's agent gave notice and told the plaintiffs he had done so. It was contended, however, that notice had been waived: First, because the company did not draw attention to the omission; second, because they sent an adjuster to adjust the loss; and third, because the manager of the company made an appointment to discuss the claim. The policy, however, contained a clause that no condition should be waived except in writing. The policy also required that the proofs of loss should show when and how the fire originated to the best of the claimant's belief, while in the proof of loss filed the claimant stated the cause of fire to be unknown, while from his examination for discovery it appeared that he believed it started from an explosion of the furnace. In an action to recover the amount of the policy:—Held, that the defendant, having drawn a bill of exchange upon the plaintiffs which was by them accepted and became a floating security which might be passed from hand to hand, must be deemed to have accepted "settlement" within the meaning of the terms of the application. 2. That compliance with the term of the policy requiring notice of loss was a condition precedent to the right to recover, and while if some sort of notice had been given which was defective the Court might possibly relieve, yet no such relief could be granted where there was an absolute non-compliance. 3. That the acts pleaded in support of waiver were not sufficient to support the plea, but in any event the policy provided that no waiver should be effective unless in writing, and there being no writing that would constitute a waiver, the plaintiffs could not succeed on that ground. 4. That the proofs of loss were insufficient, as the statement of the cause of the fire being in the belief of insured unknown, was untrue.

Bell Brothers v. Hudson's Bay Insurance Co., 2 Sask. R. 355.

[See same case on appeal, column 1741 ante.]

Apprehension of incendiary danger—Application filled in by local agent—Untrue

answer.]—An application for insurance on the contents of a barn, contained the question "Is there any incendiary danger threatened or apprehended?" to which the answer was "No." The plaintiff, who had not previously carried any insurance, stated that he effected the insurance, having learned that the owner of the barn had placed a high insurance on it, as well as on the adjacent dwelling-house. This was told by the plaintiff to the company's agent, who filled in the application and the answers to the questions. The application was then signed by the applicant, who was not an illiterate man, but he did not read over the application, and was not told that the question had been answered in the negative:—Held, that the plaintiff was bound by his untrue answer to the question, it being material to the risk, for the reasonable inference was that the apprehension of incendiary danger as a fact existed. Graham v. Ontario Mutual Ins. Co. (1887), 14 O.R. 318, Chatillion v. Canadian Mutual Fire Co. (1877), 27 C.P. 450, considered and commented on. Quære, whether the enquiry raised by the question was not as to the apprehension of the applicant of incendiary danger and not whether, as a fact, any incendiary danger was to be apprehended.

Kniseley v. British America Assurance Company, 32 O.R. 376.

—Condition in policy—Interest of insured—Mortgagor as owner—Further insurance—Estoppel—Pleading.]—By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . or if the interest of the assured in the property whether as owner, trustee . . mortgagee, lessee or otherwise is not truly stated:"—Held, that a mortgagor was sole and unconditional owner within the terms of said condition. By another condition the policy would be avoided if the assured should have or obtain other insurance, whether valid or not on the property. The assured applied for other insurance but before being notified of the acceptance of his application the premises were destroyed by fire. Held, that there was no breach of said condition. Commercial Union Assurance Company v. Temple, 29 Can. S.C.R. 206, followed. In one count of his declaration plaintiff admitted a breach of said condition but alleged that it was waived. On the trial counsel agreed that the facts proved in the case against the Commercial Union should be taken as proved in the present case. These facts showed, as held by the decision in the previous case, that there was no breach. Held, that the agreement at the trial prevented the appellant company from claiming that respondent was estopped from denying that there had been a violation of the condition.

Western Assurance Company v. Temple, 31 Can. S.C.R. 373, affirming S.C. of New Brunswick.

—Subrogation — Mortgage — Machinery—Vendor's lien—Priorities.]—Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery, replacing it with new machinery, reserving a lien thereon for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected the mill and machinery were destroyed by fire:—Held, upon the evidence, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him. Judgment of Meredith, C.J., 31 O.R. 142, affirmed.

Goldie v. Bank of Hamilton, 27 Ont. App. 619.

—Insurance by tenant for life—Loss—Remainderman.]—S.C., the tenant for life of a house and lot of land, insured the house against loss or damage by fire, paying the insurance premiums out of her own funds, and taking the policy in her own name. S.C. was not in any way bound to repair, or rebuild, or insure. The house was totally destroyed by fire, and the amount of the insurance paid over to S.C., who placed it in the bank, on deposit receipt, to her own credit:—Held, that the amount received from the insurance company belonged exclusively to S.C., and that her executors were entitled to judgment for the amount of the deposit receipt, with interest from date, and costs, against the devisee of W.C., to whom the lot and house were devised subject to the life estate of S.C.

Re Estate of Susan Curry, 33 N.S.R. 392.

—Statutory conditions—Variations—Co-insurance.]—The co-insurance clause printed as a variation from the statutory conditions in a policy of insurance against fire, requiring the insured in consideration of a reduced premium to keep the property covered by other policies to at least 75 per cent. of its value, will not be pronounced unjust and unreasonable, within the meaning of s. 115 of the Ontario Insurance Act, (R.S.O. [1887] c. 167). Judgment of the Court of Appeal for Ontario, 27 Ont. App. 373, affirmed.

Eckhardt & Co. v. Lancashire Insurance Co., 31 Can. S.C.R. 72.

—Sale of realty—Insurable interest—Unpaid vendor.]—An unpaid vendor who, by agreement with his vendee, has insured the property sold, may recover its full value in case of loss though his interest may be limited if, when he effected the insurance, he intended to protect the interest of the vendee as well as his own. The fact that the vendor is not the sole owner need not be stated in the policy, nor disclosed to the insurer. Judgment of the Court of Appeal (26 O.A.R. 277) reversed, and that of the trial Judge (29 O.R. 394) restored.

Keefer v. Phœnix Insurance Company of Hartford, 31 Can. S.C.R. 144.

—Conditions—Variations from statutory conditions—The Fire Insurance Policy Act, R.S.M. c. 59—Proofs of loss—Interest—Valuation of property.]—Defendants objected to the plaintiff's claim for loss of property insured under a policy of fire insurance issued by defendants on the ground that at the time of the loss a portion of plaintiff's note given for the premium for the insurance was unpaid, and relied on a condition indorsed on the policy that the company should not be liable for any loss or damage that might occur to the property mentioned while any promissory note or obligation or part thereof given for the premium remained due and unpaid. What purported to be the statutory conditions prescribed by the Fire Insurance Policy Act, R.S.M. c. 59, were printed on the back of the policy, and following there, under the heading "Variations in Conditions," were several other conditions including the one relied on by defendants printed in ink of a different color but in type of apparently the same size as that of the statutory conditions and which the Judge held was not conspicuous type within the meaning of the Act. The conditions printed on the policy also differed in several important particulars from the words found in the statute; and after the heading "Variations in Conditions," the company had omitted to print the part of the heading prescribed by s. 4 of the Act, "This policy is issued on the above statutory conditions, with the following variations and additions," or any other words to the same effect:—Held, following Sly v. The Ottawa Agricultural, etc., Co. (1878), 25 U.C.C.P. 28; Sands v. Standard Insurance Co. (1879), 27 Gr. 167, and Ballagh v. Royal Mutual Fire Insurance Co. (1880), 5 A.R. 87, that the requirements of the statute were imperative, and that plaintiff was not bound by the condition on which the defendants relied. The policy contained in the body of it the words, "The company is not responsible for loss caused by prairie fires," and defendants contended that, as plaintiff had alleged the contract of insurance to be an absolute one, he could not recover without an amendment setting up the policy correctly and proof that the loss was not caused by a prairie fire. Held, that such qualification or exception to the absolute contract of the company must be regarded as a condition of the insurance within the meaning of the Act, and that as it was not one of the statutory conditions it would be legal and binding on the assured only if it were indicated and set forth on the policy in the manner prescribed by the Act, which it was not, and in pleading the plaintiff might ignore it altogether as he had done. The defendants also objected at the trial to the sufficiency of the proofs of claim, but although they had objected to payment of the loss on other grounds than for imperfect compliance with the conditions regarding proofs of loss, they did not notify the plaintiff in writing that his proof was objected to. Held, that, under s. 2 of the Act, they could not now take advantage of any defect in the proofs. Held, also, that the plaintiff was entitled, under 3 & 4 Wm. IV. c. 42, s. 29, to interest on the insurance money, but only from the expiration of thirty days from the time he sent in his corrected and completed proofs of loss, as he thereby admitted that his first proofs were imperfect. Held, further, that the insured was not precluded from showing what the real value of the property insured was by the fact that he had, under peculiar circumstances, offered to sell it for less than the amount insured on it.

Green v. Manitoba Assurance Company, 13 Man. R. 395.

—Loss payable to third party—Condition against other insurance — Breach.] — On March 13th, 1889, the appellant entered into an agreement for sale of property situate at St. Sauveur de Quebec to one Lachance on condition that the vendee should insure it in the sum of $800 for appellant's benefit. Lachance effected such insurance with the respondent company, making the loss payable to the appellant as his interest might appear, the policy containing a condition that it should be void if the assured had then, or should afterwards, obtain any other insurance on said property or any part of it. In violation of this condition Lachance had, at the time a fire occurred on the property, another policy taken out without the knowledge or consent of the company, and also without the appellant's knowledge:—Held, that the prohibition of the assured to have, either before or after the issue of the policy, any other insurance without the company's consent avoids the policy if the insured, in violation of the condition, takes out another policy on the same property. Held, also, that the indication in the policy of payment to a third party is subject, as regards the payee, to all the conditions in the policy; the insurer cannot be subjected to other obligations than those which he assumed by his contract. Migner v. St Lawrence Fire Ins.

Co., 10 Que. Q.B. 122, affirming the judgment in review which reversed 17 S.C. 586.

—Mutual company—Non-payment of premiums—Forfeiture—Notice.]—The forfeiture declared by Art. 5321 R.S.Q. against the insured in a mutual insurance company for neglect to pay his assessments within six months after they are due, only takes place when the company, after the notice required to render the assessment exigible, has addressed to the insured another notice informing him that in default of payment within the specified delay he will lose his right to an indemnity; and this is especially so when the company, after the expiration of the delay, have accepted payment of the premiums in arrear.

Thuot v. Montmagny Mutual Fire Ins. Co., 10 Que. Q.B. 104.

—Conditions—Limitation of risk—Amount of loss to be determined by arbitration.]—(1) Where it is a condition of the policy that the total insurance on each item of the property insured shall not exceed two-thirds of the cash value of such item, and that notice shall be given of all previous insurance effected by the insured on the same property, and it appeared that the insurance exceeded two-thirds of the cash value, and that other insurance, on two items, to the amount of $100, existed without having been declared to the company, the policy is void. (2) The condition that, in case of a loss by fire, the amount of the damages shall be determined by arbitrators, and that no action shall be brought until the amount of the loss is so determined, is a legal condition.

Pharand v. Lancashire Insurance Company, 18 Que. S.C. 35.

—Insurance by mortgagor—Loss payable to mortgagee—Release of equity of redemption—Cessation of mortgagor's interest—Right of mortgagee.]—A mortgagor who had made a mortgage, under the Short Forms Act, containing a covenant to insure the mortgaged premises against fire, effected an insurance thereon with defendants, the loss, by the policy, being payable to the plaintiff, the mortgagee, as his interest might appear under the mortgage. Subsequently the mortgagor conveyed his equity of redemption to the mortgagee without the consent of the insurance company having been obtained therefor. The premises having been afterwards destroyed by fire:—Held, that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by the mortgagor to the plaintiff, whereby he ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituted a breach of the fourth statutory condition, which provides against the insured premises being assigned without the insurance company's consent.

Pinhey v. The Mercantile Fire Insurance Co. 2 O.L.R. 296.

—Furniture in house of ill-fame—Illegal and immoral contract—Promissory note.]—Insurance upon the furniture in a house of ill-fame is an illegal and immoral contract, and the premium note will not be enforced by the courts.

Bruneau v. Laliberté, 19 Que. S.C. 425. Andrews, J. (Cir. Ct.).

—Policy—Notice of other insurance—Mortgagee—Title.]—A policy of insurance on a mortgaged property contained a condition that the insured should give notice of any other insurance already made, or which should afterwards be made elsewhere on the same property, whether valid or not valid, and whether concurrent or otherwise, so that a memorandum of such insurance might be indorsed on the policy. The mortgagee, without such notice or endorsement, effected another insurance with another company in the name of the plaintiff's wife, with the loss, if any, payable to himself as his interest might appear:—Held, that the mortgagee's insurance, without the notice and endorsement, voided the plaintiff's insurance.

Perry v. Liverpool and London and Globe Insurance Company, 34 N.B.R. 380.

—Conditions in policy—Subsequent insurance—Application for not accepted until after destruction of property insured—Whether or not mortgagor is sole and unconditional owner of property insured.]—A policy of insurance against fire contained the following condition: "If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof, . . . this policy shall become void, unless consent in writing by the company be endorsed hereon:"—Held, following the judgment of the Supreme Court of Canada in Commercial Union Insurance Co. v. Temple, 29 S.C.R. 206, that where additional insurance was applied for, but not accepted until after the property insured was destroyed by fire, the condition had no application. A mortgagor is the "sole and unconditional owner" of property within the meaning of a condition in a policy of insurance against fire stipulating that the policy shall become void if the assured is not the sole and unconditional owner of the property insured. The policy also contained a condition that it should become void if any building intended to be insured stood on grounds not owned in fee simple by the assured. The land upon which the buildings insured stood was subject to a mortgage:—Held, that the defence that the lands were not

owned in fee simple by the assured mortgagor was not available under a plea charging that the plaintiff had been guilty of misrepresentation in the application for insurance, in that he stated that the property insured was not mortgaged or otherwise encumbered, whereas, etc., it was mortgaged.

Temple v. The Western Assurance Co., 35 N.B.R. 171.

—Mutual plan—Annual renewal—Proposal for increased premium—Non-acceptance—Condition of payment in advance—Delivery of receipt—Waiver.]—Two policies on the mutual plan, issued in 1898 and 1899, provided for insurances for the original period of one year and "during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." The policies were delivered to the plaintiffs, without prepayment of any cash premium, and without the previous delivery of the premium notes in consideration of which the policies purported to be issued; but the cash was paid and the notes delivered soon afterwards. On the 27th October, 1900, the executive officer of the defendants wrote to the plaintiffs enclosing a receipt for $363.23, being the amount of the cash premium for the renewal of both policies. The letter was on a printed form, stating that a receipt "renewing" the policies was enclosed, and asking the plaintiffs to remit the amount of the cash premium. It also asked for new premium notes, and stated that the old ones were enclosed, as they were. The plaintiffs retained the receipts, but did not send the money or the notes until about the 20th December, 1900. On the 28th October, 1901, the same officer again enclosed renewal receipts in a letter on the same form as above, but the amount of the cash payment was higher, and on the 6th November, 1901, the plaintiffs wrote to the defendants calling attention to the increase; the officer answered the next day that the defendants had been obliged to increase the rate; and on the following day the plaintiffs wrote as follows: "If you cannot do better we will have to accept, but we are going to ask you to reconsider the matter and meet us in this if at all possible. . . . Kindly give this your consideration and let us hear from you." On the 11th November the officer wrote to the plaintiffs: "The consulting board carefully considered your risk before making the advance in rate they did, and had no alternative but to do so to procure the re-insurance we required. Trusting this explanation will prove satisfactory to you." No answer was made by the plaintiffs to this. On the 16th November, 1901, a fire took place, and damage was done to the property covered by the defendants' policies. Two days afterwards the plaintiffs sent the defendants a cheque for the amount of cash demanded and new premium notes, but the defendants returned them. The defendants re-insured their risk as soon as the premiums became payable, and had not cancelled these re-insurances down to the time of the trial: Held, that no contract existed between the plaintiffs and defendants for an insurance for the year beginning on the 31st October, 1901. Semble, that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for the intention of the defendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for the amount.

Doherty et al. v. Millers and Manufacturers Ins. Co., 4 O.L.R. 303 affirmed, 6 O.L.R. 78.

—Condition of policy—Proof of loss—Waiver—Acts of officials.]—An insurance company cannot be presumed to have waived a condition precedent to action on a policy on account of unauthorized acts of its officers.

Hyde v. Lefaivre, 32 Can. S.C.R. 474.

—Writ of summons—Service on insurance company—Power of attorney—Removal of office from province.]—An English insurance company which had carried on business in Canada and whose head office was then at Toronto, had by two powers of attorney appointed its general agent at Toronto attorney to receive process both under R.S.O. 1897, c. 293, s. 66, and R.S.C. 1886, c. 124, s. 13. It afterwards transferred its Canadian business to another company and closed its Canadian offices, but the deposit under the Dominion Act had not been released, and neither of the powers of the attorney had been cancelled. On a motion to set aside the service of a writ of summons which was accepted by solicitors as if served on the Toronto agents of the company, subject to the right to move against it on the ground that the company was not within the jurisdiction:—Held, that a writ of summons upon a policy issued in Quebec in respect of a loss upon property there was properly served upon the agent named as attorney at Toronto under Con. Rule 159, and that therefore the Court in Ontario had jurisdiction to entertain the action. Semble, that the power of attorney required to be filed under R.S.C. c. 124, s. 13, is to receive service of process in any suit instituted in any Province of Canada in respect of any liability incurred in such province.

Armstrong v. Lancashire Fire Ins. Co., 3 O.L.R. 395.

—**Fire insurance company—Agent of—Tax—Fire Companies' Aid Ordinance, 1869 (No. 121) and Fire Companies' Aid Amendment Act 1871 (No. 154).**]—In an action against defendant company under the Fire Companies' Aid Amendment Act of 1871, which applies only to Victoria, for taxes due by it as a company issuing policies within the city limits, it was held by Martin, J., at the trial, dismissing the action, that the plaintiff had failed to establish agency:—Held, by the full Court, dismissing plaintiff's appeal, that the action was misconceived; that the tax sought to be recovered was not on the company directly, but in respect of a special form of agency, described in the statute; and the evidence negatived the existence of such an agency.

Dowler v. Union Ass. Society of London, 9 B.C.R. 196.

—**Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent.**]—The lex fori must be presumed to be the law governing a contract unless the lex loci be proved to be different. The appointment of a local agent of a fire insurance company is one in the nature of a delectus personæ, and he cannot delegate his authority nor bind his principal through the medium of a sub-agent. Summers v. The Commercial Union Ass. Co., 6 S.C.R. 19, followed. The local agent of a fire insurance company was authorized to effect interim insurances by issuing interim receipts, countersigned by himself, on the payment of the premiums in cash. He employed a canvasser to solicit insurances who pretended to effect an insurance on behalf of the company by issuing an interim receipt countersigned by him (the canvasser) as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium:—Held, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority. Held, further, that even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurances. Appeal from the K.B. Quebec allowed with costs.

Canadian Fire Ins. Co. v. Robinson, 31 Can. S.C.R. 488.

—**Policy—Condition — Waiver — Proof of loss—Adjuster—Agency.**]—(1) A condition of the policy required that proof of loss "shall be made by the assured." The son of the assured filled in and signed the statement of loss, under the general authority of a notarial power of attorney:—Held, that this was a sufficient compliance with the condition of the policy. (2) Where the insurer retained the proof of loss, without objection as to its sufficiency, for more than sixty days before action was taken, the company will be considered to have waived the condition which requires a delay of sixty days after filing claim before the institution of suit; and the fact that a blank in the statement was filled in, at the request of the company, within the period of sixty days before suit, will not affect the right of action. (3) The condition which requires proof of loss to be furnished within thirty days after the fire may be waived either expressly or impliedly; and the assured is held to be relieved from this condition if the presentation of the claim has been delayed by the company's investigation of the loss, or if the representations of the company's authorized agents have led the assured to understand that compliance with this condition will not be required. (4) While adjusters of fire losses are not, as a general rule, agents of the companies under an authority sufficient to make their statements binding upon the companies for whom they act, yet an adjuster may become a duly authorized agent of the company by the course of procedure in a particular case, e.g., where the adjuster was the only medium of communication after the fire between the company and the assured, and was engaged by the company to look over the proofs, advise as to a settlement, etc.

Western Ass. Co. v. Pharand, 11 Que. K.B. 144.

—**Conditions—Prior insurance—Subsequent insurance — Substitution of policies — Implied assent—Adjustment of loss—Waiver.**]—In an application for insurance, particulars of prior insurance in two other companies of $4,000 in each company were given, but in the policy in question prior insurance of only $4,000 was assented to, neither company being named. The defendant pleaded as a breach of the statutory condition non-disclosure of prior insurance for $4,000 in one of the two companies:—Held, that the plea must be read strictly and without amendment and that so read the assent in the policy to insurance of $4,000 might be treated as an assent to the prior insurance complained of in the plea; and semble, that had the defendants not intended to assent to the prior insurance of $8,000 they would have been bound under the second statutory condition to point out in writing the particulars wherein the policy differed from the application. Held, also, that to a subsequent insurance for $4,000 in another company in substitution for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary. Assent, express or implied, to subsequent insurance, is sufficient even if given after the loss has occurred. In this case such assent was held to be sufficiently shown by the defendants joining in

the adjustment of the loss and allowing the insured to accept from the subsequent insurers their proportion of the loss so adjusted. Judgment of Ferguson, J., affirmed.

Mutchmor v. Waterloo Mutual Fire Insurance Co., 4 O.L.R. 606 (C.A.).

—**Insurance agent—Gratuitous undertaking—Mandate.**]—The defendant, a general insurance agent, gratuitously undertook to have an additional policy placed on the plaintiffs' property, and also to notify the companies already holding policies of this additional insurance. A loss occurred, and, owing to defendant having neglected to give the notice, the plaintiffs had to compromise their claim at $1,000 less than they otherwise would have recovered:—Held, that the defendant having undertaken, though gratuitously, to perform the business, and having actually entered on the execution of, was liable for the negligence which had caused loss to the plaintiffs. Coggs v. Bernard (1703), 2 Ld. Raym. 909, specially considered.

Baxter v. Jones, 6 O.L.R. 360 (C.A.), affirming 4 O.L.R. 541.

—**Cancellation—R.S.O. 1897, c. 203—Statutory condition 19(a)—Notice of cancellation received after loss.**]—The insured sent to the company his policy with an indorsed surrender clause, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office and did not reach the company till the morning after the insured property had been destroyed by fire:—Held, that the letter did not take effect from the time of its being posted, but only from the time of its receipt, and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt, that the attempted surrender did not operate, and therefore the company was liable for the loss. Judgment of Lount, J., 4 O.L.R. 123, affirmed.

Skillings v. Royal Ins. Co., 6 O.L.R. 401 (C.A.).

—**Policy on goods—Partial loss—Other insurance—Proportionate payment—Conditions of policy—Construction.**]—The insurance was upon goods valued in the application at $15,000. The policy was dated the 11th June, 1902, and the fire occurred on 12th July following, with the loss of $6,250. The defendant's policy was for $3,000; there was other insurance to the amount of $7,000, and the total value of the goods at the time of the fire was $9,274.62. Statutory condition No. 9 provided that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was endorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property insured is found, by arbitration, or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application:"—Held, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amounts of his loss in accordance with statutory condition No. 9.

Eacrett v. Gore District Mutual Ins. Co., 6 O.L.R. 592, 40 C.L.J. 30 (Ont. C.A.).

—**Policy—Countersigning by agent.**]—A policy contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company:—Held, that defendants were not bound by a policy signed by the general manager and countersigned in the name of one who had been their agent, by one of his clerks, but without any authorization by him, even though the insured may not have known of the cessation of the agency.

Walkerville Match Co. v. Scottish Union Co., 6 O.L.R. 674, 40 C.L.J. 28 (Ont. C.A.).

—**Conditions—Refusal to arbitrate—Statement of loss—Waiver of conditions.**]—The contract for insurance between the plaintiff and the defendant provided:—That in case of loss the damages would be ascertained by agreement of the parties or by arbitration; that the insured would, whenever called upon to do so, produce for inspection by any person named by the company, all the property saved, whether damaged or not; that he would likewise produce for examination all his books, invoices and other documents or certified copies thereof if the originals are destroyed; that the company should not be considered as having waived any condition unless such waiver is expressed in writing and signed by one of its agents. A fire having partially destroyed the plaintiff's stock, the company's agent visited the premises, and plaintiff having proposed to leave the question of damages

to arbitration, the agent stated that he did not wish to do so, and requested the plaintiff to prepare, himself, with the aid of his clerks, a statement of the loss, and send the same to him, adding that if it was satisfactory he would pay the amount claimed. He said at the same time that the premises could be put in order and the plaintiff continue his business. The plaintiff prepared a statement, and, on demand of the agent, put his claim in writing. The agent submitted his claim to the adjusters, who went to the plaintiff's place of business to examine into the loss, but the plaintiff refused to produce the goods damaged, most of which were still in his possession, stating that everything had been put in order, and he could not say what damage they had sustained. The company then refused payment, but did not claim that the plaintiff's demand, which was, moreover, justified by the subsequent evidence, was excessive:—Held, (1) That the contract of insurance being of a commercial nature, oral testimony was admissible to prove these facts, it not being a question of contradicting a written instrument, or one of a breach of the condition of the policy which required a waiver in writing, because the policy provided for a settlement by mutual assent, and the plaintiff could prove such assent by oral testimony. 2. On account of the refusal of the agent to submit the question of compensation to arbitration, and his proposal that the plaintiff should himself prepare a statement of the loss, the latter could not then be required to exhibit the damaged goods to the adjusters.

Duffy v. St. Lawrence Assurance Co., Q.R. 23 S.C. 181 (Sup. Ct.), affirmed by the Court of King's Bench, 20th January, 1903.

— Void policy — Renewal — Mortgage clause.]—By s. 167 of the Ontario Insurance Act, a mercantile risk can only be insured for one year, and may be renewed by a renewal receipt instead of a new policy:—Held, reversing the judgment of the Court of Appeal (3 Ont. L.R. 127) and restoring that at the trial (32 O.R. 369), Girouard, J., contra, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance, the renewal was likewise a nullity, though the prior insurance had ceased to exist in the interval. Held, per Girouard, J., that the renewal was a new contract which was avoided by non-disclosure of the concealment in the application for the original policy. The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgages therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc.," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy. Quære, would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy?

The Liverpool and London and Globe Insurance Company v. Agricultural Savings and Loan Company, 33 Can. S.C.R. 94, reversing Agricultural v. Liverpool Co. 3 Ont. L.R. 127.

—Insurance against fire—Application—Untrue statement — Materiality — Statutory condition.]—In an application for insurance against fire among the questions to the applicant were: "Have you . . . ever had any property destroyed by fire?—Ans. Yes. Give date of fire, and, if insured, name of company interested.—Ans. 1892. National and London and Lancashire." The evidence showed that there was a fire on the applicant's property in 1882, and two fires in 1892, and the insurance by the policy granted on this application was on property which replaced that destroyed by the latter fires:—Held, reversing the judgment appealed from (Harrison v. Western Assurance Co., 35 N.S. Rep. 488) that the above questions were material to the risk and the answers untrue. The first statutory condition therefore precluded recovery on the policy.

Western Assurance Company v. Harrison, 33 Can. S.C.R. 473.

—Condition of policy—Double insurance—Application—Representations and warranties—Substituted insurance—Condition precedent—Lapse of policy—Statutory conditions—Estoppel.]—B., desiring to abandon his insurance against fire with the Manitoba Assurance Co., and, in lieu thereof, to effect insurance on the same property with the Royal Insurance Co., wrote the local agent of the latter company stating his intention, and asking to have a policy in the "Royal" in substitution for his existing insurance in the "Manitoba." On receiving an application and payment of the premium, the agent issued an interim receipt to B. insuring the property pending issue of a policy, and forwarded the application and the premium, with his report, to his company's head office in Montreal, where the enclosures were received and retained. The interim receipt contained a condition for non-liability in case of prior insurance unless with the company's written assent, but it did not in any way refer to the existing insurance with the Manitoba Assurance Co. Before receipt of a policy from the "Royal" and while the interim receipt was still in force, the property insured was destroyed by fire, and B. had not in the meantime formally abandoned his policy with the Manitoba Assurance Co. The latter policy was conditioned to

lapse in case of subsequent additional insurance without the consent of the company. B. filed claims with both companies which were resisted, and he subsequently assigned his rights to the plaintiffs, by whom actions were taken against both companies:—Held, reversing both judgments appealed from, Whitla v. Royal, 14 Man. R. 90, that, as the Royal Insurance Company had been informed, through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk notwithstanding that such prior insurance had not been formally abandoned, and that the Manitoba Assurance Co. were relieved from liability by reason of such substituted insurance being taken without their consent. Held, further, that, under the circumstances, the fact that B. had made claims upon both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk.

Manitoba Assurance Company v. Whitla, 34 S.C.R. 191.

—Transfer of insurance claim—Signification—Valuation of goods insured—Undisclosed insurance—Waiver of time limit for proofs.]—(1) A transfer of a contract of insurance, by a private writing made in duplicate, signed by the transferor and transferee in the presence of two witnesses, is good and valid. (2) The admission of the debtor that he received a duplicate of such transfer is a sufficient signification (1571 C.C.). (3) An estimate by the insured in round figures of the value of the stock, at the time of the application, should not be considered a ground of nullity, unless it contains such an exaggeration as creates a suspicion of fraudulent intention. (4) The fact that an interim receipt had issued for an insurance in another company, which insurance was afterwards declined by that company, does not establish a plea of undisclosed insurance. (5) The time limit for furnishing statement of loss is waived by a letter from the company to the insured, dated after the expiration of the delay, and enclosing a blank form of policy in order that the insured might know exactly what it was necessary that he should do.

Western Assurance Co. v. Garland, 12 Que. K.B. 530.

—Contract—"Valid in Canada"—Meaning of—Policy in company not licensed in Canada.]—A contract to procure fire insurance in some office valid in Canada means in some company licensed to do business in Canada; and a premium paid under such a contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the insured in a company not so licensed.

Barrett v. Elliott, 10 B.C.R. 461 (Full Court).

—Ownership—Lease—Sheriff's sale—Title to land—Insurable interest—Trust.]—The lessor of real estate insured the leased property "in trust," and notified the insurers that the lessee, his son, was the real beneficiary. The lessee paid all the premiums, and, the property having been seized in execution of a judgment against the lessor, the lessee purchased at the sheriff's sale and became owner in fee. He afterwards increased the insurance, the insurer acknowledging, in the second policy, the existence of the first in his favour. The property having been destroyed by fire, payment of the amount of the first policy to the lessee was opposed by a judgment creditor of the lessor and the money attached in the possession of the company:—Held, affirming the K.B., Montreal, that the lessee having had an insurable interest when the first policy issued, and being, when he acquired the fee and when the loss occurred, the only person having such interest, he was entitled to the payment of the amount of the policy insured upon the application of the lessor. Held, also, that even if the lessor knew that his father was embarrassed at the time he took the lease and when he purchased the property at the sheriff's sale, that would not make the transaction fraudulent as against the father's creditors. A creditor who was a party to the action against the lessor in which the property was sold in execution subject to the lease, and who did not oppose such sale, could not, afterwards, contest payment of the amount of the policy on the ground of fraud.

Langelier v. Charlebois, 34 Can. S.C.R. 1.

—Mutual fire insurance—Misrepresentations as to title of assured.]—(1) In a contract of mutual fire insurance, where the application forms part of the contract, representations in the application as to the title of the insured are to be strictly interpreted, and the rules of ordinary fire insurance do not apply. So, where the insured stated in the application that he was owner of the immovable sought to be insured, whereas his father-in-law was the registered owner, his pretension that he was the real owner, and that his father-in-law was merely his agent in respect of the property, could not avail, and the contract was absolutely null and void. (2) Where the insured has made a material false statement in his application, as to one of the subjects insured, the whole contract is void. (3) An inadvertent misstatement by the insured, in his application, as to the name of the company in which an insurance existed, is immaterial, and would not void the contract. (4) The

insured is not bound by sketches or additions made by the company's agents on the back of the policy, after he has signed the same.

Lambert v. Foncière Compagnie D'Assurance, 25 Que. S.C. 169 (Davidson, J.).

—Loss payable to mortgagee—Appraisement—Statutory condition 16.]—Where a policy of fire insurance, not containing any mortgage or subrogation clause, nor any direct agreement with the mortgagee, is effected by a mortgagor pursuant to a covenant in the mortgage, and by the policy the loss, if any, is made payable to the mortgagee as his interest may appear, an appraisement of the loss under statutory condition 16 of the Insurance Act, R.S.O. 1897, c. 203, s. 168, is, in the absence of fraud or collusion, binding on the mortgagee, although he has not been consulted in, nor notified of, the appraisement. In such a case, under Greet v. The Citizens' Insurance Company (1879), 27 Gr. 121 (1880), 5 A.R. 596, the mortgagee can sue the insurance company in his own name for the amount due under the policy.

Haslam v. Equity Fire Insurance Co., 8 O.L.R. 246 (Teetzel, J.).

—Certificate of magistrate most contiguous to the place of fire—Condition precedent—Proof of loss.]—A policy of insurance contained a condition requiring the assured, in case of loss, to procure a certificate as to the matters contained in the statement of loss under the hands of two magistrates most contiguous to the place of the fire. A further condition provided that no condition should be deemed to have been waived unless the waiver was expressed in writing indorsed on the policy:—Held, per TUCK, C.J., Hanington, Barker and Gregory, JJ., that the production of the certificate of the magistrates most contiguous to the place of fire was a condition precedent to the assured's right to recover. Per Landry and McLeod, JJ., that the magistrate most contiguous qualified to act is the most contiguous within the meaning of the condition, though not the nearest in point of distance to the place of the fire. Per curiam, that if there could be a waiver under the condition without indorsement on the policy, the acceptance of the proof of loss by the company, without objection, was not a waiver.

LeBlanc v. Commercial Union Insurance Company, 35 N.B.R. 665.

—Application for insurance—False statements—Duty of agent.]—In an action by the plaintiff company against the defendant, the first count of the declaration alleged that the defendant was hired for the purpose of receiving and forwarding to the company applications for fire insurance, yet the defendant, not regarding his duty, so negligently and wrongfully received and forwarded to the company an application for insurance containing statements which he knew at the time to be false, and material to the risk, and said company, relying upon the truth of the application, accepted the risk, and issued a policy thereon which became a claim, and said company were put to great costs in defending an action at law. The second count alleged the false statements were received and forwarded to the company by the defendant fraudulently and in collusion with the applicant against the company:—Held, per Tuck, C.J., Landry, McLeod and Gregory, JJ., that both counts stated a cause of action and were good on demurrer. Per Hanington, J., that the defendant's duty, under the contract, was to receive and forward all applications, whether the statements therein were true or false, and as the first count did not charge any duty beyond that, or fraud, it was bad on demurrer; that he was in doubt as to the second count, because it did not allege that the damage suffered was directly caused by the fraud and collusion of the defendant.

Norwich Union Fire Insurance Society v. McAlister, 35 N.B.R. 691.

—Foreign company—Delivery of policy—Cause of action enforceable in Ontario—Place of payment.]—The insured residing in Ontario applied through an insurance broker in Montreal for an insurance policy on property in Ontario in the defendant company, which was incorporated under the laws of one of the United States and had its home office in that State. The evidence of the insured was that he received the policy through the mail from the broker—and the evidence of the company was that it was delivered to the broker as the assured's agent and who was not an agent of the company which had no agent or officer in Ontario. No place of payment was named in the policy:—Held, that the plaintiffs had not proved a cause of action upon which they were entitled to sue the company in Ontario; and that in the provision as to committing a policy to the post office the words "to be delivered or handed over to the assured, his assign or agent in Ontario" in s. 143 of c. 203, R.S.O. 1897, contemplates a committing to the post office of the policy by the insurer addressed to the insured, his assign or agent in Ontario; and the provision therein that in such event the money should be payable at the office . . . in Ontario shows that the section was intended to apply to companies having an office or agent in Ontario and not to a company which has in no way brought itself or its business within the limits of the province. Held, also, that the company, not having complied with the Insurance Act R.S.O. 1897, c. 203, in regard

to license or registration, it was precluded by s. 85 of that Act from entering into any contract with any one in Ontario.

Burson v. German Union Insurance Co., 10 O.L.R. 238 (Teetzel, J.).

—Insurance by mortgagee—Subrogation.] —Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and if he failed to do so that the mortgagees might insure it and add the premiums paid to their mortgage debt. The policy was issued in the name of the mortgagor who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred the company paid the mortgagees the sum insured, and the mortgagor claimed that his mortgage was discharged by such payment. The company disputed this, claiming that they had a valid defence against the mortgagor by reason of breaches of a number of the statutory conditions, and were subrogated to the rights of the mortgagees. The Court of Appeal (15 Ont. App. R. 421) and the Divisional Court (14 O.R. 322) held that, the insurance company having failed to establish its defence, that the policy had been voided by the acts of the mortgagor, the latter was entitled to the benefit of the money paid by the insurance company to the mortgagees and to have his mortgage discharged:—Held, per Strong, Fournier, Taschereau and Gwynne, JJ., that the judgment of the Court of Appeal for Ontario, 15 Ont. App. R. 421, should be affirmed and the appeal dismissed with costs. Held, per Taschereau and Gwynne, JJ., that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause which was inserted in the policy without the knowledge and consent of the mortgagor could not have the effect of converting the policy into one insuring the interest of the mortgagees alone; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy effected with the mortgagor, and that the payment to the mortgagees discharged the mortgage. Held, per Taschereau and Gwynne, JJ., that the company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him; not having done so they could not, in the present action, raise any questions which might have afforded them a defiance in an action against them on the policy.

Imperial Fire Insurance Company v. Bull (1889), 1 S.C. Cas. 1 (Revision of report in 18 Can. S.C.R. 697).

—Declarations of assured — Previous fires.]—Property insured against fire had been burned three times but the assured, on applying for the policy stated, in answer to a question in the application, that he had property damaged or destroyed by fire only once:—Held, that this statement was material to the risk and avoided the policy. The following clause in the application, "and the said applicant hereby covenants and agrees to and with the same company that the foregoing is a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of the company and shall form a part and be a condition, of the insurance contract," does not constitute an absolute warranty but the answers given by the assured only amount to warranties under said clause in so far as they are material to the risk.

Gillis v. Canada Fire Assurance Co., Q.R. 26 S.C. 166 (Sup. Ct.).

—Mutual company — Assessments — Premium notes—Lien.]—To secure the payment of assessments imposed on premium notes given by members of mutual fire insurance companies in the counties of Quebec the said companies have a special lien on the movable property only of the assured; upon immovables they have merely an ordinary hypothec ranking according to the date of the premium note and not a lien taking rank after the municipal taxes.

Cantwell v. Wilks, Q.R. 26 S.C. 149 (Ct. Rev.).

—Variations to the statutory conditions—"Just and reasonable"—Encumbrances—Notice to local agent.]—A policy provided, by the way of variation of statutory condition 1, that any encumbrance by way of mortgage should be deemed material to be known to the company within the meaning of the said statutory condition: —Held, that this was too wide to be just and reasonable, and that the Court had to determine whether the non-disclosure of the mortgage was a material fact, the onus being on the defendants who asserted its materiality. By another variation of the statutory conditions it was provided that the words "or its local agent," in the 3rd statutory condition, which provides

that any change material to the risk must be notified in writing "to the company or its local agent," were struck out, and that wherever the words "agent" or "authorized agent" occurred elsewhere in the statutory conditions, such "agent" or "authorized agent" should be held to mean the company's secretary only:—Held, where a company had its head office in Ontario, a valid variation since it was not unjust or unreasonable to stipulate that notice of important changes in the character of the risk should be communicated to the head office. Where, in a policy, variations from the statutory conditions were printed in type of the same size and shape of the statutory conditions, but in bright scarlet, whereas the latter were in black ink:—Held, that the requirements of s. 169 of the Ontario Insurance Act, R.S.O. 1897, c. 203, were sufficiently complied with.

Lount v. London Mutual Fire Insurance Co., 9 O.L.R. 549 (Street, J.).

—Variations from statutory conditions—Notice to agent.]—A variation from the statutory conditions striking out from the third statutory condition the words "or its local agent" in the clause requiring notice of a change material to the risk to be given to "the company or its local agent" and providing that wherever the words "agent" or "authorized agent" occur in the statutory conditions such agent or authorized agent shall be held to mean the company's secretary only, was, in the case of a company having its head office in the Province of Ontario and more than four hundred local agents in the Province held, as to the third statutory condition, to be just and reasonable, and notice to a local agent insufficient. Judgment of Street, J., 9 O.L.R. 549, affirmed.

Lount v. London Mutual Fire Insurance Company, 9 O.L.R. 699 (D.C.).

—Standing timber—"Property."] — The defendants, an insurance company incorporated under the laws of Ontario, insured the defendants, a railway company having a branch line in the State of Maine, "against loss or damage by fire . . . on property as follows: on all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured." By the statute law of the State of Maine, where "property" is injured by fire communicated by a locomotive engine, the railway company is made responsible and it is declared to have an insurable interest in the property along its line for which it is responsible:—Held, that the policy in question was, in consequence of this statutory provision, a valid policy of fire insurance, and not an ultra vires policy of indemnity, but that the property in respect of which the insurance attached was that defined by the enabling section of the Ontario Insurance Act (R.S.O. 1897, c. 203, s. 166), and that standing timber was not included.

Canadian Pacific Railway Company v. Ottawa Fire Insurance Company, 9 O.L.R. 493 (Clute, J.).

—Oral application—Ownership of goods insured—Lessees—Notice to agents—Policy differing from application.]—The plaintiffs having an insurable interest as lessees in machinery applied verbally to the defendant's agents for insurance to whom they communicated the state of the title, the name of the owners, and the nature of their interest in the machines. The agents had authority to accept the risk, receive the premium and issue an interim receipt, which they did. They also partly filled up an application form, not containing any statement as to the nature of the ownership and signed it in the name of the plaintiffs, but without the knowledge, consent or authority of the latter. A policy was issued and sent to the plaintiffs, which contained the statement that "the property is being held by the assured as owners." Statutory condition 10 provides that the company is not liable for loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy:—Held, that the plaintiffs were not precluded from recovery by this condition inasmuch as the defendants had notice through their agents of the real interest of the plaintiffs, and it was their duty to have indorsed on the policy the necessary statement as to it, or at all events they were estopped from setting up the condition. Held, also, that the plaintiffs could invoke the 2nd statutory condition, under which, after application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application. There is no reason for confining the operation of this condition to a written application.

Davidson v. Waterloo Mutual Fire Ins. Co., 9 O.L.R. 394 (D.C.).

—Parol contract—Interim receipt limiting duration of contract—Incumbrance—Omission to notify company—Absence of written application with questions and answers.]—The plaintiffs on Nov. 7th, 1901, applied through an agent of the defendants to their general manager for an insurance of $2,800 on certain machinery and stock in trade which he accepted, and the usual interim receipt was issued by its terms limiting the insurance to thirty days, but of such limitation no notice in writing was given to the plaintiffs. On November 30th the plaintiffs, in the be-

lief that the insurance was for a year, paid the annual premium to the agent, who, according to his usual course, paid it over to the defendants in January following, when it was duly accepted by the defendants. No policy, however, was issued, and a fire subsequently occurring some ten months after, whereby the goods were destroyed, the defendants repudiated liability on the ground that the insurance was for thirty days only:—Held, that there was a valid parol contract for insurance for a year, and that nothing subsequently took place to modify or impair it, the interim receipt under the circumstances not having such effect. Held, also, that under the parol contract an implication was raised that a proper policy would be issued subject to the statutory conditions and such variations thereof as were just and reasonable, and that was substantially the effect of the interim receipt, which, though ineffective to restrict the duration of the contract, was to be looked at as part of the evidence surrounding it. Under the first statutory condition the applicant for insurance is not to misrepresent or omit to communicate any circumstances material to be made known to the company to enable it to judge of the risk, while a variation thereof on the company's policies required the applicant to communicate the existence of a mortgage or other incumbrance and the amount thereof, and it was objected that the applicant had omitted to communicate the existence of a mortgage on the insured property whereby the insurance was vitiated:—Held, that whether the first statutory condition was alone considered or the variation thereof, which was in effect the same, the object was to obtain information as to the risk before accepting it, which information is usually obtained by questions and answers in a written application, and as there was no such application here and no question put at all, either written or verbal, there was no duty imposed on the insured to communicate the fact of the existence of the mortgage; and, semble, the existence of the mortgage was not, in the circumstances of this case, a fact material to be made known to the company. Judgment of Meredith, C.J.C.P., 7 O.L.R. 180, affirmed.

Coulter v. Equity Fire Insurance Company, 9 O.L.R. 35.

—Fire insurance—Goods in existence at time of fire—"120 sacks of green coffee" —Termination of insurance—Notice of—Variation in limitation condition—Unreasonableness.]—Where a policy of insurance against fire was effected by the owners, wholesale dealers in coffee, etc., on "120 sacks of green coffee" stored in a specified warehouse, and which policy was a renewal of a similar insurance in force for some years:—Held, that such insurance was not limited to the particular 120 sacks on hand when the policy was effected, but covered similar stock to the specified number of sacks in hand at the time of a fire which subsequently occurred. About a week before the fire occurred the insured wrote to the company's local agent that they had decided to cancel the existing policy and to have a new one issued for a reduced amount, but this was never communicated to the head office, or any action taken upon it until after the fire had occurred:—Held, that this was not such written notice terminating the insurance as was required by 19a of the statutory conditions, being merely an intimation of the insured to have the existing policy cancelled when a new one was substituted for it, but which was never carried out. A variation of statutory condition 22 reducing the time for bringing an action to six months is an unjust and unreasonable condition.

Merchants Fire Insurance Company v. Equity Fire Insurance Company, 9 O.L.R 241 (Meredith, C.J.).

—Company re-building after loss—Defective work—Damages—Measure of.]—The defendant company instead of paying to the plaintiff the amount of damages sustained by a fire in her bakery, undertook to repair the damage, and for the faulty manner in which the work was carried out plaintiff sued for the amount of the damage caused by the fire, and also, for damages in respect of loss occasioned by reason of being unable to carry on the business. The plaintiff's chief witness stated that the injury to the business was $3,000, and the jury returned a verdict for her for that amount. On appeal, the Full Court being of the opinion that the amount of damages was excessive, with plaintiff's consent, reduced it to $1,000. Precise directions should have been given to the jury as to what they should have taken into account in estimating the damages, and as the case had been allowed to go to the jury without such directions without objection by defendants' counsel and without contradiction of the statement as to the damage being $3,000, no costs of the appeal were allowed.

Murray v. Royal Insurance Company, 11 B.C.R. 212.

—Alterations in property insured—Increase of risk—Burden of proof.]—Alterations made without notice by the owner in the property insured after the issue of a policy of fire insurance, which do not increase the risk, do not affect the policy, and the burden of establishing the increased risk is on the insurer.

Bachand v. Compagnie d'Assurance Mutuelle, 27 Que. S.C. 500 (C.R.).

—Arbitration — Amicable inquiry — Appraisement.]—The provisions of the Code

of Civil Procedure as to arbitrations do not apply to amicable inquiries, under the conditions of a policy of insurance, as to the cause of the disaster. The arbitrators or appraisers, and umpire are, consequently, not subject to judicial formalities as to notice, hearing, swearing of witnesses, report, etc., but act merely as amicable valuators. (2) A defendant admitting part of the claim in his plea is to be considered as confessing judgment for that amount and making a deposit thereof in Court; on default of so doing the defendant is liable for the costs of an action for the amount in dispute.

Town of Beauharnois v. Liverpool & London & Globe Ins. Co., Q.R. 28 S.C. 68 (Ct. Rev.).

—Breach of statutory condition—Subsequent insurance—Notice—Knowledge of sub-agent.]—By a condition of a policy of fire insurance (statutory condition No. 8) the insurance company were not to be liable if any subsequent insurance were effected unless and until the company should assent thereto, etc. A subsequent insurance was effected by the insured, and no notice in writing thereof was given nor any communication made to the company nor to any agent having power to receive such notice, and the fact of the existence of the subsequent insurance was not disclosed to the company until after the insured premises were injured by fire:—Held, that the circumstance that the subsequent insurance was effected by a sub-agent of the company's general agent, who had also acted in procuring the prior insurance with the company, should not be regarded as affecting the company with constructive notice of the subsequent insurance. An action upon the policy being dismissed, the company were ordered to refund the last payment of premium, which was received in ignorance that the policy was no longer in force.

Imperial Bank v. Royal Insurance Co., 12 O.L.R. 519 (Boyd, C.).

—Broker — Representations — Circumstances increasing risk.]—Where an insurance company has acted in such a manner as to lead the insured to believe that the broker soliciting his insurance was the agent for the company, and he was thereby induced to depend upon such agent complying with all formalities, the company cannot, afterwards, set up failure to make representations of circumstances increasing the risk as a reason for avoiding the policy of insurance.

Abousamra v. Cie. Equitable d'Assurance Mutuelle contre de Feu, Q.R. 27 S.C. 252 (Ct. Rev.).

—Contract of insurance—Interpretation—Misdescription—Alteration in use or condition of thing insured.]—(1) A statement in an application for insurance that "if answers to the questions are made by the agent of the company, soliciting the insurance, he shall be considered for those purposes the agent of the applicant and not that of the company," must be construed strictly and cannot therefore be extended to a diagram of the premises made by the agent on the back of the application. (2) A statement in an application that a diagram on the back of it disclosed the exact situation of the property insured, when it showed another building as distant thirty feet instead of twenty-three, and the company charged the premium at a higher rate such as would have been charged had the distance been correctly given, is not a material misdescription sufficient to vitiate the policy. (3) When the owner shortly before the fire, left the house insured to work in the lumber shanties, and his wife during his absence went to reside with her parents, the policy containing no special prohibition in this respect, the fact that the house was unoccupied at the time of the fire, without notice to the company, did not amount to such an alteration in the use or condition of the premises insured as would vitiate the policy.

Mutual Fire Insurance Company of Canada v. Mercier, 14 Que. K.B. 227.

—Lease of machine—Insurance against fire—Indemnity substituted for thing leased—Revendication.]—The owner of a thing leased, under condition that the lessee should insure it for the benefit of the owner, who receives the amount of such insurance after a fire in which the thing so leased was supposed to have been destroyed, is presumed, by accepting such indemnity, to have renounced his right of property in the thing leased. Consequently, he cannot subsequently revendicate the thing in the possession of a third party without making a tender of the price paid therefor by the latter.

United Shoe Machinery Co. v. Caron, Q.R. 14 K.B. 437.

—Notice and proof of loss—Waiver by insurer — Conflicting evidence.]—(1) The condition in a policy of insurance against fire, that notice and proof of loss must be given within a stated delay, is not one of liability but of recovery and is imposed in the interest of the insurer. The assured may therefore be relieved from it either expressly, or impliedly, e.g., by the insurer putting him off when applying for a settlement, on the ground that the insurer is himself investigating the circumstances of the loss. (2) The finding of the trial Judge in such matters as the representations by the assured as to the value of the property insured and the extent of the loss will not be interfered with on appeal when the evidence is contradictory.

Mount Royal Insurance Company v. Benoit, 15 Que. K.B. 90.

—Standing timber — Property.]—The defendants, an insurance company, incorporated under the laws of Ontario, insured the plaintiffs, a railway company, having a branch line in the State of Maine, the policy stating the insurance to be against loss or damage by fire . . . on property as follows: On all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured." By the statute law of Maine when "property" is injured by fire communicated by a locomotive engine, the railway company is made responsible, and it is declared to have an insurable interest in the property along its line for which it is responsible:—Held, that the policy was a valid policy of fire insurance, but did not, under the company's statutory powers cover standing timber along the defendants' line of road; that the policy was not therefore ineffective, for there was abundance of other property covered by it in which the plaintiffs had an insurable interest. Judgment of Clute, J., 9 O.L.R. 493, affirmed.

Canadian Pacific Railway v. Ottawa Fire Insurance Co., 11 O.L.R. 465, 39 Can. S.C.R. 405, affirmed.

—Action for damages suffered by fire—Payment by insurance—Want of interest—Art. 77 C.P.]—A defendant sued for damages alleged to have been suffered by the plaintiffs from a fire claimed to have been caused by defendant's fault, cannot plead want of interest of the plaintiffs, because they have been compensated for their loss by insurance moneys received by them.

Burritt v. Pillow & Hersey Mfg. Co., 7 Que. P.R. 461.

—Notice of loss—Waiver of formalities.]—A notice of loss by fire in the words, "Je vous donne avis que mon ameublement de maison est brûlé le 10 de ce mois. Veuillez y voir," receipt of which is acknowledged by the insurer and followed by an offer by the latter of a sum in payment, is sufficient. The offer is a waiver of the requirements in the conditions of the policy and in the provisions of a law respecting the form and contents of notices, intended to give the insurer information, which he may exact or dispense with, as he chooses.

Labbe v. Equitable Mutual Fire Assurance Co., 29 Que. S.C. 274 (C.R.).

—Appraisement bond—Notice—Award.]—An arrangement for determining the amount to be paid by insurers to the insured by means of an "appraisement bond" containing certain clauses defining the duties of the appraisers and the mode of procedure before them is an agreement for arbitration and the rules prescribed by arts. 1431 et seq., C.C.P., apply to it as well as to the subsequent operations of the appraisers who are really arbitrators. Hence, failure by the latter to notify the parties or one of them of the time and place of their proceedings is a contravention of article 1436 and nullifies their award.

Town of Beauharnois v. Liverpool, London & Globe Ins. Co., Q.R. 15 K.B. 235.

—Concurrent policies—Contribution to loss—General policies and special policies.]—An insurer of a stock of merchandise under a general policy, who has to contribute to a loss with insurers under special policies, each upon a part of the same stock, is liable in proportion to the loss in each part. For this purpose the general policy is divided into as many parts as there are special insurances and proportionately to the losses on each, and each such part contributes rateably with the special insurances.

Bloomfield v. London Mutual Fire Insurance Co., 29 Que. S.C. 143 (Archibald, J.).

—Determining loss by arbitration—Powers of arbitrators—Misrepresentation—Setting aside award.]—An agreement was entered into between plaintiff and the defendant company for the appointment of two arbitrators to appraise the loss to property damaged and destroyed by fire, the arbitrators appointed being empowered to select a third who should act with them in matters of difference only. The arbitrators first appointed made an award which was good upon its face, but failed to comply with one of the material terms of the submission, in failing to make an estimate of the value of goods actually destroyed, or to determine the sound value of goods not destroyed:—Held, that when the award was signed the authority of the arbitrators ceased, and that it was not within the power of either of them to re-open it or to deal further with the matter. Also, that the fact that one of the arbitrators was misled by his co-arbitrator in connection with the signing of the award, if true, would form good ground for an application to the Court to set it aside, but did not justify him in calling in the third arbitrator and making another award different from that to which he was already a party. Also, that a difference between the arbitrators arising after the filing of the award was not a difference within the meaning of the submission which justified the calling in of the third arbitrator. After the making of the award, plaintiff made an assignment under the Collection Act to a bank which subsequently reassigned to plaintiff. In the meantime, before the reassignment, plaintiff made an assignment, also under the Act, to M., who notified the company. Quære, whether the action could be brought in the name of plaintiff, and

whether any legal interest passed to M. under the assignment.

Hall v. The Queen Insurance Co., 39 N.S.R. 295.

—Undertaking of mortgage company to keep up insurance on mortgaged property.] —(1) If a mortgage company through its manager undertakes with the mortgagor to keep alive an insurance on the mortgaged property, and takes steps towards carrying out such undertaking, but fails to carry it out, it is guilty of such negligence as to render it liable in damages to the mortgagor, if ignorant of such failure, for the amount of such insurance in case the property is burned after the policy lapses. Skelton v. L. & N. W. Ry. Co. (1867), L.R. 2 C.P., per Willes, J., at p. 636, followed. (2) It is not necessary in such a case that the company's undertaking should be under seal.

Campbell v. Canadian Co-operative Investment Co., 16 Man. R. 464.

—Lease—Change in nature of risk—Absence of notice or knowledge by landlord—Control of landlord—Omission to notify insurance company.]—After the owner of dwelling-house property had effected an insurance thereon he leased the premises to a tenant who, without the owner's knowledge, changed the occupation thereof, by bringing in a stock of goods, which he sold out to pedlars:—Held, that the owner was not affected by the third statutory condition, R.S.O. 1897, ch. 203, sec. 168 (3), which requires notice of any change material to the risk within the control or knowledge of the insured, to be given to the company, for, being under lease, the premises were not under the owner's control while the change in the occupation was without his knowledge, and the fact that the change was made by the tenant after the making of the policy was immaterial.

London and Western Trust Co. v. Canada Fire Insurance Co., 13 O.L.R. 540, affirmed 16 O.L.R. 217.

—Re-insurance—Limitation clause imported from original policy—Construction clause held to be unreasonable and inapplicable.]—In a contract of re-insurance which was engrafted on an ordinary printed form of fire insurance policy, and incorporated all its terms, there was a clause which purported to prohibit an action thereon unless commenced within twelve months next after the fire:—Held, by the Privy Council, that, having regard to the true construction of the contract, which carelessly purported to include many conditions inapplicable to re-insurance, the above clause must also be regarded as inapplicable. Such a clause is reasonable in the original policy where the assured can sue immediately on incurring loss; it cannot apply where the insured is unable to sue until the direct loss is ascertained between parties over whom he has no control. Judgment of the Supreme Court of Canada dismissing the appellant's action, 35 S.C.R. 208, reversed and judgment of the Quebec Court, 27 Que. S.C. 494, restored.

Home Insurance Company v. Victoria-Montreal Fire Insurance Company (1907), A.C. 59, 16 Que. K.B. 31.

—Statutory conditions—Arbitration Act—Motion to stay proceedings.]—After issue had been joined in this action against the defendants, a fire insurance company, on a policy containing the statutory condition as to reference to arbitration, a motion was made on their behalf to stay the action. On the motion all defences were withdrawn, and it was represented that the whole matter in dispute was the amount of the loss:—Held, that under sec. 6 of the Arbitration Act, R.S.O. 1897, ch. 62, the application, being made after delivery of the statement of defence, was too late. (2) This was not a case within the powers of the Court to stay an action under the O.J.A. sec. 57.

Cole v. Canadian Fire Insurance Company, 15 O.L.R. 336.

—Representation of ownership of property insured—Insurance by husband of property belonging to his wife—Insurable interest.] —A contract of insurance of movables in favour of a husband who represents himself to the insurer as the owner of them, whereas they belong to his wife, is null and void for false representation.

Lemieux v. Equitable Fire Assurance Co., 30 Que. S.C. 490.

—Statutory conditions — Variation — Appraisement in place of arbitration.]—In a policy of fire insurance, it was provided, by way of variation of statutory condition No. 16 providing for reference under the Arbitration Act in case of differences, that if any difference arose as to the value of the property insured, of the property saved, or the amount of the damages or loss, the same should be submitted to and ascertained by appraisers, one to be appointed by the assured and one by the company, who were to select an umpire and that the assured and the company should pay the appraisers respectively selected by each of them, and that each should pay one-half the expenses of the umpire:—Held, that the variation was not binding upon the assured, not being "just and reasonable to be exacted by the company," inasmuch as it was more stringent and onerous than the statutory condition, both because (1) the plaintiff would be bound by the findings of the majority of the appraisers as the result of their own personal opinions only, and would be deprived from examining witnesses on oath

touching the amount of his loss; and because (2) it imposed upon the insured the payment of certain of the expenses in any event, whereas the statutory condition provides that where the full amount of the claim is awarded costs shall follow the event, and in other cases be in the discretion of the arbitrators. Semble, that if the language of the variation was to deprive the insured of the benefit of the provisions of the Arbitration Act, which the statutory condition expressly made applicable to the reference, it would be manifestly unjust, as more stringent and onerous than the latter.

Cole v. London Mutual Fire Ins. Co., 15 O.L.R. 619.

—Policy—Condition for occupancy—Reasonableness.]—In an action for a loss on a fire policy containing a condition that any change material to the risk should avoid the policy, unless promptly notified to the company, and that any change of occupancy or non-occupancy should be deemed material to the risk, it was proved that the premises insured had been vacant for some months during the currency of the policy, but were occupied at the time of the loss, and it did not appear that the loss was in any sense due to the non-occupancy. Under a proviso in the policy that certain conditions (including the one in question) should be in force only so far as the Court or a Judge should declare it to be just and reasonable to be exacted by the company, the trial Judge declared the condition as to occupancy made at the time the policy issued, but tested with relation to the circumstances which afterwards arose, to be unjust and unreasonable. He submitted to the jury the questions whether the change from occupancy to non-occupancy was material to the risk in this case, and whether it was material generally. To the former question the jury answered, "No," and to the latter, "Yes." On these answers a verdict was entered for the plaintiff:—Held, that the condition as to occupancy was to be tested as to its being just and reasonable in the light of circumstances at the time the policy issued and not at the time of the loss, and being so applied was just and reasonable, and the breach of non-occupancy avoided the policy, and a verdict should be entered for the defendant.

Payson v. Equitable Fire Insurance Co., 38 N.B.R. 436.

— Concealment — Mortgaged property — Waiver—Second policy.]—The statement in an application for insurance against fire that the immovable to be insured is mortgaged for an amount less than is really the case is not a ground for avoiding the contract. Even if it is offers of payment made by the insurers after the loss is a waiver by them of the right to invoke it. Failure by the insured to make known to the insurers the fact that an application for further insurance had been accepted by another company is not a reason for avoiding the first contract. The plaintiff who sets up acknowledgments and promises to pay by the defendant in a replication to the pleas cannot be prevented from giving evidence thereof on the ground that the same should have been alleged in the declaration.

Fiset v. Equitable Mutual Fire Ins. Co., Q.R. 31 S.C. 334 (Sup. Ct.).

—Action on policy—Proof of claim—Application—False declaration.]—The observance of the formalities required by the law respecting mutual fire insurance companies as to filing proofs of claim in case of loss is a condition precedent to an action on the policy. If the assured in his application states that he is owner of the property to be insured when he holds merely an agreement for the sale thereof he makes a false declaration which avoids the contracts of insurance.

Ouellette v. La Jacques Cartier, Q.R. 31 S.C. 29 (Sup. Ct.).

—Application — Misrepresentation in — Knowledge of false representation by agent of company.]—Plaintiff insured a building with defendant company, and made certain statements in the application as to fires used on the premises which were found to be false. The premises were destroyed by fire, and the company disputed liability. In answer to the defence of misrepresentation, the defendant pleaded that the company's agent, who had filled out the application, was aware of the condition of the premises:—Held, that the policy was void on account of the mis-statements contained in the application. (2) That even if the plaintiff's agent had been aware of the condition of the premises, as it appeared that he had filled out the application and had filled in the answers to the questions upon which the misrepresentations were based, he would be acting as agent of the plaintiff and in fraud of the company, and the company would not be bound by the policy or affected by his knowledge.

Parsons v. Alberta-Canadian Insurance Co., 2 Sask. R. 76.

—Premium—Payment by bill of exchange—Default in payment.]—Plaintiffs insured in the defendant company against loss by fire a stock of goods for $2,000. The application contained a clause that if the premium was not paid as agreed the insurance should be void until "such settlement is made." The premium was never paid in cash, but a bill of exchange was drawn upon plaintiffs and accepted by them, but this was never paid. The property was shortly afterwards destroyed by fire. The policy contained one of the statutory condi-

tions, namely, that the insured should forthwith after loss give notice to the company in writing. No such notice was given by the insured, although the company's agent gave notice and told plaintiffs he had done so. It was contended, however, that notice had been waived: first, because the company did not draw attention to the omission; second, because they sent an adjuster to adjust the loss; and third, because the manager of the company made an appointment to discuss the claim. The policy, however, contained a clause that no condition should be waived except in writing. The policy also required that the proofs of loss should shew when and how the fire originated to the best of the claimant's belief, while in the proof of loss filed the claimant stated the cause of fire to be unknown, while from his examination for discovery it appeared that he believed it started from an explosion of the furnace. In an action to recover the amount of the policy:—Held, that the defendant, having drawn a bill of exchange upon the plaintiffs which was by them accepted and because a floating security which might be passed from hand to hand, must be deemed to have accepted "settlement" within the meaning of the terms of the application. (2) That compliance with the term of the policy requiring notice of loss was a condition precedent to the right to recover, and while if some sort of notice had been given which was defective the Court might possibly relieve, yet no such relief could be granted where there was an absolute non-compliance. (3) That the acts pleaded in support of waiver were not sufficient to support the plea, but in any event the policy provided that no waiver should be effective unless in writing, and there being no writing that would constitute a waiver, the plaintiffs could not succeed on that ground. (4) That the proofs of loss were insufficient, as the statement of the cause of the fire being in the belief of insured unknown, was untrue.

Bell Brothers v. Hudson's Bay Insurance Co., 2 Sask. R. 355.

—Misdescription—False declaration—Vacant premises.]—An error, in an application for insurance against fire, in the name of the place given as that in which the property is situated (e.g., that the mill to be insured is in the parish of St. Honore du Canton Armand when it is in St. Hubert du Canton Demers); which does not affect the nature nor extent of the risk is not a ground for avoiding the policy. In order that a false declaration by the assured should work a forfeiture of the policy it is necessary that it should relate to a material fact of a nature to aggravate the risk. The insurer who invokes this objection must prove its materiality and if he fails to do so the fact that the application was untrue in respect to the subject matter of the objection, that is, that it was untruly stated there was no stove on the premises, does not work a forfeiture. Nor does it when the insured had previously lost an insured mill though he denied the fact in his application. In the absence of agreement to the contrary the non-occupation of the insured premises at the time of the loss without proof that it aggravated the risk, does not cause forfeiture. Nor additions made to the insured mill without notice to the insurer. Insurance on articles specified in the policy covers others of the same nature which replaced them at the time of the loss. The insured is justified in effecting the insurance though his title is imperfect if it results from circumstances that he has the same legitimate interest in the preservation of the property that an owner under an incontestable title would have had. The insurer sued on the policy cannot at the trial on the merits set up a want of interest not mentioned in his pleas. Moreover, having accepted the premiums for several years, he is not in a position to rely on this ground as arising from the loss.

Equitable Assur. Co. v. Saint Aubin, Q.R. 18 K.B. 345.

—Conditions of forfeiture—Knowledge of insurer—Factory—Machinery.]—In an action on a policy of insurance against fire effect must be given to provisions for forfeiture though it is proved that the conditions under which they were inserted could have had no effect on the origin and development of the fire causing the loss. Thus, the insured forfeits his policy by a breach of a condition forbidding him to leave the premises unoccupied without notice to the insurer and of another requiring him to furnish proofs of his loss within a stated time. Whereby a condition in a policy on a factory and its machinery makes it void in case of non-occupation or of cessation of work, a breach causes forfeiture even though the insured premises were under the continual surveillance of the owner or his foreman and visited daily by one or the other. Knowledge acquired by the agent of the insurer of the increased risk in such case will not prevent the forfeiture. Such forfeiture is incurred with respect to insurance on the building as well as that on the machinery insured separately, as the machinery incorporated with the factory or consisting of implements required to work it form part of the immovable, the first by nature (see Art. 379 C.C.) and the second by destination. The insurer sued on the policy who pleads forfeiture need not ask that the policy be annulled. His defence is not based on grounds for avoiding the contract, but on those which relieve him of his obligations while those of the insured remain.

Village of Masson v. Liverpool, London & Globe Ins. Co., Q.R. 35 S.C. 455.

—Property subject to agreement for sale—Insurable interest.]—(1) The owner of property covered by insurance policy and subject to an agreement for sale has an insurable and beneficial interest in the property. (2) Where the insurance policy is claimed to be for a larger amount than the value of the property insured, the judgment, in the absence of fraud, will be in favour of the plaintiff for the value, with a reference to the clerk to ascertain such value. (3) The insured, having a beneficial interest in the property covered by the policy, is entitled to the insurance money, and the insurance company will not be subrogated to the insured's right to claim from the purchaser the balance of the purchase price, if the contract for sale specially provides that the insured (the vendor) is not to be liable to the purchaser in the event of loss of property by fire.

Hoffman v. Calgary Fire Insurance Co., 2 Alta. R. 1.

—Application — Untrue answer — Warranty.]—The first statutory condition makes fire insurance of no force in respect to property in regard to which the insurer has misrepresented any circumstance material to the risk. By variation or added condition, the insurers declared, in their policy sued on in this action, that any mortgage or other lien should be deemed material to the risk within the above condition:—Held, that it still remained for a Judge or jury to determine the fact of the materiality or immateriality; and that if the added condition was intended otherwise, it could not be upheld as reasonable or just. The insurance in question was on the "ordinary contents" of a barn and stable. Held, that the fact that there were vendors' liens on implements, part of such contents, which were not communicated to the insurers, was not material to the risk; and the fact that the plaintiff's application for insurance contained a warranty of the truth of his answers therein, and expressly stated that any untrue answer should avoid the policy, and the plaintiff falsely stated therein that nobody had any legal or equitable claim to the property insured, made no difference, the insurers not having made the warranty any part of the policy or of the contract of insurance, save as above mentioned. At the annual meeting of the insurance company, the authority to issue policies was taken from the president and manager and vested in an executive committee. Held, that this applied only to policies to be issued on future applications or then unaccepted applications, and not to cases where, as here, there was a complete contract to insure.

Fritzley v. Germania Farmers' Mutual Fire Insurance Co., 19 O.L.R. 49.

—Condition in policy as to salvage in case of fire.]—Failure by the insured to comply with the condition of the policy that he will use all means in his power to save the goods insured, in case of fire, is a bar to his right to recover any insurance at all.

Parent v. Providence Assurance Co., 36 Que. S.C. 377 (C.R.).

II. LIFE INSURANCE.

—Presumption of death of insured—Proofs of death—Return of premiums paid after supposed death.]—In an action upon two policies of insurance on the life of S., the plaintiff, his wife or widow, alleged that he died before the action was commenced and within a year after the 20th December, 1897, when he was last heard from; and she also claimed a return of the premiums paid by her upon the policies since the 20th December, 1898. Under each policy the insurance money was payable "within ninety days after due notice and proof of the death;" and by the Ontario Insurance Act, R.S.O. 1897, c. 203, s. 80, insurance moneys are payable in sixty days after "reasonably sufficient proof." There was no direct evidence of the death, but the plaintiff rested upon the presumption arising from the fact that S. had not been heard of since the 20th December, 1897. S. left his home in Toronto in November, 1897, and went to Chicago, with a view of seeking employment. During the six or seven weeks next after his departure he wrote three letters to his wife. In the last dated the 20th December, 1897, written in Chicago, he stated that he was leaving there. Then all communications ceased, and since then nothing had been heard from or of him by the plaintiff or any of his family, who took no steps to trace him or ascertain whether he was living or not. In December, 1906, the plaintiff first made claim for the insurance money, and forwarded to the defendants proofs of loss, which consisted of her own statutory declaration setting out the above facts, exhibiting copies of the three letters, and stating her belief that if he were living he would have continued to correspond with her. There was no proof of search or inquiry. The action was begun on the 23rd March, 1907. After the action had begun the defendants advertised and made inquiries for S., but without success:—Held, upon the evidence given at the trial, and especially considering the efforts made by the defendants, that S. should be presumed to be dead before the 13th May, 1908; the probability of his sending intelligence of himself was not rebutted by anything in the evidence so as to prevent the presumption of his death arising. But held, that the defendants had not received reasonably sufficient proof thereof before action, and upon that ground the action failed, and should be dismissed, but without prejudice to another action. Held, as to the claim for return of the premiums, that no presump-

tion arose as to that, and the plaintiff had not established that the death took place before the date of payment of any of the premiums accruing before action; and they were not paid negligently or under mistake, but voluntarily, with full knowledge of the doubt as to their being payable at all.

Somerville v. Ætna Life Insurance Co., 21 O.L.R. 276.

Beneficiary certificate — Will.]—Testator held a beneficiary certificate in Canadian Home Circle, payable to his wife. He made a will directing that real and personal estate "be sold and converted into cash and divided as follows: one-third of the same (which includes the money that shall come from the Home Circle) to be invested for my present wife, and the interest arising therefrom paid her during her lifetime, and after her death the principal to be equally divided among my children share and share alike":—Held, that there was nothing in the will which operated to change the beneficiary, and the policy was not affected by the will. In re Cochrane, 16 O.L.R. 328, followed.

Re Earl, 1 O.W.N. 1141, 16 O.W.R. 901.

Benefit association — By-laws and regulations — Transfers between lodges—Member in good standing — Regularity of affiliation.]—Where the constitution of a benefit association provides that members shall not be transferred from one lodge to another unless all dues and assessments have been paid, up to and including those for the month in which the application for affiliation is made, the fact that, upon such an application, a member was transferred from one lodge to another involves the presumption as against the association that the transfer was regularly made when the member was in good standing and in accordance with the regulations. Judgment of K.B., Quebec, affirmed.

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

—Life insurance in favour of wife—Bequest of insurance moneys in trust for wife during life.]—The testator had insured his life for the benefit of his wife, and the policy was in force at his death. By his will he purported to give the insurance moneys, sufficiently describing the policy to identify it with that in favour of his wife, to his executors to be held in trust by them for the maintenance of his wife as long as she should live; he also gave other property upon the same trust; and directed that, after her death, the residue of his estate should be divided among certain named persons, none of whom came within the preferred class of the Insurance Act, R.S.O. 1897, c. 203, s. 159 (2):—Held, that the testator could not make any such disposition of the insurance moneys as he had attempted to do by his will—the trust declared by s. 159 (1) of the statute not being displaced by an effective declaration under s. 160; and the wife was, at his death, entitled to receive the insurance moneys. It was contended that the will raised an election, and that the wife must either allow the insurance moneys to be disposed of as the will directed or lose all benefit under the will. Held, that the case fell within the "notable exception" referred to by James, V.-C., in Wollaston v. King (1869), L.R. 8 Eq. 165; the testator, having the power to appoint to any within the class of preferred beneficiaries, first gave the insurance moneys in trust for the wife as long as she lived —and then over; that he could not do; and the wife was entitled to the insurance moneys, as well as to the other benefits under the will. Semble, that the case would have been different had the insurance moneys been disposed of away from the wife. Griffith v. Howes (1903), 5 O.L.R. 439, and In re Anderson's Estate (1906), 16 Man. L.R. 177, distinguished.

Re Edwards, 22 O.L.R. 367.

—Conditions avoiding policy — "Serious disease or complaint."]—A policy of life insurance was made subject to conditions "below and on page two hereof":—Held, good within R.S.C., c. 54, s. 71, notwithstanding the words of the Act that no such conditions shall be good or valid unless "set out in full on the face or back of the policy." Also, that acute bronchitis, of such a character as to be mistaken and treated for chronic bronchitis, was a "serious complaint" within the condition of the policy, avoiding it if the insured, before its date, had been attended by a physician for "any serious disease or complaint."

Leonard v. Metropolitan Life Insurance Co.

—Assignment of policy to stranger—Gift —Delivery.]—The plaintiff, in December, 1896, signed a document (not under seal) by which he purported to assign to the defendant a certain twenty-year endowment policy of insurance on his life, effected in 1888, by which the insurance company promised, in consideration of an annual premium of $256.50, to pay at the death of the plaintiff, or at the maturity of the policy in 1908, the sum of $5,000. The assignment stated that "for one dollar" and "for other valuable considerations," the plaintiff assigned, transferred, and set over to the defendant (naming her and describing her as "fiancee") all his right, title, and interest in the policy (describing it), "and, for the consideration above expressed, I do also, for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators, and assigns, and their title to the said policy will forever

warrant and defend." There was in fact no consideration for the assignment. The plaintiff did not, at the time he executed it, inform the defendant of it; but in February, 1897, he wrote to her about it, and in March he sent the assignment to the insurance company, and they registered it in their books, and notified the defendant of it. In April the plaintiff wrote to the defendant saying that he enclosed her the assignment, and telling her not to lose it, but he did not in fact enclose it, and she never had the policy or the assignment in her possession. The plaintiff paid the premiums and kept the policy on foot. In January, 1900, he executed a document purporting to revoke the assignment, and brought this action for a declaration that the assignment was duly revoked and the plaintiff entitled to the insurance moneys, the policy having matured:—Held, that, even if evidence of the plaintiff's intention was admissible (and, semble, it was not), there was nothing in the evidence to warrant a finding that it was not the intention of the plaintiff to give the policy absolutely and irrevocably to the defendant, nor that it was his intention to make the policy payable to her at his death, should that occur before maturity of the policy, and subject to any change he might desire to make before death or maturity. When the assignment was transmitted to the insurance company and the defendant notified of the transfer of the policy to her she was, to all intents and purposes, owner of the policy. Delivery was not necessary, but, if it were, there was a constructive delivery by the formal acts of registration with the insurance company and notice to the defendant. Held, also, that the assignment did not operate merely as a designation of a beneficiary, under the Ontario Insurance Act, R.S.O. 1897, c. 203, s. 151, which the plaintiff would have a right to change, but was an absolute, irrevocable assignment outside of the statute.

Wilson v. Hicks., 21 O.L.R. 623.

—Application—Answer to questions—Mutual company—Condition in policy.]—A general expression added to a question on a special subject in the application for a life insurance policy should be construed as relating to things of the same nature as those mentioned. Thus, in the question "have you suffered from chronic dyspepsia or any other malady," the latter words must be understood to refer to maladies of the same nature and gravity as chronic dyspepsia or which can enhance, in the same manner, the risk of insurance. Therefore the applicant's answer in the negative, though he has had attacks of acute dyspepsia and indigestion, is not a concealment avoiding the contract. Nor is it avoided by the answer "Never sick" to the question "for what maladies have you consulted a physician or been under one's care, or undergone any treatment whatever within five years?" The condition in a contract for life insurance resulting from admission into a mutual society, that the member or his beneficiary will only have the remedies provided by the by-laws, and particularly, that failure to appeal within twenty days from the adverse decision of the official appointed to give it, does not give the society an absolute defence to an action for the insurance money if it is established that the decision of the said official was given without notice to the beneficiary as giving him an opportunity to establish his rights.

Independent Order of Foresters v. Turmelle, Q.R. 19 K.B. 261.

Assassination of insured by beneficiary —Knowledge of insured—Rights of heirs.] —The fact that the beneficiary under a life insurance policy intended to assassinate, and did in fact assassinate, the assured will not—when it is not shewn that the assured knew of such intention when he effected the insurance nor that the beneficiary was his agent in effecting it—discharge the insurer from the obligation to pay the amount of the policy to the heirs of the assured after judicial revocation of the benefit stipulated for in favour of the assassin.

Standard Life Assurance Co. v. Trudeau, 9 Que. Q.B. 499, affirming 16 S.C. 539. Affirmed by Supreme Court of Canada 12 June, 1900, 31 Can. S.C.R. 376.

—Beneficiary certificate — Condition — Change of occupation — Failure to notify insurers.]—In 1905 W. became a member of the defendant society, beneficiary department, and received a beneficiary certificate, which directed payment of $1,000, in case of his death, to his wife, the plaintiff. He was then a carter, but later became a brakesman, without notice to the defendants, and was killed in a collision while a brakesman. In his application he agreed that compliance on his part with all the laws, regulations, and requirements enacted or which might thereafter be enacted by the society was the express condition upon which he was to be entitled to participate in the beneficiary fund, and this was recited in the certificate, and W. accepted the condition and agreed, for himself and those claiming through him and under the certificate, to be bound by it. The constitution, as enacted in 1908, separated holders of certificates into classes, a carter being in the ordinary class and a brakesman in the hazardous; it provided also that if a member changed his class he should notify the society, and his rating would be increased, and provided, in default of notice, for forfeiture of all benefits; and that, in case of death during the continuance of the forfeiture, the beneficiary should not be entitled to any benefit, notwithstanding con-

tinued payment of the ordinary class rates. W. changed his occupation, but did not notify the defendants, and went on until his death paying the lower rate:—Held, that the constitution of 1908 applied, and the defendants were not liable at all.

Wilson v. Sons of England Benefit Society, 1 O.W.N. 144.

—Non-payment of premium — Lapse of policy—Revival by subsequent payment — Warranty of good health—Breach.]—

Seery et al. v. Federal Life Assurance Co., 5 E.L.R. 406 (N.B.).

—Life policy—Claim by assignee—Fraudulent representations of assured in application — Sickness at time of application — Insurable interest — Speculative insurance —Invalidity.]—

Dupere v. London & Lancashire Life Assurance Co., 6 E.L.R. 232 (Que.).

—Promissory note for premium — Withdrawal of application before acceptance by company — Liability of applicant on note.]

Lesperance v. Brisson, 4 E.L.R. 97 (Que.).

—Change of beneficiary—Trusts.]—

Allen v. Wentzell, 7 E.L.R. 575 (N.S.).

—Benevolent society—Misstatement of age —Rules regulating mode and amount of payment.]—A benevolent society's certificate provided for payment to the plaintiff upon his total disability, or upon his attaining the age of seventy years, out of the total disability fund, in accordance with the laws governing the fund, sums not exceeding in the aggregate one thousand dollars. In his application, upon which it was declared the certificate was founded, the plaintiff gave his age as fifty-four when it was in fact fifty-five, the latter age being within the age allowed for entrance and the assessments and fees chargeable being the same for both ages. The plaintiff attained the age of seventy on the 10th December, 1899, and brought this action on the 15th of May, 1900, asking for payment of $1,000. The jury found that the plaintiff's age was not material to the contract, and that the statement as to age was made in good faith and without any intention to deceive:—Held, that the certificate was binding, and that the plaintiff was entitled to payment thereunder upon, in fact, attaining the age of seventy, but that the "laws governing the fund" applied, though not set out, and that under them the plaintiff was entitled at the time of action brought only to a benefit of $225. Judgment of Rose, J., reversed.

Hargrove v. Royal Templars of Temperance, 2 O.L.R. 79 (C.A.).

—Recovery of deposit—Form of proceeding—Art. 1198 R.S.Q.]—Proceedings to recover a deposit made, under Art. 1198 R.S.Q., by an insurance company when there are different claimants therefor, should be taken by ordinary action and not by petition.

Coleman v. Catholic Order of Foresters, 3 Que. P.R. 400 (S.C.).

—Beneficiary—Withdrawal of profits.]—A married woman, beneficiary of a policy of insurance with participation of profits on her husband's life, cannot draw the profits as long as the insured as living.

Colleret v. Ætna Life Insurance Co., 3 Que. P.R. 394 (S.C.).

—Assignment of policy—Will—Arts. 5581, 5584 R.S.Q.]—Under the provisions of Arts. 5581 and 5584 R.S.Q., an assignment of a policy of insurance may be made by will. It is not necessary that, on pain of nullity, the will should be attached to the policy; it is sufficient for the will to indicate the assignment in an incontestible manner.

Hardy v. Shannon, 19 Que. S.C. 325 (S.C.).

—Embarrassing pleadings—Setting aside of—Setting out of foreign law—Want of particularity.]—To the two counts of a declaration upon a policy or certificate of life insurance defendants pleaded thirty-four pleas. The first and eighteenth were alike and were as follows: "The defendants say that no demand of the said sum of two thousand dollars was made at the Association's office in Galesburg, Illinois, and by reason thereof, and by the laws of the State of Illinois, the plaintiff cannot recover upon the said certificate." The third and twentieth pleas were also alike and were as follows: "The defendants say that the death of the said August P. B. LeBlanc was from a cause exempted by the provisions and agreements contained in the said certificate." An order was made by Landry, J., in Chambers, striking out these four pleas as being embarrassing. Upon a motion to rescind said order:—Held, 1. That the first and eighteenth pleas were bad for not averring what the law of the State of Illinois was by reason of which the plaintiff could not recover; and 2. That the third and twentieth pleas were good—it being unnecessary to specify the particular cause relied upon by defendants as exempting them from liability.

LeBlanc v. Covenant Mutual, 34 N.B.R. 444.

—Insurance monies—Charge on—Payment by devisees pro rata.]—A policy of insurance was by the husband's will made payable to and for the benefit of his wife and son, and he thereby apportioned the proceeds between them. The policy was charged with the payment of a loan procured by the testator from the company:—

Held, that the amount of the loan was payable by the wife and son pro rata out of their respective shares of such monies, the gifts to them being specific.

Re Tatham, 2 O.L.R. 343.

—Change of beneficiary—Will—R.S.O. 1897 c. 203, ss. 151, 160.]—When a policy of insurance is payable to a beneficiary for value, not so named on the face of the policy, who is also one of the preferred class of beneficiaries, the assured cannot by his will transfer the benefit of the insurance to another beneficiary of the preferred class. Such a case is governed by s. 151, and does not fall within s. 160, of the Insurance Act, R.S.O. 1897, c. 203. Judgment of Mededith, J., 32 O.R. 206, reversed.

Book v. Book, 1 O.L.R. 86 (C.A.).

—Company winding-up—Proof of claim of unmatured policy.] — The amount for which the holder of an unmatured policy payable at the death of the insured is to rank against an insolvent life insurance company in liquidation under the Ontario Insurance Act, R.S.O. 1897, c. 203, is the difference if any, at the date of the commencement of the winding-up, between and in favour of the present value of the reversion in the sum assured at the decease of the life and the present value of a life annuity of an amount equal to the future premiums which would become payable during the estimated duration of the life assured. Re The Merchants' Life Association, Vernon Cases, 1 O.L.R. 256 (D.C.). The ascertainment of the present value of the reversion in the sum assured by the policy at the decease of the life insured, as directed by the judgment in 1 O.L.R. 256, is a matter of simple calculation from the ordinary life insurance tables; the premium actually paid by the insured has nothing to do with the calculation. The statute 1 Edw. VII. c. 21 (O.), assented to on the 15th April, 1901, altering the manner of valuing unmatured policies, and enacting that the alterations declared the law of the Province as it existed on the 14th April, 1892, did not affect the rights of the claimants under their policies, because those rights had been declared by the judgment in 1 O.L.R. 256 before the Act was passed, and judgments are not reopened even by such legislation.

Re Merchants' Life Association of Toronto, Vernons' Claims, 2 O.L.R. 682 (D.C.).

—Foreign benefit society—Registration as friendly society—Certificate—Beneficiary—Change by will—Contract of insurance—Rules of society—Conflict with Ontario Insurance Act.]—"The Catholic Order of Foresters" were incorporated in the State of Illinois, and had branches in Ontario, and in 1892 became registered as a friendly society in Ontario under the provisions of the Insurance Corporations Act, 1892, and had since kept their registry in force as a friendly society, and had not at any time been registered as an insurance company. A member of one of the Ontario branches was the holder of a certificate of the society whereby they promised to pay to the defendant, a brother of the holder, $1,000, upon satisfactory proof of his death. The holder was resident in Ontario; the application for the certificate was made in Ontario; and the certificate was delivered in Ontario. The holder made a will whereby he bequeathed the certificate to the wife of one of the plaintiffs, naming the plaintiffs executors:—Held, that the Order were legally entitled to do business in Ontario; that the certificate in question was a "contract of insurance" within the meaning of the Ontario Insurance Act, R.S.O. 1897, c. 203; that the rules of the Order, so far as they were inconsistent with the provisions of the Act, were modified and controlled by such provisions; and therefore the benefits of the certificate passed by virtue of the will to the legatee, although the rules of the Order provided that no will should be permitted to control. In re Harrison (1900), 31 O.R. 314, followed.

Gillie v. Young, 1 O.L.R. 368.

—Policy inconsistent with application—Repayment of premiums—Laches.] — The plaintiff applied to the defendants for insurance at a fixed annual premium for life, but the policy sent to him contained a provision that the premium might be increased. The plaintiff did not read the policy, and, pursuant to notices from the defendants, paid them seven annual premiums at the original rate. In the eighth year the defendants demanded a larger premium:—Held, that the policy, not being in accordance with the application, was a mere counter-proposal, and that there was no contract; that the plaintiff was under no obligation to read the policy, which he was entitled to assume, in the absence of anything done by the company to call his attention to the provision in question, to be in accordance with the application; that he was, therefore, not barred by acquiescence or delay, and that he was entitled to repayment of the premiums with interest.

Mowat v. Provident Savings Life Assurance Society, 27 Ont. App. 675.

—Note given for premium—Part payment—Extension of time—Forfeiture—Waiver.] —A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due, the policy should be void. A note given, payable with interest, in payment of a prem-

ium, provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note it was partly paid, and an extension was granted, and on a part payment being again made a further extension was granted. The last extension was overdue and balance on note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured:—Held, that no estoppel was created by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and that the policy was void.

Wood v. Confederation Life Insurance Co., 2 N.B. Eq. 217.

—Premium note—Condition as to non-payment not indorsed on face of policy—R.S. C. c. 124, s. 27.]—G. made application for a policy of insurance upon his life in the defendant company, the amount insured to be paid in case of the death of the insured to plaintiff. The defendant company accepted the risk, and issued and delivered the policy, the premium upon which was to be paid half-yearly in advance. G. paid the first premium partly in cash and partly by giving his promissory note payable two months after date. The form of application signed by G. contained an agreement on his part that if any note given for the first or any subsequent premium or any part thereof were not paid when due, any policy issued under said application should cease to be in force without any notice or action on the part of the company. The note given by G. fell due on the 18th July and was not paid. G. died on the 7th August, and after his death the amount due on the note was tendered to the company and refused:—Held, 1. The stipulation avoiding the policy for non-payment of the note was inoperative, not being set out on the face of the policy in compliance with the provisions of R.S.C. c. 124, s. 27. 2. Under all the circumstances of the case the note given by G. and accepted by the company was an absolute payment. 3. Plaintiff was entitled to judgment for the amount of the policy, with costs, less the amount unpaid on the note.

Greenwood v. Home Life Ins. Co., 37 C.L.J. 129 (Townshend, J.).

—Benefit society — Condition—Abandonment of compensation.]—There may be a condition in an insurance policy that the accused cannot sue the company before endeavouring to procure justice through its officers and persons in authority, in the manner indicated by its rules. But a condition is not valid which has for its object, directly or indirectly, the prevention of recourse to the Courts, or to compelling the insured to go before a foreign tribunal. The insured may, by agreement, renounce the benefit of compensation, but such renunciation will not be presumed and should be stipulated for in a clear and precise manner; in case of doubt as to whether or not there has been renunciation the compensation will take effect

Dahmé v. Supreme Court of Foresters, 21 Que. S.C. 439 (Sup. Ct.).

—Beneficiary certificate—Designation of beneficiaries—Indorsement—Will—I. Edw. VII. c. 21, s. 2, sub-s. (7) (O.)—Infant children of assured.]—A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died; and he then (in 1895) indorsed on the certificate a direction that payment was to be made "to my children as directed by my will." The day before his death (in 1902) the assured made a will by which he directed that the whole of his estate should be divided amongst his children—there being both adult and infant children—in equal shares, but made no reference whatever to the benefit certificate or to the moneys payable thereunder:—Held, that the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to the Insurance Act, R.S.O. 1897, c. 203, s. 151, sub-s. 6, by 1 Edw. VII. c. 21, s. 2, sub-s. 7.

Re Snyder, 4 O.L.R. 320.

—Friendly society — Benefit certificate—"Dependent" — Supposititious wife.]—A supposititious wife of the holder of a life benefit certificate in a friendly society, who had married him in ignorance that he had a lawful wife living, and had cohabited with him some six years and up to his death, believing herself during the greater part of this time to be his wife, and to whom the certificate was made payable by name, with the appellation "my wife" added, was held, after his decease, entitled, as against the lawful wife to the moneys payable thereunder as being a "dependent" within the meaning of the society's rules, notwithstanding the conjunction of that word with a number of others importing relationship by blood or affinity:—Held, also, that although the society had not stood upon their strict rights but had paid the money into Court, to be dealt with by the Court, that fact did not affect the rights of the parties, which must be determined according to law, and not ex æquo et bono.

Crosby v. Ball, 4 O.L.R. 496.

—Benevolent society—Beneficiary certificate—Alteration of constitution—Domestic forum—Retroactivity.]—A beneficiary cer-

tificate, dated October 19th, 1896, issued by a friendly society incorporated under the Benevolent Societies Act, R.S.O. 1877, c. 167, was conditioned, inter alia, that the beneficiary complied with the constitution, rules or orders governing, "or that might thereafter be enacted by the defendants to govern the order and its benefit funds," and by it the defendants agreed that on the plaintiff, the beneficiary, attaining the age of 70, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums not exceeding a certain amount:—Held, that the constitution of the defendants having been duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in 1896, when the plaintiff's certificate was issued, in such a way as to diminish the amount the plaintiff would be entitled to, he was nevertheless bound by the alteration, and could only recover in accordance with it. Held, also, that the plaintiff was not bound to exhaust, before the action, the appeals within the society provided for by the rules, for under R.S.O. 1897, c. 203, s. 80, every lawful claim against an insurance corporation under an insurance contract shall become legally payable 60 days after proper proof of loss, and any rules, conditions, or stipulations to the contrary shall, as against the assured, be void. A provision of the defendants' constitution provided that the plaintiff must sign an acceptance subscribed thereto, which he had not done until shortly before the action brought. Held, that the defendants, having assessed the plaintiff and accepted payment of the assessments on the footing of an existing certificate, and having accepted proofs of claim and paid part on account thereof, had waived this requirement. Held, also, that the optional or special benefit which the plaintiff was claiming being payable in full and not by instalments, he was not estopped from insisting that the whole of the benefit was due, merely by reason of having accepted a cheque expressed to be for the full amount of the first instalment thereof. Judgment of MacMahon, J., varied.

Doidge v. Royal Templars, 4 O.L.R. 423 (C.A.).

—Condition of policy—Payment of premium—Delivery of policy—Evidence—Art. 1233 C.C.]—The production from the custody of representatives of the insured, of a policy of life insurance, raises a prima facie presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to show that, as a matter of fact, the premium was not so paid and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional. The reception of proof, cannot under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the Province of Quebec, in commercial matters, such evidence is admissible under the provisions of art. 1233 of the Civil Code.

Mutual Life Assurance Co. of Canada v. Giguere, 32 Can. S.C.R. 348.

—Application—Beneficiary not named in policy—Right to proceeds—Accident policy—Act for benefit of wives and children.]—Where through error and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy, he is, nevertheless, entitled to the benefit of the insurance. Judgment of Supreme Court of New Brunswick appealed from, reversed. Davis and Mills, JJ., dissenting. Per Sedgwick, J.: The New Brunswick Act (58 Viet. c. 25) for securing to wives and children the benefit of life insurance applies to accident insurance as well as to straight life insurance.

Cornwall v. Halifax Banking Co., 32 Can. S.C.R. 442.

—Application—Issue of policy—Completed contract—Antedating policy—Policy not to take effect before first payment of premium—Due dates of premium.]—The initialing of an application for insurance by officers of an insurance company, though indicating acceptance of the risk, does not without communication of the fact to the applicant constitute any contract with him. If a policy is afterwards prepared and the applicant informed that it is ready for him, this will constitute an acceptance of the original application; and such policy may be properly antedated to the date of the application. A provision in the application and policy, that the insurance shall not be binding on the company, or the policy go into effect until payment of the first premium, will not postpone or affect the due dates at which the respective premiums will fall due, so as to make them different from those mentioned in the policy. Per Boyd, C.: Acceptance of the policy by the applicant without objection after paying his first premium and a subsequent payment of the second premium by him according to the terms of the policy, is cogent, and after his death conclusive evidence of his contract as expressed in the policy.

Armstrong v. Provident Savings Life Assurance Society, 2 O.L.R. 771 (Div. Ct.).

—Life insurance—Revocation by assured of benefit declared in policy—By what law governed—Revocation by will—Lien for premiums.]—A contract of life insurance entered into between a company whose head office is in Ontario, the policy having

issued from the head office and providing for payment of the insurance money there, is an Ontario contract, and must be interpreted and carried out in accordance with Ontario law, although the assured lived in Manitoba and made application there to a local agent for the insurance, but an assignment of or dealing with the benefits of the policy made by the assured in Manitoba will be governed by the law of this province relating thereto. Deceased, who was a resident of Manitoba, insured his life with the London Insurance Co. of Canada, whose head office was in Ontario, and by the policy the insurance money was appropriated in favour of his wife, but by his will he absolutely revoked this appropriation and directed that the money should become part of his estate and should be paid to his executor. Sec. 12 of the Life Assurance Act, R.S.M., c. 88, as re-enacted by 62 & 63 Viet. c. 17, permits such a revocation and new disposition of the insurance money, but the corresponding statutory provision in Ontario (R.S.O. 1897, c. 203, s. 160) forbids it:—Held, that the law of Manitoba must be applied to the determination of the question as to the right of the assured to make such new disposition, and that the insurance money must be paid to the executor as part of the deceased's estate. Toronto General Trusts Co. v. Sewell (1889), 17 O.R. 442, and Lee v. Abdy (1886), 17 Q.B.D. 309, followed. Held, also, that a will is an instrument in writing within the meaning of the Manitoba Statute above referred to. The widow was held entitled to a charge in her favour for insurance premiums paid by her to keep the policy in force.

National Trust Co. v. Hughes, 14 Man. R. 41 (Bain, J.).

—Life insurance—Terms of contract—Delivery of policy—Payment of premiums.]—A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms, or induced not to read it, has neglected to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon.

Provident Savings Life Assurance Soc. of New York v. Mowat, 32 Can. S.C.R. 147, reversing 27 Ont. App. R. 675.

—Wager policy—Endowment—14 Geo. III. c. 48, s. 1 (Imp.)—Action for cancellation—Return of premiums.]—If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit and pays all the premiums himself the policy is a wagering policy and void under 14 Geo. III. c. 48, s. 1 (Imp.). The Act applies to an endowment as well as to an all life policy. In an action by the company for cancellation of the policy under said Act a return of the premiums paid will not be made a condition of obtaining cancellation. Judgment of Court of Appeal, 2 Ont. L.R. 559, varied.

Brophy v. North American Life Assurance Co., 32 Can. S.C.R. 261.

—Condition in policy—Payment of premium—Delivery of policy—Art. 2481 C.C.]—On February 24th, 1900, plaintiff's husband applied to the defendant company for insurance on his life, the application containing this stipulation: The policy asked for, if issued, will only come into force when the first premium has been actually paid to the company and accepted while the applicant for insurance is alive and in good health." When making the application the applicant paid $4 on account of the first premium, and the medical examination having been satisfactory the company issued the policy at New York on March 8th, 1900, and mailed it on the 9th March to its agent at Montreal, who received it in the daytime on Saturday, March 10th. On March 8th the applicant was attacked with congestion of the lungs, from which he died on March 10th between 9.30 and 10 o'clock a.m. The plaintiff afterwards tendered the balance of the premium to the agent, who refused to deliver up the policy:—Held, that if in principle, the acceptance of the application constitutes a valid contract of insurance (art. 2481 C.C.) in this case, such acceptance was made subject to the above condition and that not having been complied with no contract for insurance existed. Held, also, that in view of the said condition the deposit of the policy in the post office at New York did not constitute a delivery of it to the assured.

Girard v. Metropolitan Life Ins. Co., 20 Que. S.C. 532 (Sup. Ct.).

—Medical examination—Misstatements and concealments—Materiality—Breach of warranty—Cancellation of policy.]—In the plaintiff's application to the defendants for a policy of life insurance, he warranted, amongst other things, that the answers in the medical examination which formed part thereof, were full, complete and true, and without any suppression of facts, so far as such answers were material to the contract of insurance to be based thereon. In the examination the plaintiff stated that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of la grippe, for three years next before his examination, whereas he had been ill for two months immediately before his examina-

tion, and had consulted two doctors, who told him that he was suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which though undeveloped by physical signs, was existing:—Held, that these statements and concealments were material and constituted a breach of warranty, and, therefore, the policy was void. Judgment was given for the defendants in their counterclaim for delivery up of the policy to be cancelled.

Smith v. Grand Orange Lodge of British America, 6 O.L.R. 588, 40 C.L.J. 35 (Ferguson, J.).

—Gift inter vivos—Transfer of life insurance policy.]—The provisions of the Civil Code of Quebec, Arts. 787 and 791, as to gifts inter vivos do not apply to transfers of life insurance policies.

Montreal Coal & Towing Co. v. British Empire Mutual Life Co., 5 Que. P.R. 302 (Davidson, J.).

—Note given for premium—Right to recover on—Consideration.]—An application for a policy of life insurance in the plaintiff company contained the following provision: "In consideration of the acceptance of this application and the expense incurred in connection therewith, I will accept said policy, when issued, and pay the first annual premium thereon, and if any note . . . or renewal or renewals thereof, given for the first or any subsequent premium, or any part thereof, be not paid when due, and policy issued hereunder will cease to be in force without any notice or action on the part of the company, but nevertheless the liability to pay such note . . . shall continue and be enforceable, provided the company will revive the policy in its terms, on production of satisfactory evidence of continued good health." A promissory note, given by defendant, for one-half of the premium on the policy issued by the plaintiff company, was not paid at maturity, and the company notified plaintiff that the policy was forfeited, and made an entry to that effect on their books. The defence to the action on the note was failure or want of consideration. It appearing that, in addition to the considerations mentioned in the application, defendant had been insured for at least five months:—Held, dismissing defendant's appeal, with costs, and affirming the conclusion of the County Court Judge, that there was valuable consideration for the note, and that plaintiff was entitled to recover. Also, that the effect of the words in the application "provided the company will revive," etc., was merely to signify the terms upon which a policy forfeited under the rules of the company could be revived, and formed an agreement on the part of the company independent of the payment of the premium. Per Graham, E.J., that if the provision in the application was void, not being endorsed on the policy, the policy remained in force, and there was no failure of consideration; while, if, on the other hand, the provision was valid, although not indorsed, it was binding upon defendant, and he must pay the note whether the policy remained in force or not.

Home Life Association v. Walsh, 36 N.S. R. 73.

—Condition of policy—Premium in arrear—Acceptance of payment.]—When by the condition of a policy of life insurance the non-payment of a premium when due will avoid it, and it is likewise provided that payment of a premium in arrear will only be accepted on the consent in writing of the President, Vice-President, or Secretary being given thereto, acceptance of payment after it became due, and transmission of a receipt signed by the Secretary amounts to such consent and validates the payment. The fact that the insured was dying when such payment was made, the company having made no enquiries as to his state of health, and no false representation having been made, does not invalidate it.

Page v. Metropolitan Life Insurance Co., Q.R. 23 S.C. 503 (Ct. Rev.).

—Friendly society—Altering beneficiary—Privileged beneficiary—Statutory restrictions.]—The designation of a beneficiary in an Ontario contract of insurance can be revoked, and the benefit diverted to another, only within the limits laid down by the Ontario Insurance Act, R.S.O. 1897, c. 203, s. 151, even though the original designation of the beneficiary be expressly made subject to power of revocation and substitution reserved, and to the by-laws of the insurers, which by-laws permit the desired change. Thus in such a case the attempted diversion of the benefit from a beneficiary of a privileged class to a beneficiary not belonging to that class was held invalid by reason of sub-s. 3 of s. 151 of the Act.

Lints v. Lints, 6 O.L.R. 100, 2 C.L.R. 469

—Premium note—Suit by agent of the company — Consideration — Onus probandi.]—Where a promissory note was given to the agent of an insurance company in payment of a first premium on a policy; and a policy was issued and sent to the insured and retained by him, containing provisions to the effect that the insurance should not take effect or be binding until the first premium had been paid to the company or a duly authorized agent; also, that if a promissory note or obligation

were given for the premium, and should not be paid at maturity, the policy should not be in force while the default continued, but the party should be liable on the note, the Court refused to set aside a verdict for the agent of the company on the note, on the plea that there was no consideration.

Crawford v. Sipprell, 35 N.B.R. 344.

—**Arbitration before action—Condition in policy.**]—In an action on a policy, on which was endorsed a condition that in case any question should arise "it is a condition of this policy, which the assured by the acceptance thereof agrees to abide by, . . . every such difference shall be referred to the arbitration and decision of a mutual person . . . and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable, . . . and it is hereby expressly stipulated and declared that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim under this policy," etc. "Provided, also, that compliance with the stipulations endorsed hereon is a condition precedent to the right to recover on this policy":—Held, that an action did not lie on the policy, nor did the amount payable under it become due, until the determination of the arbitrator to be appointed under the agreement to refer contained in the condition. Held, also, that the condition was not in contravention of s. 80 of The Ontario Insurance Act, R.S.O. 1897, c. 203. Spurrier v. La Cloche, [1902] A.C. 446, followed.

Nolan v. Ocean Accident and Guarantee Corporation, Limited, 5 O.L.R. 544 (D.C.). 2 Commercial L.R. 367.

—**Benevolent society—Certificate—"Legal heirs designated by will"—Election.**]—A certificate issued by a benevolent society to a married woman on the 25th of October, 1892, provided that the benefit was to be payable to her "legal heirs as designated by her will." She died on the 14th of November, 1892, leaving her husband and her three children surviving her. By her will, dated the 30th of September, 1892, she gave specific properties and legacies to her husband and each of her three children by name, the insurance to her executors "for the purpose of paying thereout all debts due by me," and the residue to her children:—Held, that the bequest of the insurance money to the executors was inoperative; that it was payable to the three children as "legal heirs designated by will," and that the children were not bound to elect between the benefits specifically given to them and the insurance money.

Griffith v. Howes, 5 O.L.R. 439, 2 C.L.R. 15 (Boyd, C.).

—**Life insurance—Delivery of policy—Escrow—Incontestability—Operation of conditions.**]—An application for life insurance, dated 16th September, 1894, and made part of the contract to be effected, provided that the issue and delivery of a policy in the usual form should be the only acceptance thereof, and that the place of contract, for all purpose, should be the head office of the company at Toronto. The policy insured the applicant's life to the 5th day of October, 1895, and provided that it would not be in force until the first premium had been paid and accepted and the first receipt delivered to the insured, and the attesting clause stated that the company affixed its seal and the President and Managing Director signed and delivered this contract "at the City of Toronto this 27th day of September, A.D. 1894." The insured lived in British Columbia, and the policy and receipt were mailed at Toronto on September 27th to the company's agent at Winnipeg, and forwarded by him on October 1st to the insured, who would not receive it before October 7th. The insured died on 30th September, 1897:—Held, Taschereau, C.J., dissenting, that the policy and receipt were delivered and the contract of insurance was completed, at least as early as 27th September, 1894, when the papers were mailed at Toronto. The policy provided that, after being in force for three years, only certain specified conditions therein should be binding on the holder, and in all other respects the liability of the company thereunder should not be disputed. The insured violated a condition, but not one so specified, that would have avoided the policy for this clause:—Held, that said provision covered breaches of conditions made during the three years the policy was in force, and was not confined to those committed subsequently thereto, and as the three years expired on 27th September, 1897, the insured dying three days later, the company was liable.

The North American Life Assurance Company v. Elson, 33 Can. S.C.R. 383.

—**Application — Materiality of answers—Evidence—Onus—Bona fides.**]—A defence to an action on a policy of life insurance was that the insured in his application, made in 1891, stated he was forty-one, whereas in fact he was forty-four:—Held, that evidence of statements made by the insured many years before the application, tending to show his belief that he was born in 1850, for the purposes of showing bona fides, was improperly rejected. The jury found that the statement in the application that the insured was born in 1850 was untrue and was material, and although there was no evidence to that effect, that it was made in good faith:—Held, that on these answers judgment should have been entered for the defendants, the onus being

on the persons seeking to uphold the contract to prove the bona fides of the answers. New trial ordered to permit plaintiff to adduce evidence of good faith which had been rejected,

Dillon v. The Mutual Reserve Fund Life Association, 5 O.L.R. 434, 2 C.L.R. 10 (C.A.).

—Policy—When complete—Insured taking hazardous employment without permission—Retention of premium paid—Estoppel.]—A policy of insurance "signed, sealed and delivered" by the President and Managing Director of an insurance company is complete and binding as against the company from the date of execution, though in fact it remains in the company's possession, unless there remains some act to be done by the other party to declare his adoption of it. A life policy was subject to a condition making it void if the insured took a hazardous employment without the written permission of the President, Vice-President or Managing Director of the Company. The assured did take such employment without the written permission of any of the officers named, but with the assent of the company's provincial agent, and after the change of occupation paid a premium which was retained by the Company with knowledge of the change of occupation:—Held, that the Company was estopped from taking advantage of the forfeiture clause.

Elson v. The North American Life Assurance Company, 9 B.C.R. 474; 2 Commercial L.R. 460.

—Revendication of policy—Wrongful detention.]—In an action of revendication of life insurance policies illegally detained, costs should be awarded according to the actual value of same and not according to their face value.

Bouchard v. Hétu, 6 Que. P.R. 44 (Charbonneau, J.).

—Policy payable to mother—Surrender—New policy—Change of beneficiary.]—In 1888 the deceased insured his life for $1,000, payable at death, in favour of his mother as sole beneficiary. In 1894 he assumed to surrender that policy in consideration of a sum of money and a paid-up policy for $500, payable at his death. By the latter policy it was provided that the sum insured was to be paid to his mother, or, "in the event of her prior death," to a sister, or, if the insured should survive the aforesaid beneficiaries, "to his legal representatives or assigns." The mother died in 1901 and the assured in 1903:—Held, that the sister was entitled to the insurance money as against the executors of the mother.

Re The Travellers Insurance Co., Kelly v. McBride, 7 O.L.R. 30.

—Application—Concealment—Accident insurance.]—M., in answer to a question in an application for insurance on his life, requiring him to state "the amount of insurance you now carry upon your life," gave particulars of all ordinary life policies, but failed to disclose the fact that he had two accident policies, on each of which $10,000 was payable in the event of his death by accident:—Held, that an accident policy is not life insurance within the meaning of the application, although such accident policy contains an undertaking to indemnify the insured in case of death by accident only.

Montreal Coal and Towing Co. v. Metropolitan Life Insurance Company, 24 Que. S.C. 399 (C.R.).

—Action for premium—Plea that policy does not agree with the application—Inscription in law.]—In an action by an insurance company upon a premium, where the defendant pleads that the policy did not comply with his application, the company, may, in answer, aver such allegation as would tend to prove that the policy was a substantial compliance with the application, but it cannot declare and pray acte of its willingness to effect any change that may be required to have the policy conform with the application.

Mutual Life v. McCooe, 6 Que. P.R. 87 (Doherty, J.).

—Application for insurance—Misrepresentation.]—One who has signed a document containing an agreement to take out an insurance policy and pay the first premium without first reading it, and believing, on the representations made by the person who procured his signature, that it only contained a request for information in view of insurance upon his life to be effected, can prove by oral testimony the error which induced him to sign it.

Imperial Life Assurance Co. v. Aigneault, Q.R. 25 S.C. 75 (Sup. Ct.).

—Application for insurance—Withdrawal—Company's receipt—Note to agent for premium.]—The defendants signed an application to the Mutual Life Insurance Company of New York for insurance on the lives of S. F., R. F., E. F., and G. H. W., members and directors of the defendant company. When the application was given the plaintiff, the agent of the company took from the defendants their note, payable to his own order for the amount of the premium, and gave the defendants a receipt on one of the company's forms, which contained this provision: "The insurance so applied for shall be in force from this date, provided that the said application shall be accepted and approved by the said company at its head office in the City of New York, and a policy there-

on duly issued. In case the application is not so accepted and approved and no policy is issued, or should the applicant receive no notification from the company within thirty days from the date of this receipt of any application, then in every such case no insurance shall be effected, and it shall be understood and agreed that the company declines the risk, whereupon all moneys paid hereunder shall be returned on the delivery of this receipt." The plaintiff discounted the note and placed the amount to his own credit, and paid the amount of the premiums, less his commission to his principals. After the note was discounted, but before the application was accepted, the defendants notified the plaintiff and his principal at its head office in New York that they withdrew the application:—Held, in an action on the note by the agent, that the application was a mere proposal for insurance, and might be withdrawn at any time before acceptance; that the consideration for the note having failed, defendants were not liable in an action by the payee.

Johnson v. Flewwelling Manufacturing Company, 36 N.B.R. 397.

—War risk—Service in South Africa—Extra premium—Special condition—Consideration for premium.]—Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war." Each policy also provided that the assured "has hereby consented to engage in military service in South Africa in the army of Great Britain, any restriction in the policy contract notwithstanding." The restrictions were against engaging in naval or military service without a permit, and travelling or residing in any part of the torrid zone. The contingent arrived at South Africa after hostilities ceased and an action was brought against the company for return of the extra premium on the ground that the insured had never been soldiers of the army of Great Britain in time of war:—Held, Girouard and Davies, JJ., dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid, was a sufficient consideration for the extra premium, and it could not be recovered back. Held, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone.

Provident Savings Life v. Bellew, 35 Can. S.C.R. 35.

—Husband and wife—Proceeds of life policy payable to her—Separate estate.]—The plaintiff was a judgment creditor of the defendant, by virtue of a judgment payable out of her separate estate, recovered on bills of exchange accepted by the defendant, a married woman engaged in trade, for her trade debts, subsequent to 13th April, 1897. Afterwards on the death of her husband, she became entitled to the proceeds of a policy of insurance on his life, which he made payable to her as beneficiary:—Held, that the effect of s. 159 of c. 203 R.S.O. 1897 is to create a statutory trust of the money, payable under the policy, in favour of the wife without restraint on anticipation; that on the death of her husband the absolute right to the money became vested in her, her original interest in the trust being separate property within the contemplation of The Married Woman's Property Act, R.S.O. 1897, c. 163, and that the fruits of the trust must be regarded as separate property and as such liable to satisfy the plaintiff's judgment.

Doull v. Doelle, 10 O.L.R. 411 (D.C.).

—Benefit of wife and children—Declaration by will—Identification of policy.]—A testator, being the holder of a policy of life insurance, payable to "his order or heirs," made his will by which he devised real estate, and proceeded: "I give the residue of my property, including life insurance, to my wife . . . and to my youngest children . . .":—Held, that the will sufficiently identified the policy within the meaning of s. 160 of the Insurance Act, R.S.O. 1897, c. 203, and operated as a valid declaration under the statute in favour of wife and children to the exclusion of creditors. Re Cheesborough (1897), 30 O.R. 639, applied. Held, also, that the word "including" in the will did not mean that the life insurance was a part of the residuary estate, but that it was given in addition to the residuary estate.

Re Harkness, 8 O.L.R. 720 (Teetzel, J.).

—Bequest to wife—Subject to payment of debts.]—Policies of life insurance were, by the terms thereof, made payable to the insured's personal representatives, but, by his will, after directing the payment of his just debts, etc., out of his general estate, he devised and bequeathed to his widow, all his estate, including the policies, subject to the payment of said debts:—Held, that the widow only took the policies subject to the payment of the debts.

Re Wrighton, 8 O.L.R. 630 (Anglin, J.).

—Post-mortem examination — Family interest.]—A post-mortem examination of a body should not be ordered in a civil proceeding on the application of a life insurance company when parties having a family interest in relation to the removal of the body from the vault and its examination, oppose the same.

Re Grothé and North American Life Co., 7 Que. P.R. 111 (Davidson, J.).

—Application for—Withdrawal before acceptance—Contract—Recovery of premium.]—The plaintiff signed an application to the defendant company for an insurance on his life and paid the first year's premium. In the premium receipt the following words were printed: "The insurance will be in force from the date of approval of the application by the medical director," and the application contained statements of the payment of the premium, and that a receipt had been furnished "to make the insurance . . . binding from the date of approval by the company's medical director" and that the contract should not take effect until accepted by the head office. Before the approval of the application by the medical director the plaintiff withdrew the application:—Held, that what took place was a mere offer of a risk on the plaintiff's life and that he was entitled to withdraw it and to recover the premium paid. Judgment of the County Court of Wentworth affirmed.

Henderson v. State Life Insurance Co., 9 O.L.R. 540 (D.C.).

— Action to cancel an insurance policy — Heirs of original beneficiary.] — The cessionnaire of an insurance policy, sued in cancellation thereof, cannot ask, by dilatory exception, that the heirs and representatives of the party on whose life and in whose favour the policy issued, shall be called in to defend the action.

North American Life Assurance Co. v. Lamothe, 7 Que. P.R. 159 (Davidson, J.).

—Beneficiaries, designation of—Legal heirs —Preferred beneficiaries.]—By a beneficiary certificate issued in 1901, a benevolent society agreed to pay $2,000 to the beneficiary or beneficiaries designated therein, with a reservation of powers of revocation and substitution. The beneficiaries were designated by an endorsement whereby payment was to be made to three named persons, "executors in trust for legal heirs," the insured having at this time a son and grandson living. In 1902, after the death of the son, the insured by a declaration in writing directed the moneys to be paid to a daughter-in-law, and by his will he also so assumed to dispose of the moneys. The insured died in 1904, leaving him surviving his grandson and several brothers and sisters. On a claim made by the grandson as the legal heir:—Held, that by the use of the words "legal heirs" an irrevocable declaration was not created in favour of the persons who would answer that description on the death of the insured as preferred beneficiaries under s. 159 of the Insurance Act, R.S.O. 1897, c. 203, for, according to the true construction of the contract, "legal heirs" meant children, and on the death of the insured's only son the designation failed, and the insured had therefore the right to designate another beneficiary, which was properly exercised in favour of the daughter-in-law. Judgment of Meredith, C.J.C.P., 9 O.L.R. 517, affirmed.

Re Farley 10 O.L.R. 540.

—Warranty—Misstatement and concealment in application.]—The action was to recover indemnity payable under a bond issued by the defendants to W. The defence alleged that deceased warranted that he was confined to his house by sickness five years before the application, when in fact he had been confined to the house by a severe attack of apoplexy within four years of the application. All the issues were found by the trial Judge in favour of the plaintiffs except that as to the date of the attack of apoplexy, and, on the ground that there was misrepresentation as to this fact, he gave judgment for the defendants. On appeal to the full Court this judgment was set aside and judgment directed to be entered for the plaintiffs. On appeal to the Supreme Court of Canada:—Held, Gwynne and Paterson, JJ., dissenting, affirming the judgment appealed from, (20 N.S. Rep. 347), that there was no statement made by the deceased, although so found at the trial, that the attack of apoplexy occurred five years before the application, nor was that issue raised by the pleadings. Per Strong, J., that upon the evidence, the merits of the case were not such as to warrant the Supreme Court in allowing a new defence by way of amendment to be set up at this stage.

Mutual Relief Society v. Webster (1889), 1 S.C. Cas. 463.

—Thirty days' grace—Condition as to payment of premium — Estoppel.]—An insurance for $4,000 in the defendant company effected on the life of the plaintiff's husband and payable to her, was some time afterwards, in consideration of an annuity of $1,500, made payable to her, assigned by her to her husband with a proviso that if he predeceased her, such annuity was to be a charge on the proceeds. By one of the conditions thirty days' grace for payment of a premium was allowed, if the insured were unable to do so when it became due, which the plaintiff stated was the fact, while by s. 148 (1) of the Insurance Act, R.S.O., c. 203, payment of any premium, not being an initial premium, might be made within thirty days after becoming due, by the insured or her beneficiary under the contract, when it would ipso facto be revived or renewed, any stipulation to the contrary notwithstanding. The insured died about ten days after a premium had become due, leaving the premium unpaid. A firm of solicitors, acting

for the insured's family, at once notified the company of the death, and not knowing whether or not the premium had been paid, but thinking that payment might have been overlooked, asked, if it had not, to advise them, and they would pay it. Subsequently, on the same day, the plaintiff called at the head office and saw the secretary, who, with full knowledge of the fact of such non-payment, stated, in answer to her enquiry, that the policy was all right as far as he knew. The solicitors' letter had been handed over to the company's solicitor with instructions to answer it, which he did, by merely asking them to send in proofs of loss, and that the matter would receive prompt attention, making no answer to the enquiry as to non-payment. Administration was taken out by the plaintiff and proofs duly furnished, and it was not until some months afterwards, on the solicitors enquiring when the amount of the policy would be paid, that they were informed that the company contested payment for non-payment of the premium:—Held, that the plaintiff was a beneficiary under the contract and entitled to make a claim under the policy; and that the company were estopped by their conduct from setting up the non-payment of the premium.

Tattersall v. People's Life Insurance Co., 9 O.L.R. 611 (D.C.).

—Conditions of contract—Misrepresentation—Non-disclosure — Accident policies—Warranties.] — Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted. On an application for life insurance, the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life insurance companies named, but did not mention two policies which he had in accident insurance companies insuring him against death or injury from accidents. The questions so answered did not specially refer to accident insurance, but the policy provided that the statements in the application should constitute warranties and form part of the contract:—Held, affirming the judgment appealed from, the Chief Justice dissenting, that "accident insurance" is not insurance of the character embraced in the term "insurance on life" contained in the application and, consequently, that the questions had been sufficiently and truthfully answered according to the natural and ordinary meaning of the words used, and, even if the words used were capable of interpretation as having another or different meaning, then the language was ambiguous and the construction as to its meaning must be against the company by which the questions were framed. Confederation Life Association v. Miller, (14 Can. S.C.R. 330), followed. Mutual Reserve Life Insurance Co. v. Foster, (20 Times L.R. 715), referred to.

The Metropolitan Life Insurance Company v. Montreal Coal and Towing Company, 35 Can. S.C.R. 266.

—Conservatory seizure—Loans on life policy—Refusal to give writing—Recourse.]—A party claiming a privilege on the proceeds of a life insurance policy for monies advanced for the payment of the premiums thereon must allege that the loans were evidenced by a writing of which a duplicate was filed with insurance company, and noted by the company on the duplicate retained by the lender, as provided by R.S.Q. s. 5603; 2. Subsequent refusal to give such writing does not create a right of conservatory seizure.

Smith v. Smith, 7 Que. P.R. 229 (Davidson, J.).

—Natural premium system—Level premium—Mortuary calls—Rate of assessment—Fraud—Rescission of contract—Estoppel.]—A took out a policy on his life in a mutual association relying on statements contained in circulars issued by the association stating that interest on the reserve fund would be sufficient to cover increases in death rates and make the policy, after a certain period, self-sustaining. The rates having been increased, A. paid the assessments for some years under protest and then allowed his policy to lapse and sued for a return of the payments he had made with interest and for a declaration that the contracts were void ab initio:—Held, (Sedgewick and Nesbitt, JJ., dissenting), that the statements in the circulars only expressed the expectation of the managers of the association as to the future and did not prevent the rates being increased in the discretion of the directors. The Mutual Reserve Fund Life Association v. Foster (20 Times L.R. 715) distinguished. The Provident Savings Life Assurance Society v. Mowat (32 Can. S.C.R. 147) referred to. Per Taschereau, C.J. As the contracts of A. with the association were only voidable he was not entitled to be repaid the premiums for which he had received value by being insured as long as the contracts were in force. Bernardin v. Réserve Mutuelle des Etats-Unis (Cour d'Appel, Paris, 10 Feb., 1904; Gaz. des Trib. 26 fév., 1904), referred to.

Angers v. Mutual Reserve Fund Life Association, 35 Can. S.C.R. 330.

—Foreign benefit society—Local court—Capacity to sue.]—A local lodge or branch of a foreign mutual benefit society cannot, at all events if it has not complied with the requirements of the Provincial Act respecting registration of such societies (assuming it could do so) bring an action

in its own name, and such an action will be dismissed on exception to the form but without costs as the plaintiff has no legal existence.

Court St. Charles Catholic Order of Foresters v. Gibeault, 7 Que. P.R. 95 (Sup. Ct.).

—Policy—Memo. on margin—Want of countersignature—Admission of a deceased agent against interest of the principal.]—A policy of life insurance sued on had in the margin the following printed memo.: "This policy is not valid unless countersigned by agent at
Countersigned this day of
Agent." This memo. was not filled up and the policy was not, in fact, countersigned by the agent. The case was first tried before McDonald, C.J., without a jury, and a judgment entered in favour of the plaintiff was affirmed by the Supreme Court of Nova Scotia, but on appeal to the Supreme Court of Canada the judgment was set aside and a new trial ordered (10 Can. S.C.R. 92). The second trial was before McDonald, C.J., and a jury when a judgment was entered in favour of the plaintiff on the findings of the jury. Upon appeal to the Supreme Court of Nova Scotia this judgment was affirmed, but a further appeal to the Supreme Court of Canada was allowed, and a new trial ordered (13 Can. S.C.R. 218). The third trial was before Townshend, J., and a jury, and a judgment was again given for the plaintiff upon the findings of the jury. This judgment was affirmed by the Supreme Court of Nova Scotia, and on appeal to the Supreme Court of Canada: —Held, Gwynne, J., dissenting, that the judgment of the Supreme Court of Nova Scotia should be affirmed and the appeal dismissed with costs. Held, per Strong, J., that nothing but strictly legal evidence having been submitted to the jury, and the whole question being one of fact, the third verdict in favour of the plaintiff should be sustained.

Confederation Life Association v. O'Donnell (1889), 1 S.C. Cas. 154.

—Assignment of policy—Assignee's selection of option—Revocation of selection.]—The assured assigned shortly before its maturity an endowment policy to a creditor by an assignment absolute in form, there being an agreement however that the creditor should apply to the company for the cash surrender value and should pay the surplus thereof over his indebtedness to the assured's wife. The assignee after the time limited by the policy for the purpose elected to take the cash surrender value. After this judgment creditor of the assured obtained an attaching order against the company. The assignee then before an action had been taken by the company in respect of the election made by him revoked it and the husband executed a declaration that the policy was to be held, subject to the assignment, for the benefit of his wife:—Held, that the assignee's election not having been made within the time limited was a mere proposal to the company; that his revocation before action taken by the company put an end to it; and that the cash surrender value was not payable by the company. Held, also, that in any event, notwithstanding the attaching order, the assured's declaration in his wife's favour took effect and defeated the attaching creditor's claim. The principle of Weeks v. Frawley (1893) 23 O.R. 235, approved and applied.

Fisken v. Marshall, 10 O.L.R. 552 (D.C.).

—Preferred beneficiaries — Survivorship—Onus of proof.]—The insured in a policy effected by him in favour of his wife and two of his children, which had not been varied by him, perished with his wife in a storm on one of the Great Lakes, and there was no evidence of survivorship. The personal representatives of the wife claimed a third share of the policy moneys, which had been paid into Court:—Held, that, apart from the operation of sub-s. 8, s. 159, R.S.O. 1897, c. 203, as amended, a preferred beneficiary under a policy within sub-s. 1 of that section, only acquires an interest contingent upon being alive when the insured dies; and that the wife's representatives being unable to prove that she was living at the time her husband died, were not entitled to the share claimed by them. Order made declaring the fund to be the property of the two children in equal shares.

Re Phillips and Canadian Order of Chosen Friends, 12 O.L.R. 48 (Anglin, J.).

—Beneficiary—Altering terms of policy.]—A wife is not entitled to have a policy of life insurance transferred to her name as beneficiary where it was taken by her husband in the name of another person whom he declared to be his wife, whereas, in fact, she was his concubine.

Deere v. Beauvais, 7 Que. P.R. 448 (Pagnuelo, J.).

—Varying benefit of—Instrument in writing—Invalid will.]—A will, invalidly executed, is not an "instrument in writing" effectual to vary the benefit of an insurance certificate, under R.S.O. 1897, c. 203, s. 160, sub-s. 1.

In re Jansen, 12 O.L.R. 63 (Falconbridge, C.J.K.B.).

—Benefit certificate—Attempt to change beneficiary—Necessity of consent—Trust.]—Under an insurance certificate for $3,000, issued by a society in 1882, the insured's wife was made the beneficiary, and the certificate was delivered to her and always remained in her possession. In 1886 the

husband purported to surrender the certificate, procuring another one to be issued in favour of his son and daughter, which was delivered to the daughter, who had always retained it. In 1887 the wife procured a divorce from her husband, which was admitted to be invalid; and in 1889 the husband went through a form of marriage with one E., when he purported to surrender the last-mentioned certificate, procuring another one to be issued in E.'s favour, to whom it was delivered, and who always retained possession of it. On the husband's death a claim made by E. was settled, and the question was as to the rights of the wife and children under the respective certificates:—Held, that under the statute then in force, 47 Vict. c. 20 (O.), the first certificate became a trust in the wife's favour, over which, so long as she lived, the husband had no control except under ss. 5 and 6 of that Act, which, however, did not empower him to surrender and replace it by another, for this only could be done with the wife's consent under 48 Vict. c. 28, s. 1, sub-s. 3 (O.), and that the wife's rights were not affected by sub-s. 5 of s. 160, R.S.O. 1897, the assured not having availed himself of the power conferred by that section.

Cartwright v. Cartwright, 12 O.L.R. 272 (Teetzel, J.).

—Thirty days' grace—Payment of premium — Estoppel — Beneficiary.] — Held, affirming the judgment of the Divisional Court, 9 O.L.R. 611, that, under the circumstances there fully set out, the plaintiff was a beneficiary under the contract and entitled to claim under the policy; that under s. 148 (I.), if a policy is kept alive or renewed by payment of the premium by the assured or any of the beneficiaries within 30 days after default, although the insured may have died during such period of grace, and that here the assured was "unable to pay" the renewal premium within the meaning of condition 5 of the policy, and that the company was estopped by their conduct from setting up the non-payment of the premium.

Tattersall v. People's Life Insurance Co., 11 O.L.R. 326 (C.A.). [Affirmed by S. C. Canada, 37 Can. S.C.R. 690]

—Note given for premium—Failure to meet—Termination of contract.]—A policyholder in the defendant company gave to one of the company's agents a promissory note for a premium which he was unable to pay. The note was discounted and the proceeds paid into the agent's private account, the receipt for the premium being attached to the note to be handed over on payment at maturity. The note was not paid, and a renewal note was given for a smaller amount, the difference being paid by the agent. When the latter note fell due the assured was again unable to pay, and a second renewal note was given, subject, as both giver and taker both fully understood and agreed, to a further arrangement or undertaking, to be come to at the end of the then current month, when the premium would have to be reported by the agent. Subsequently the assured told the agent that he could not pay the difference due on the original note, and would have to let the policy go, and was informed that, in that case, there was nothing for the agent to do but send the receipt back, which he did. The assured died some time afterwards, and later, the note fell due and was retired by the agent. The jury having found under these circumstances, in an action brought by the assured's widow, that the premium due under the policy was paid to defendant's agent in cash when the first note was discounted, and that payment was made at the head office of the company:—Held, that the findings must be set aside, and judgment entered dismissing the action. Semble, that the acceptance of the notes, under the circumstances stated, amounted, at most, to an extension of the time for payment.

Hutchings v. National Life Assurance Co., 38 N.S.R. 15.

—Condition of policy—Premium note—Payment of premium.]—When the renewal premium on a policy of life assurance became due the assured gave the local agent of the insurance company a note for the amount of the premium, with interest added, which the agent discounted, placing the proceeds to his own credit in his bank account. The renewal receipt was not countersigned nor delivered to the assured and the agent did not remit the amount of the premium to the company. When the note fell due it was not paid in full and a renewal note was given for the balance, which remained unpaid at the time of the death of the assured. The conditions of the policy declared that if any note given for a premium was not paid when due the policy should cease to be in force:—Held, affirming the judgment appealed from, 38 N.S.R. 15, Davies and Maclennan, JJ., dissenting, that the transactions that took place between the assured and the agent did not constitute a payment of the premium and that the policy had lapsed on default to meet the note when it became due. The Manufacturers Accident Ins. Co. v. Pudsey, 27 Can. S.C.R. 374, distinguished; London and Lancashire Life Assurance Co. v. Fleming (1897), A.C. 499, referred to.

Hutchings v. National Life Assurance Co., 37 Can. S.C.R. 124.

—Benefit society—Rights of member—Action to establish—Domestic forum.]—An action to establish the right of a person to membership in a benefit society will not be entertained by the Court, even where the society submits to the jurisdiction, until

the remedies provided by the constitution of the society have been exhausted. A dispute arose as to the plaintiff's right to continue to be a member of the defendant society, and a body of officials of the society decided against him; the plaintiff, instead of appealing to the Grand Lodge, as permitted by the constitution (by which he was admittedly bound), brought an action against the society. The action was dismissed, but without costs, and without prejudice to any other action being brought after the remedies provided by the constitution should be exhausted.

Zilliax v. Independent Order of Foresters, 13 O.L.R. 155 (Riddell, J.).

—Application—Speculative purpose—Agent —False declaration.]—A contract of insurance, on the life of a person who makes application therefor without intending to benefit by it himself or to perform the obligations of an assured, but for purposes of speculation and of assigning the policy to a third party, is void. The assured who signs an application prepared or written by the agent of the insurer makes the latter his own agent for the purposes of such application. Therefore the contract embodying concealments and false declarations contained in said application may be annulled.

Lamothe v. North American Life Assur. Co., Q.R. 16 K.B. 178, affirmed on appeal to Supreme Court, 39 S.C.R. 323.

—Non-payment of premiums—Lapse—Forfeiture.]—Held, reversing the judgment of Mabee, J., 14 O.L.R. 613, that upon the proper construction of the policies sued upon, in the circumstances disclosed in the evidence, both policies had lapsed and ceased to be in force at the time of the death of the person insured, and there could be no recovery thereon.

Pense v. Northern Life Assurance Co., 15 O.L.R. 131 (C.A.), affirmed 42 Can. S.C.R. 246.

—Liability on note for premium when policy voided by non-payment.]—A person who applies for and receives a policy of life insurance and gives his promissory note for the amount of the first premium, payable in three months, cannot, by refusing to pay the note, and returning the policy, avoid liability for the full amount of the note, although the policy becomes void by reason of such non-payment. Manufacturers' Life Ins. Co. v. Gordon (1893), 20 A.R. per Maclennan, J., at page 335, followed. Royal Victoria Life Ins. Co. v. Richards (1900), 31 O.R. 483, distinguished.

Manufacturers' Life Insurance Co. v. Rowes, 16 Man. R. 540.

—Benevolent society—Appropriation of insurance benefit by will—Election.]—Interpleader at the instance of a benevolent society incorporated under 40 Viet. c. 25, now R.S.M. 1902, c. 18, the subject matter being the proceeds of a life insurance certificate or policy which the insured had made payable to his wife. By his will the insured made other provision for her and directed that the money in question should fall into and form part of his general estate:—Held, (1) That the case was not governed by the Life Insurance Act, R.S.M. 1902, c. 83, and that the will did not operate as a good appointment of the fund under the rules of the society, which did not allow such an appropriation, that the direction of the will could not operate so as to make the money part of the general estate, and that the widow was entitled to it. (2) The widow was not put to her election, and was entitled to the full benefit of the will as well as to the moneys payable under the certificate.

In re Anderson's Estate, 16 Man. R. 177.

—By-laws of association part of contract —Appointment of beneficiary—Failure of appointment.]—(1) A contract of life insurance arising out of membership in a foreign mutual benefit association is governed by the by-laws of the association, not incompatible with or contrary to the laws of this province, which are embodied in it. So, when the by-laws provide that the insurance is to be paid at death to the beneficiary or beneficiaries appointed by the member insured, from a stated category of relatives, and in case of no appointment, or of one that fails through the predecease of the appointee, then the amount shall be paid to his widow, the latter is entitled to it, to the exclusion of the testamentary or legal heirs of the member, even though, during life, he has revoked a former appointment of his wife as beneficiary. (2) An action in warranty by a defendant against his warrantor in a case of garantie simple brought before adjudication on the principal demand which is afterwards declared unfounded, will be dismissed with costs.

Chevalier v. The Catholic Mutual Benefit Association, 29 Que. S.C. 399 (Dunlop, J.).

—Qualified assignment—Interest of assignee—Declaration by legal representatives of the insured.]—An assignment of a policy of life insurance with a direction that in the event of death the amount be paid to the assignee, as his interest may appear, is a qualified assignment and casts on the assignee when claiming under the policy the obligation to establish an indebtedness of the assured to him. A declaration by the legal representatives of the insured that they do not pretend to have any claim under the policy will entitle the assignee to the full amount.

Dubrule v. Sun Life Insurance Co., 29 Que. S.C. 457 (Curran, J.).

—Surrender value of policy—Lapse of insurance.]—(1) When a policy of life insurance provides for a benefit to the insured or his representatives upon surrender of the policy, such a surrender means a giving up of the policy with an express or implied consent that it be cancelled. The deposit of the policy in the hands of the insurer for the purposes of a loan will not avail as a surrender under the covenant. (2) When it is provided in a policy that after the insurance has been maintained for two years, if it lapses by non-payment of the premium and application is made within six months thereafter, a benefit will still accrue, at the death of the insured, to his representatives, and the insured dies and his representatives apply for payment of the insurance within six months of the lapse thereof, such an application is sufficient to entitle them to the benefit of the proviso, though not made specifically therefor.

Beaudette v. The Provident Savings Life Assurance Society, 30 Que. S.C. 160.

—Varying apportionment—Postponing payment till after full age—Ineffective provision.]—By her will a testatrix assumed to reapportion her insurance, reducing the interest of a "preferred beneficiary" from $500 to $250, and further directed that he should not be paid his share till the age of twenty-five. At the age of twenty-one, however, he claimed the right to immediate payment:—Held, that even if section 160 of the Insurance Act as to altering or varying apportionments of insurance moneys authorized such attempted postponement of payment, the provision was ineffective, for all persons who attain twenty-one are entitled to enter upon the absolute enjoyment of property given to them by will, notwithstanding any direction by the testator to the contrary, unless between twenty-one and the specified later age the property is given for the benefit of another, or so clearly taken away from the devisees up to the time of their attaining such greater age as to constitute an intestacy as to the previous rents and profits; and it is impossible to distinguish between such a provision in regard to insurance and a like provision in regard to personal property bequeathed by will.

In re Canadian Home Circles, Eliza J. Smith Case, 14 O.L.R. 322.

—Payment at head office—Demand at—Ancillary probate.]—In an action against an insurance company on a life policy a verdict was entered for the plaintiff on answers of the jury to questions submitted by the Court and counsel. Some of the answers on material issues were inconsistent and unsatisfactory, and some pertinent and relevant questions were not answered:—Held, that there should be a new trial on the ground that the findings were incomplete, unsatisfactory and inconsistent. By the terms of the policy the defendants agreed to pay at its head office at the City of Hamilton in the Province of Ontario. Held, per Tuck, C.J., that a nonsuit should not be granted on the ground that the plaintiff had failed to prove a demand at the head office, or on the ground that no ancillary probate had been taken out in Ontario before action brought.

Seery v. Federal Life Assurance Company, 38 N.B.R. 96.

—Benefit society—Change of beneficiary—Wife of member—Foreign divorce—Remarriage.]—The deceased was married in 1860, in Massachusetts, U.S., to M., where they both resided until 1886, when, in consequence of his becoming amenable to the criminal law, he left, and came to Canada, where he resided until his death, M. remaining in the State. In 1891, on proceedings taken by M., the deceased not appearing, she obtained a decree of divorce a vinculo upon the ground of desertion and cruelty. In 1896 the deceased went through a form of marriage with one C., and thereafter continued to live with her as his wife down to the time of his death. In 1889 the deceased insured in a fraternal society for $2,000, which by the certificate was made payable to his wife M., and was so continued until 1896, when he endorsed on the certificate a revocation of the payment to M., and procured a duplicate certificate to be issued, stating that M. was dead, and having the amount made payable to C. and an adopted daughter, and the insurance so continued until his death, C. for several years before his death paying the premiums: — Held, without deciding whether or not the divorce obtained by M. was valid, that she could not be heard to impugn the jurisdiction of the Court of the United States she had invoked to grant the divorce. Held, also, that it was not necessary to decide whether or not C.'s marriage was legal or the adopted daughter entitled, as the society had not contested their claims, and it was not open to M. to do so, and that C. and the adopted daughter were entitled to the moneys.

Re Williams and Ancient Order of United Workmen, 14 O.L.R. 482 (D.C.).

—Assignment of policy—Informal assignment—Security for debt.]—The holder of a policy of insurance on his own life intending to secure payment of a loan to him, signed a document addressed to the lenders in which he stated: "For collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Assurance Company for $2,000":—Held, that the effect of the document was to give the equitable right and title to the policy to the lenders of the money; and that other creditors could not claim as against them, for they could take no higher

rights than the insured had at the time of his death.

Thomson & Avery v. Macdonnell, 13 O.L.R. 653 (Boyd, C.).

—Bequest of proceeds of policy on testator's life—Several policies answering description—Preferred beneficiaries—Designation.]—A testator by his will bequeathed all his estate to his wife, subject to payment of his debts and four legacies of $50,000 each to his four children. The will also contained the following provision: "I also bequeath to each of the above named children one-quarter of the proceeds from a 5% gold bond policy issued by the Travellers of Hartford, Conn." The testator had four such policies, bearing the same date and in identical terms, in the Travellers' Insurance Company of Hartford, each for $25,000. Evidence was tendered to shew that the testator regarded the insurance as one contract for $100,000:—Held, that, even if such evidence were admissible, the bequest must be regarded as a gift of a single policy. Held, also, that a bequest of one of four policies, any one of which may be selected to answer the bequest, is not such a designation, even in favour of preferred beneficiaries, as meets the requirement of the Insurance Act, R.S.O. 1897, c. 203, s. 159, that in a designation by will the policy shall be identified "by number or otherwise."

MacLaren v. MacLaren, 15 O.L.R. 142 (Anglin, J.).

—Benefit certificate—Disposal of fund—Wife and children—Income—Corpus.]—The whole of the deceased's estate consisted of $2,000, secured by a benefit certificate, by which it was made payable to his executors to be put at interest, to be paid to his wife, for the benefit of herself and children until her death or marriage, when it was to be paid to his children until the youngest attained twenty-one, when the principal was to be equally divided amongst them:—Held, that the intention was not that the wife and children should be jointly entitled to the interest, but that, until the wife's death or marriage, the whole should be payable to her, giving her a discretionary power as to its disposal according to the family needs and requirements, and that the corpus should not be distributable until her death or marriage, and until the youngest child attained twenty-one years of age.

Re Shafer, 15 O.L.R. 266.

—Declaration in favour of wife and children—Variation in favour of beneficiary who is also a creditor—Intention to exonerate estate from the debt—Invalidity.]—By sub-sec. 1 of s. 159 of the Ontario Insurance Act, R.S.O. 1897, c. 203, the insurance money payable under a benefit certificate to preferred beneficiaries is constituted a trust fund therefor, and so long as any object of the trust remains shall not be subject to the control of the assured or his creditors or form part of his estate. By ss. 1 of s. 160 the insured is empowered to vary the apportionment in favour of one or more of the preferred beneficiaries, and by ss. 2 no authority is deemed to be conferred to divert the moneys from the class to a person not of the class or to the assured himself or to his estate. Under a benefit certificate in a fraternal society, the sum insured, $2,000, was made payable on the insured's death to his wife and children. Being indebted to a daughter in the sum of $3,000, he endorsed on the certificate a transfer of the insurance to, and surrendered the certificate and obtained a new one in favour of, such daughter, he undertaking to keep the insurance in force, and she, on being apprised thereof, acquiesced in the transfer, and agreed to release the insured from the debt:—Held, reversing the judgment of the Divisional Court, 14 O.L.R. 424, and restoring the order of Falconbridge, C.J., that the transfer was not invalid, either under the statute or as an improper exercise of a power of appointment, and that the other beneficiaries were debarred on equitable grounds from contesting the claim of the daughter to the insurance money.

Re Kemp, 15 O.L.R. 339 (C.A.).

—Fraternal order—Secession of Grand Lodge from Supreme Lodge—Right of Supreme Lodge to operate in territory of seceding Grand Lodge.]—Up to the year 1904, the plaintiff Grand Lodge of the Ancient Order of United Workmen of Manitoba and the North-West Territories, which had been incorporated under that name in the year 1893 under the laws of the Province of Manitoba, had been carrying on the business of life insurance amongst its members in subordination to, and under a charter granted to it by, the defendant Supreme Lodge of the same order, which had its headquarters in Texas. In that year the plaintiff Grand Lodge refused any longer to be subject to the jurisdiction of the Supreme Lodge, or to levy or remit to the latter the special assessments demanded by it for a guarantee fund created for the purpose of meeting any excess over estimated death losses that might occur in any of the jurisdictions under the Supreme Lodge. In 1905 the Supreme Lodge suspended the plaintiff Grand Lodge and organized a new Grand Lodge for Manitoba, Saskatchewan and Alberta with subordinate lodges, all working in harmony with and under the control and supervision of the Supreme Lodge, and all using the words "Ancient Order of United Workmen" as part of their names. These newly created bodies at once commenced and thereafter carried on the business of fraternal life insurance in the same way as it

had been carried on by the plaintiff Grand Lodge. They issued circulars and sent them to the members of the plaintiff Grand Lodge who still adhered to it as well as to other persons, and carried on an active propaganda in opposition to the plaintiffs:—Held, (1) The plaintiff Grand Lodge was not entitled to an injunction restraining the defendants from using the name "Ancient Order of United Workmen" in Manitoba and the North-West Territories, or from carrying on business there in the name of the Supreme Lodge, A.O.U.W., or from collecting any money for life insurance from the members of the plaintiff Grand Lodge, or from soliciting such members to join or contract with the defendant Supreme Lodge or any of its subordinate lodges. (2) Although the plaintiff Grand Lodge had for a number of years levied and collected special assessments for the general guarantee fund created by the Supreme Lodge as above mentioned, and had voluntarily remitted some of these moneys to the treasurer of the Supreme Lodge, yet the evidence failed to shew that there was any contractual relationship existing between the two bodies by which the former was under any legal obligation to pay over to the latter any of the money raised by these assessments which had not been already paid over. (3) The defendant Supreme Lodge was not entitled to an injunction forbidding the plaintiffs, their members, servants or agents, to use the name "Ancient Order of United Workmen," as the plaintiff Grand Lodge had been legally incorporated in 1893, with the knowledge and consent of the Supreme Lodge, and had issued a great many beneficiary certificates for life insurance, a great proportion of which were still in force. The Supreme Lodge incurred no liability under these certificates, and to restrain the plaintiff from the use of its own name would be practically to nullify the powers conferred upon it by our Provincial laws for the benefit of a foreign corporation not even licensed to do business in Manitoba.

Grand Lodge, A.O.U.W. v. Supreme Lodge, A.O.U.W., 17 Man. L.R. 360.

—Beneficiary—Revocation by will—Acceptance of benefit.]—Where a son insures his life and names his mother as beneficiary he can, afterwards, having married in the interval, revoke such stipulation by his will and bequeath the amount of the policy to his wife provided that his mother had not previously accepted the benefit. The fact that she had the policy in her possession and paid the premiums is not sufficient to establish that the mother had accepted the benefit when the surrounding circumstances did not show that she had made the payments for herself, for her own benefit and as having accepted, and do show that the policy had been placed in her hands. There should be, on the mother's part, some act done, or some circumstances shown, which would leave no doubt of the manifestation of her intention to accept and such was not shown in this case.

Baron v. Lemieux, Q.R. 17 K.B. 177.

—Changing beneficiary—Identifying policy—"By number or otherwise"—Extrinsic evidence.]—R.S.O. 1897, c. 203, s. 160, "The Ontario Insurance Act" provides that the assured may vary a policy previously made so as to restrict, extend, etc., the benefits, or alter the apportionment, inter alia, by a will identifying the policy by a number or otherwise. The assured, in this case, being the holder of a beneficiary certificate in a benevolent society made payable to his wife, by his will bequeathed "out of my life insurance funds the sum of $200 to my sister," and "all the rest, residue and remainder of my insurance funds . . . to my daughter":—Held, that this did not sufficiently identify the beneficiary certificate above mentioned, nor was it permissible to prove by extrinsic evidence that the testator must have referred to it as he held no other policies. Re Cheesborough (1897), 30 O.R. 639, specially discussed. Semble, even were it otherwise, the widow's claim would have been good to the extent of the $200 assumed to be bequeathed to the sister.

In re Cochrane, 16 O.L.R. 328 (D.C.).

—Premium not paid in full at death—Acceptance of part after expiry of days of grace—Waiver of forfeiture.]—In an action upon a policy of life insurance the defence was that the assured or the plaintiff (his wife) did not pay the quarterly premium due on the 1st September, 1908, on that date, nor within one month thereafter, the period of grace allowed by the policy, whereupon the policy lapsed, and was not revived, and was at the date of the death of the assured, the 3rd November, 1908, null and void. The evidence showed that the defendants, by their practice, through their agents, with the knowledge and consent of the superior officers, took money on account of premiums whenever it was given to them, whether the period of grace had expired or not; and in this case, of the $2.55 premium due on the 1st September, $1 was paid on the 23rd September, $1 on the 1st October, and forty-five cents on the 24th October, these amounts being received by the defendants and carried into their books as good payments. The ten cents remaining due was, before the death, tendered to the agent to whom the plaintiff or the insured had been in the habit of paying, but was refused:—Held, that, even if there was no tender of the ten cents before death, the defendants were not in a position to forfeit the policy; by their dealing they were estopped from saying that the policy was not a current policy on the 24th

October; and the defendants could not, on their own motion and without specific warning, afterwards revive the right to forfeit for non-payment of a small balance; and their implied engagement to accept that balance within a reasonable time remained operative though death ensued.

Whitehorn v. Canadian Guardian Life Insurance Co., 19 O.L.R. 535.

—Total disability through insanity—Suspension.]—M. was a regular beneficiary member of the defendant society, in good standing at the end of October, 1906, when he became, by reason of insanity, totally incapacitated from doing any work or following any employment. In November, 1906, he went to an insane asylum, where he remained, his incapacity continuing, until his death on the 3rd April, 1909. His dues to the society were paid up to the end of February, 1908, but, as they were not paid after that date, he was suspended for non-payment of dues. He would have been entitled, under the constitution and laws of the society, to a total disability benefit of $1,000, had he or some one on his behalf applied for it when he was in good standing, but his wife did not become aware of this till shortly before the 13th January, 1909, when she applied for it, but was refused. She then brought this action for it, her husband being joined as a plaintiff suing by a next friend; he died before the action came to trial:—Held, upon reference to the constitution and laws of the society, that the member to obtain the benefit must be in good standing at the time he applies for it; and, express provision being made for an application by some one on behalf of the member where he is mentally incapacitated, the insanity in this case did not excuse the default; and the plaintiff was not entitled to recover.

McCuaig v. Independent Order of Foresters, 19 O.L.R. 613.

—Benefit society—By-law—Suspension for non-payment—Liquidation.]—The suspension of members of a benefit society for non-payment of dues, authorized by by-law, does not exclude them from membership which, and rights appertaining thereto, they still preserve. Thus, when the society is dissolved and is being wound up they have the right, in common with other members, to be notified and to receive their share (subject to reduction of what they owe) in the distribution made of the excess of assets over liabilities. If the liquidation and distribution takes place without regard to suspended members and without their being notified they can bring a joint action against all the other members to compel them to report to the Court the amounts they have respectively received in order that there may be a fresh distribution notwithstanding each defendant may have received and each of the claimants be entitled to a different sum.

Boiteau v. Ethier, Q.R. 35 S.C. 1 (Ct. Rev.).

—Payment of premium—Authority of agent.]—An insurance company supplied an agent for soliciting insurance with printed forms on one of which was this clause: "If a cheque, draft or other obligation is given for the first or a subsequent premium, or for part thereof, and is not paid when due it is expressly agreed that any policy issued on this application or any contract for insurance effected thereon shall become null and void though the cheque or obligations remains payable," and in the margin was this question: "What cash premium has been paid to make the insurance, under this application, binding from this date providing the risk be assumed by the delivery of the company's policy? $——":—Held, that this did not give a person who applied to such agent for a policy reasonable grounds for belief that he had authority to receive or collect the first premium and when the note of the applicant was given in payment and discounted by the agent who appropriated the proceeds the insurers incurred no liability.

Beaudoin v. Federal Life Assur. Co., Q.R. 35 S.C. 236 (Ct. Rev.).

—Benevolent society—Appropriation of insurance benefit by will.]—The destination of a benefit in the nature of life insurance conferred by membership in a benevolent society is to be determined solely by a consideration of the rules and regulations of the society, and, when such rules and regulations make full and explicit provisions as to the destination of such benefit, the insurance is not subject to the Life Insurance Act, R.S.M. 1902, c. 83. Re Anderson (1906), 16 M.R. 177, followed. The testator's beneficiary certificate in the Canadian Order of Chosen Friends was expressed to be payable to his wife in the manner and subject to the conditions set forth in the laws governing the life insurance fund. Those laws prevented a member diverting the benefit to anyone not related to or dependent upon him unless there were no such persons, and provided that, in case of the prior death of the beneficiary "and no further or other disposition be made thereof" the benefit should go to the surviving children of the deceased member in equal shares:—Held, that it was not competent to the testator to divert by his will the benefit to his executors as part of his estate, although they were to take it in trust for the children, and that the proceeds should go to the children free from the claims of creditors of the deceased.

Re Drysdale Estate, 18 Man. R. 644.

—**Fraternal society—Payment of assessment—Rules of society—Membership in good standing in primary lodge.**]—A certificate of membership issued to McK. in 1889 by the Orange Mutual Insurance Society of Ontario West set forth that he was a member of a certain (primary) Orange Lodge, a member in good standing of the Loyal Orange Association of British America and of the insurance society. He undertook to pay all assessment to the insurance society, and to comply with all laws then or thereafter to be in force; and payment of the insurance was conditioned on proof being made of his good standing, at the time of his death, in the association and the insurance society. The defendants were incorporated by 53 Vict. c. 105 (D.), and established a benefit fund, and took over the certificates of insurance theretofore issued by the insurance society, and assumed liability therefore. The proofs of death prescribed required that there be a certificate of the primary lodge that the deceased was a member thereof in good standing at the time of his death. McK., being in arrear for dues to his primary lodge, was suspended in 1891 or 1892; in 1896 he applied for reinstatement, but did not pay his arrears; his name never appeared again upon the membership roll of his primary lodge, and nothing more was heard of him by that lodge until his death occurred in 1907, when an application was made for a certificate of good standing, which was refused. The annual assessments made by the defendants for the benefit fund had been paid on his behalf by one to whom his certificate had been pledged. The constitution and laws of the defendants and the benefit fund rules were strict in requiring membership in good standing in some primary lodge to be shown as a condition of the payment of the insurance benefit; one of the benefit fund rules provided that no member should be entitled to bring an action until he had exhausted all the remedies provided for in the rules by appeal or otherwise; and another rule provided that the members of the mutual benefit society who were in good standing on the 1st January, 1893, should be held to be members in good standing in the defendants' benefit fund on that day:—Held, that if the old rules and the action as to suspension thereunder were to be regarded as governing the deceased he was not in good standing on the 1st January, 1893, and his good standing was never effectually restored thereafter; and if he was to be regarded as under the new rules (the two sets being worked cumulatively), he was not in good standing at his death. The certificate of good standing being withheld, there was no proof of claim. The primary lodge not being before the Court, there could be no adjudication as to the bona fides of the withholding of the certificate; and it was questionable whether an action could be maintained if an appeal or other remedy had not been resorted to, under the rules. The provision of s. 165 (1) of the Insurance Act, R.S.O. 1897, c. 203, does not apply to a case where the payment of monthly dues is fixed by the by-laws, and the dues are collected at the regular meetings; and the original of that provision was not in force when the suspension was declared in 1891 or 1892. And an action to recover the amount of the insurance was dismissed, but without prejudice to any claim for repayment of the assessments.

McKechnie v. Grand Orange Lodge of British America, 18 O.L.R. 555.

—**Life insurance—Winding-up of company—Distribution of deposits and trust assets—Rights of policyholders and beneficiaries.**]—Where an order had been made for the winding up of a life insurance company under the Dominion Winding-up Act, and the deposits of the company held by the Minister of Finance and the assets held by trustees under the Dominion Insurance Act were in the hands of the liquidator and were being distributed by him, a question arose as to whether payment should be made, under policies issued by the company, to the assured or to the beneficiaries:—Held, that the intention of the Insurance Act is to provide funds to meet the claims of persons who were resident in Canada at the time the contract with the company was made, and that, both under that Act and the Winding-up Act, the provisions for the distribution of the fund are directed entirely to questions arising as between the company and the assured and between the Canadian policyholders themselves; there is no interference with rights which may have been acquired by third persons against policyholders; and the liquidator is bound to take notice of assignments of the policies in respect of which he is making a distribution of the fund, and also of declarations in favour of preferred beneficiaries. Under the Ontario Insurance Act, the assured may make changes in the members of the class of preferred beneficiaries who are to take; the right of any beneficiary is not absolute until he shall have survived the assured; and the mere accident that moneys become payable in respect of the policy in the lifetime of the assured, while it does not impair, does not accelerate the rights of the beneficiaries. In this case the moneys payable in respect of a policy were ordered to be paid into Court, there to be subject to control of the assured as of a trust fund created under s. 159 of the Ontario Insurance Act; and, subject thereto, to be paid out, on the death of the assured, to the named beneficiaries then surviving.

Re Mutual Life Association; Wellington's Claim, 18 O.L.R. 411.

—Children and grandchildren—Apportionment by policy—Variance by will.]—M.D. effected policies of insurance upon her life, under which the insurance money upon her death was payable to her "surviving children share and share alike." By her will dated the 10th December, 1894, she directed her trustee to invest the insurance moneys, and the other proceeds of her estate, and, after provisions for the maintenance and advancement of her children, directed that as soon as the youngest should have attained the age of twenty-one years, the trustee should divide the money, or so much as might then remain, among her "children then surviving or the issue of any child or children deceased":—Held, that, under the statutes in force at the date of the will, the testatrix had no power to take insurance money that had been apportioned to children, and to give it to grandchildren, and that one of the adult children was entitled to have his share of the fund paid out to him, notwithstanding the fact that all the children had not attained the age of twenty-one years. Re Grant (1895), 26 O.R. 120, followed.

Re Dicks, 18 O.L.R. 657.

—Benefit of wife—Declaration in writing—Identification of policies.]—R., whose life was insured in a benefit society, by a prenuptial contract gave the insurance certificates to his intended wife, and agreed to have them transferred to her after the marriage. Two years afterwards, the marriage having taken place, R. replaced the certificates by policies in an assurance company for a larger sum, and made alterations in a copy of the marriage contract in his possession, so that it read that he gave and granted to his wife "the sum of five thousand dollars, being the amount of an insurance effected on his life with the Canada Life Assurance Company," signing his name on the margin opposite the alterations:—Held, that the writing sufficiently identified the policies to meet the requirements of s. 160 of the Insurance Act R.S.O. 1897, c. 203, and operated as a valid declaration under the statute in favour of the wife. Re Cheesborough (1897), 30 O.R. 639, and Re Harkness (1904), 8 O.L.R. 720, followed.

Re Roger, 18 O.L.R. 649.

—Policy payable to beneficiary in case of insured's death within named period.]—A life insurance policy (not coming within the Act respecting Life Insurance for the Benefit of Wives and Children, R.S.M. 1902, c. 83), and the money to become due under it belonged the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries and there is no power in the insured by any act of his, by deed or by will, to transfer to any other person the interest of the beneficiary which is a vested right in him or her, and, therefore, when the beneficiary dies before the insured the right to the money passes over to the personal representatives of the beneficiary to the exclusion of the insured or his personal representatives at his death. A policy may be made payable to a person or beneficiary who is without any insurable interest in the life of the insured. By virtue of s. 40 of the Manitoba Insurance Act, R.S.M. 1902, c. 82, the money payable under a policy of life insurance issued by a company licensed under the Act, when the insured resides in Manitoba, is payable there, although the policy itself provides for payment at the head office of the company in another province, and in such a case the contract of insurance is subject to the laws of Manitoba and the money must be distributed in accordance therewith.

Re McGregor, 18 Man. R. 432.

—Re-apportionment—Election—Bequest in nature of specific legacy.]—B. died in 1907, having made a will in 1905, by which he left, among other legacies, one for $1,100 to his wife, the defendant in this suit. B. had insured his life some years previous to 1905 for $1,500, the policy being made payable to his wife. In his will B. created a fund for the payment of the several legacies, and included as part of this fund the policy for $1,500 above mentioned:—Held, that this provision in the will did not operate as a reapportionment of the insurance money as regards this policy for $1,500, under the New Brunswick Life Insurance Act, 5 Edw. VII. c. 4, s. 13; and that the proceeds of the same are payable to the defendant as sole beneficiary thereunder. Held, that the widow was not bound to make an election, and that she was entitled to be paid the legacy for $1,100. Held, that in case the fund created by the will is insufficient, then the specific legatees are entitled to rank for any unpaid balance upon the general estate.

Boyne v. Boyne, 4 N.B. Eq. 48.

—Presumption of death—Absence for over seven years.]—In order to establish the presumption of the death of the claimant's husband, who was engaged in the furniture and upholstering business, on account of his not having been heard of for seven years, it was proved that in May, 1900, he had gone in a sail-boat to an adjacent island to procure some lumber, and that while on this island a violent storm having arisen, he had telephoned his wife that he would probably be detained. He did not, however, return, and his wife had not heard of him since. The boat was subsequently found with the sail set and having some lumber and his cap in it. On the following morning he was supposed to have been seen at the railway station, but the person who thought he saw him would not swear to his identity. It was said that a

person who had lost some chairs suspected him of having stolen them, but it did not appear that he knew that he was suspected, while it appears that the detectives suspected someone else. In 1901 a letter was received from a favorite aunt in England, with whom he was in the habit of corresponding, asking about him, and stating that she had not heard from him for some time past. On the case coming before the Court of Appeal, the giving of judgment was stayed, at the claimant's request, to enable her to furnish an affidavit from the aunt verifying her letter:—Held, affirming the judgment of the Divisional Court, reversing the judgment of Riddell, J., that there was sufficient evidence to raise the presumption of death, even without the affidavit subsequently furnished.

Re Ancient Order of United Workmen and Marshall, 18 O.L.R. 129.

—"Legal heirs"—Wife and children.]—In a life insurance certificate of the Canadian Order of Foresters the money issued was expressed to be payable at the death of the insured to his "legal heirs":—Held, that the money was payable to the widow and each of the eight children of the insured in equal shares, and not to his executors to be disposed of as part of his estate.

Re Hamilton and Canadian Order of Foresters, 18 O.L.R. 121.

III.—ACCIDENT INSURANCE.

—Disability—Payment of claim for short period—Injuries subsequently developing from same accident.]—An accident insurance policy was issued by the defendants to the plaintiffs, and was in force on the 3rd September, 1907, when the plaintiff was injured in a railway accident. Provision was made in the policy for the payment of varying amounts depending upon the nature and extent of the injury. On the 17th December, 1907, the plaintiff, believing that he would speedily recover from the effect of his injury, sent in a claim for eight weeks' total and four weeks' partial disability. The claim was admitted by the defendants, and they at once sent the plaintiff a cheque for $425, which he accepted. He signed a receipt for the $425, "in final settlement of my claim, including double liability, under policy No. 64276, for injuries received on the 3rd day of September, 1907, and I hereby acquit and discharge the (defendants) from all and any further claims under said policy which I have or may hereafter have as a result of said injuries." The plaintiff on the 9th October, 1908, made a claim for permanent disability arising from the same railway accident, the defendants first having had notice of this on the 18th June, 1908; and this action was brought to recover the amount of that claim. Being examined as a witness, the plaintiff admitted that in making the settlement of December, 1907, he intended to make and believed he was making a full and final settlement of all claims against the defendants arising out of the accident. He believed that he had substantially recovered from its serious consequences, and that, if he had continued to recover as he was recovering when he received the cheque, there would have been nothing further about it. He said he did not read the receipt which he signed, and in this he was believed by the trial Judge. Some of the terms of the policy were: that the defendants should not be liable for more than one claim on account of any one accident; that the entire amount payable to and claimed by the assured should be ascertained and admitted before any part thereof was paid; that the amount so paid should be in diminution of the total amount insured in case of a subsequent claim in the same year; and that notice of the injury should be given within twenty-one days after the accident, and particulars of the claim sent within two months of the time when the same became a claim within the meaning of the policy:—Held, that the plaintiff was not entitled to recover.

Kent v. Ocean Accident and Guarantee Corporation, 20 O.L.R. 226.

Intoxicating liquor clause—Onus of proof—Notice of death—Tender before action.]—When last seen alive, in November, 1908, the insured was under the influence of intoxicating liquor, and the probabilities were that he met his death by drowning on the same day, as nothing was seen or heard of him until his body was found in the river nearby in the following spring, greatly decomposed, but without any marks of violence. The policy sued on contained a provision upon which the defendants relied, namely, that if the insured met his death while under the influence of intoxicating liquor the claimant should only be entitled to one-tenth of the amount of the policy and the defendants made a tender of the one-tenth before action:—Held, that the burden of proof was upon the defendants, and that, as there was no evidence to show exactly when the death took place, this defence failed. The policy also contained a condition that notice of the death should be given by or on behalf of the insured within ten days thereafter. Held, that a notice within ten days after discovery of the body was sufficient. Held, also per Perdue and Cameron, JJ.A., that the tender of the one-tenth made and pleaded by the defendants was a waiver of the defence of want of notice.

Haines v. Canadian Railway Accident Insurance Co., 20 Man. R. 69.

[Affirmed by Supreme Court of Canada, Canadian Ry. Acc. Ins. Co. v. Haines, April 3, 1911.]

Misrepresentations — Weekly earnings—Period of disability.]—
Cels v. Railway Passenger Assurance Co., 11 W.L.R. 706 (Alta.).

—Injury from being thrown down by dog—Consequent death—Right to recover on policy.]—
O'Brien v. Canada Atlantic Insurance Co., 4 E.L.R. 231 (Que.).

—Death of assured by drowning—Influence of intoxicating liquors—Time for giving notice.]—One of the terms of an accident insurance policy was that, if the assured met death while under the influence of intoxicating liquor, the claimant should be entitled only to one-tenth of the amount of the policy. The evidence was that on the day when the assured was last seen alive he was helplessly drunk between 7 and 8 o'clock in the evening, but at the moment when last seen, about 9, he had become considerably more sober, though still noticeably under the influence of intoxicating liquor. There was no particle of proof to show the exact time when he met his death. Six months after the day when he was last seen, his dead body was found in the Red River, and the inference was that he had been accidentally drowned, and probably on that day:—Held, in an action by the administrator of the estate of the assured upon the policy, that the onus was upon the defendants to prove that the death occurred while the deceased was under the influence of intoxicating liquor, and that they had failed to satisfy that onus. Condition 6, which, by the policy, was made a condition precedent to the right to recovery, required written notice of the death, with particulars, to be given to the defendants within 10 days thereof; "and any failure to give such notice and particulars shall invalidate and render void all claims under this policy." The plaintiff and beneficiary had no knowledge of the death till the discovery of the body, 6 months afterwards. Held, that a notice given by the plaintiff within 10 days of the time when knowledge came to him was not a compliance with the condition; and upon that ground the action failed.
Haines v. Canadian Railway Accident Co., 13 W.L.R. 709.

—Locomotive engineer—Total and permanent loss of sight—Practical blindness.]—Plaintiff held an accident policy in defendant society. His eye sight was badly injured, practically a loss of sight so far as being an engineer. Defendant's rules required a total and permanent loss of sight, and refused to allow plaintiff's claim:—Held, that however much plaintiff might be hampered by the loss of vision, yet he was not totally and permanently blind, and he could not recover on the policy.
Copeland v. Locomotive Engineers' Insurance Association, 1 O.W.N. 1089, 16 O.W.R. 739.

"Immediately disable"—Causation of time—Notice—Condition precedent.] —The defendants insured the plaintiff against accident by a policy containing a condition that if "accidental injuries . . . shall immediately, continuously and wholly disable and prevent the assured from pursuing his usual business or occupation," etc., they would pay a certain weekly allowance during a limited period. The plaintiff was injured accidentally within the meaning of the policy, but did not become wholly disabled from its effect until three months after, when he notified the company:—Held, that the word "immediately" in the condition had relation to causation and not to time, and that plaintiff was entitled to recover. Williams v. The Preferred Mutual Accident Ass'n. (1893), 91 Georgia 698; Merrill v. The Travellers Insurance Co. (1895), 91 Wis. 329, distinguished. The policy also contained a condition that written notice must be immediately given to the company at the office in Montreal . . . and "that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corporation":—Held, that the giving of notice forthwith was not thereby made a condition precedent to the right of recovery on the policy.
Shera v. Ocean Accident and Guarantee Corporation, 32 O.R. 411.

—Construction of policy—"Riding" in public conveyance.]—A person who is injured while getting into a public conveyance, after he has got upon the step or platform, but before the vehicle has begun to move, is "riding as a passenger on a public conveyance" within the meaning of a clause in an accident insurance policy containing those words.
Powis v. Ontario Accident Ins. Co., 1 O.L.R. 54.

—Accident insurance—Baggageman on railway—Conditions in policy—Hazardous occupation—Voluntary exposure to unnecessary danger.]—An accident policy issued to M., who was insured as a baggageman on the C.P.R., contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." (There was no classification of "exposure" by the company). "This insurance does not cover . . death resulting from . . . voluntary exposure to unneces-

sary danger." M. was killed while coupling cars, a duty generally performed by a brakesman, whose occupation was classed by the company as more hazardous than that of a baggageman:—Held (Davies, J., dissenting), affirming the judgment of the Court of Appeal (2 Ont. L.R. 521), which sustained the verdict for plaintiff at the trial (32 O.R. 284), that as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions. Held, also, that as the evidence showed that insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous there was no "voluntary exposure to unnecessary danger" within the meaning of the second condition.

Canadian Railway Accident Ins. Co. v. McNevin, 32 Can. S.C.R. 194.

—Unregistered insurance business—Right of insurance company to sell blank policies payable to bearer—Wagering and illegal contracts.]—The plaintiffs organized a system ostensibly for the insurance of persons in case of accident. They took from merchants a contract agreeing to purchase from the system certain so-called policies, as per specimen, on certain conditions, at $60 per thousand, and to accept the same when forwarded, to be issued within a period of one year. The plaintiffs under the so-called policy were not bound to do anything, for underneath their name and address as printed on the document is the following undertaking of an incorporated insurance company:—"The Ontario Accident and Insurance Company will pay $500 to the legal representatives of the holder, or compensation at the rate of $5 per week in accordance with and subject to certain conditions printed on the back hereof. Signature of holder ———. Witness ———." The defendants, as holders, signed one of these undertakings, but it was delivered to them as an escrow, conditioned only to have force if certain others traders adopted the same system, which was that for every $3 worth of goods purchased for cash by a customer, one of these so-called policies was to be given to the legal representatives of the purchaser, guaranteeing the payment of $500, if death should, independently of all other causes, directly result from an accident caused by extreme violence and accidental means occurring within fourteen days from the date of the instrument, or of $5 per week to such person whilst totally disabled for a period not exceeding ten weeks. There was no such insurance system registered in the insurance inspector's returns or authorized by law:—Held, 1. The plaintiffs are not a company authorized to issue currency payable to bearer. They only profess to be a medium for circulating and wagering in the name of an incorporated company, an illegal traffic in the sale of so-called life and accident assurance policies. It is in the nature of a gambling arrangement for the performance of an illegal act. It is therefore void. Any insurance in the nature of a wager is illegal, and sanctioning claim of the plaintiff would be to sanction an illegal device. 2. The plaintiffs promised nothing for the $60 per 1,000, and the Ontario Accident Insurance Company are not parties to the contract, and no consideration passed between them and the holder, and there was no mutuality of contract. The whole transaction was illegal and could have no force or effect. 3. The Ontario Accident Insurance Company, although a duly registered corporation for the transaction of insurance against accident or sickness, has no right to sub-let or delegate its franchise to any other corporation or person, much less to an inanimate aggregation without personal responsible existence. Action dismissed with costs.

Canadian Free Insurance System v. Mayell & Son, 39 Can. Law Jour. 209, (Hughes, Co.J.).

—Miners' Relief Society—Right of member to participate in fund—By-law—Construction of.]—The 12th rule or by-law of the Relief Society established in connection with the mines of the Dominion Coal Co., provided that, "No member shall participate in the benefits of the Society until two full months after the date of his first payment." Per Townshend, J., Ritchie, J., concurring:—Held, that a member was absolutely excluded from any participation in the benefits of the Society in case of illness or accident happening within the period of two months, and that the right to participate only began in cases where the inability to work was due to causes arising after the lapse of the two months. Per Graham, E.J., McDonald, C.J., concurring:—Held, that the only effect of the rule in question was to delay the right to participate, until two full months from the date of the first payment, and that if it was the intention to exclude a member from participation, in respect to incapacity subsequent to the two months, because it was due to an accident or illness which first commenced within that period, it should have been expressly so stated.

McDonald v. Dominion Coal Company's Relief Fund, 36 N.S.R. 15.

—Sufficiency of proofs of loss.]—The order of the Ontario Court of Appeal directing a new trial, 4 O.L.R. 146, was affirmed by the Supreme Court of Canada.

Ocean Accident v. Fowlie, 33 Can. S.C. R. 253.

—Insurance policy to married woman — Authority—Conditions of policy.]—A contract for insurance against accidents, by a married woman even not common as to property, must be authorized by her husband, and failing such authorization it is absolutely void. Arts. 177, 183 C.C. Therefore the husband cannot bring an action founded on such contract. Moreover, in this case, the policy on which the action was brought provided for payment by the company of indemnity in the one case of accidental bodily injury to the assured while travelling on land or sea, and she was injured while in her own house; the accident, therefore, was not one contemplated by the policy, and gave no right of action to the assured.

Transit Ins. Co. v. Plamondon, Q.R. 13 K.B. 223.

—Accident insurance—Facts material to the risk—Withholding of—Previous insurance—Cancellation of.]—A policy of accident insurance contained a warranty that the applicant had not withheld any information which was calculated to influence the decision of the directors as to the applicant's eligibility for insurance, and also a warranty that no application ever made by the applicant for accident insurance had been declined, and no accident policy issued to him had been cancelled by any company. The plaintiff had effected previous insurance, which, on a settlement of a disputed claim, was put an end to during its currency with the consent of the plaintiff, but at the request of the company, the unearned premiums being returned:—Held, that the proper question for the jury was whether the withholding of this information was in fact material, and it was misdirection to tell the jury that they were to consider whether the plaintiff believed it material. Held, also that the putting an end to the policy with the consent of the plaintiff was a surrender and not a cancellation, and was not a breach of the warranty that no policy issued to him had ever been cancelled.

Smith v. Dominion of Canada Accident Insurance Company, 36 N.B.R. 300.

—Benevolent society—Police benefit fund —Pension—Right to—Proper forum—Injury in the execution of duty.]—By Rule 32 of the rules and regulations of a police benefit fund it was provided that where a member "in the execution of duty" received such injury as "in the opinion of the police commissioners" permanently incapacitated him from service in the police force, he should receive a pension as thereon provided. The plaintiff, a policeman, while vaulting over a wooden horse in a gymnasium, this being part of a manual exercise prescribed, received an injury whereby he claimed he was permanently incapacitated from further service in the force, and so entitled to such pension, and brought an action therefor:—Held, that the injury was one sustained by the policeman in the execution of duty, but whether the permanent incapacity was the result of such injury was a matter for the consideration of the police commissioners, and the action was not maintainable.

Gummerson v. Toronto Police Benefit Fund, 11 O.L.R. 194 (D.C.).

—Insurance—Payment of premium—Company's account with agent.]—An insurance company which entrusts the collection of premiums to an agent with whom it keeps a current account is presumed to have received the premiums when due whatever may have been the date on which they were paid to the agent. The stipulation in a policy that an action thereon must be brought within a time specified is a modification of the contract which should be specially pleaded against a claim for the amount of the insurance, otherwise it cannot be relied on. When the policy contains such stipulation and another giving the assured an extended time for payment of premiums it is only at the expiration of the extended time that the time for prescribing the action begins to run.

Lachappelle v. Dominion of Canada Guarantee & Accident Ins. Co., Q.R. 33 S.C. 228 (Ct. Rev.).

—Insurance accident policy—"Happening of the event insured against"—Commencement of action.]—An action brought by the widow of a deceased person, on an accident insurance policy issued to him by the defendants, was commenced more than one year, but less than one year and six months, after his death, without the leave required by the Ontario Insurance Act, s. 148 (2). Leave was, however, granted by the trial Judge after the expiry of eighteen months from the death, the order being dated nunc pro tunc as if made on the date of the commencement of the action:—Held, 1. That the words, "happening of the event insured against" in the statute, had reference to the death of the person insured, and not to the accident which caused his death, and, consequently, the time within which the action should be brought began to run at the date of his death. 2. The trial Judge had no jurisdiction to give leave to the plaintiff to commence her action by his order made at the trial, as it was then more than eighteen months after the death, and the plaintiff's action failed because it was

not begun in time. There was a direct conflict in the evidence, as to whether deceased died from disease, as alleged by the defendants, or from the result of the injury he received, and there was also a question as to whether the plaintiff's own evidence did not support the conclusion that the injury was sustained by the deceased while lifting, in which case it would not be covered by the policy. There was other evidence, however, tending to explain this circumstance, and to establish that the injury was caused, not by lifting, but by slipping, and the jury found in favour of the plaintiff on the questions submitted to them on these points:—Held, that the case was properly left to the jury, and that where there is evidence on both sides properly submitted to the jury, the verdict of the jury, once found, ought to stand. Commissioner for Railways v. Brown (1887), 13 App. Cas. 133, followed. Held, also, that the defendants were not bound to plead the failure of the plaintiff to comply with the condition of the policy requiring the action to be brought within three months from the time when the right of action accrued, as it was by the terms of the policy a condition "precedent to the right of the insured to recover" thereunder, and the onus lay upon the plaintiff to show that her action was brought in time. Home Life Association of Canada v. Randall (1899), 30 S.C.R. 97, followed.

Atkinson v. Dominion of Canada Guarantee and Accident Co., 16 O.L.R. 619.

—Condition limiting time for proofs of loss—Requirement of immediate notice—Foreign administrator—Relief from forfeiture.]—A condition in a personal accident insurance policy provided that immediate "written notice with full particulars and full name and address of insured is to be given to the company at Toronto of any accident and injury for which claim is made. Unless affirmative proof of death, loss of limb, or sight, or duration of disability, and of their being the approximate result of external, violent and accidental means, is so furnished within thirteen months from the time of such accident, no claim based thereon shall be valid." An appeal from the judgment of Boyd, C., at the trial, in favour of the plaintiff, the administrator of the insured, for the amount of the policy, was allowed, where although written notice of the killing of the insured by a railway train and the time when and the place where he was killed was given as required by the above condition, affirmative proof of death and of its being the approximate result of external violent and accidental means, within thirteen months from the time of the accident was not furnished as required by the same condition:—Held, by Moss, C.J.O., and Meredith, J.A., that the notice and proof required in this condition were two separate and distinct things, and although proof may amount to notice, mere notice is not proof. The condition was reasonable and neither under s. 57, sub-s. 3, of the Judicature Act, R.S.O. 1897, c. 51, which empowers the High Court to relieve against penalties and forfeitures, or otherwise, was there power to relieve against the consequences of non-compliance with its provisions. Per Moss, C.J.O.:—If a foreign administrator of a deceased person brings action in this province for money to which the latter was entitled, and pending proceedings obtains ancillary letters here, the title thus obtained relates back to the issue of the writ and supports the action.

Johnston v. Dominion of Canada Guarantee and Accident Insurance Co., 17 O. L.R. 462.

—Death by drowning—Evidence sufficient to go to the jury.]—Deceased was insured in the defendant company "against loss of life while sane, resulting directly and independently of all other causes from bodily injuries effected from external, violent and accidental means." There was evidence that he had been drinking heavily just previous to his death, which occurred while he was on a fishing trip. His companion had left him cooling his bare feet in a stream, but on returning to him in less than half an hour afterwards found him lying in about 27 inches of water, his boots and socks on his feet, and his fishing rod on the bank, with the handle in the water. There was an antemortem bruise on the back of the head. It was suggested that he was subject to fainting spells or dizziness, and evidence was given that he had had one of such spells a few weeks before the accident. There was also evidence that he was not in a firm condition, physically, and had to take a rest several times during his walk to the fishing place on the day of the accident:—Held, on appeal upholding the verdict of the jury at the trial, that the direct cause of death was by drowning, and that the company was liable.

Young v. Maryland Casualty Co., 14 B.C.R. 146.

—Commercial traveller—Brakesman—Temporary engagement.]—A policy of accident insurance described the insured as a commercial traveller, and contained a condition that if he met with an accident while "temporarily or permanently engaged in any occupation . . . classed by the company as more hazardous than that in which he is insured," the amount payable should be what the premiums paid by him would entitle him to be insured for under such more dangerous classification. The

insured applied for employment as a railway brakesman, and while taking the usual trial trip prior to engagement (in which however, he worked gratuitously as a brakesman), he was killed, apparently by being run over by a train:—Held, that the case fell within the above condition, and the amount payable was limited accordingly.

Stanford v. Imperial Guarantee and Accident Insurance Co., 18 O.L.R. 562.

—Accident insurance—Contract for one year—Continuation or renewal.]—Section 148 (1) of the Insurance Act, R.S.O. 1897, c. 203, is not applicable to a contract of insurance which the assured has no right to continue or renew without the consent of the insurers; it merely makes uniform and extends the commonly contracted-for grace given to the assured to renew, after forfeiture or default, a contract renewable, or not, at his will. In this case a policy of accident insurance was considered, having regard to its provisions, to be a contract for one year only, and one which could be continued or renewed only by mutual consent; and it was held, that there was no such continuation or renewal, although the agent of the insurers had, after the expiry of the year, and after an accident had happened to the assured, from the effects of which he died two weeks later, accepted from the assured a promissory note for the renewal premium and delivered to him or the beneficiary a renewal receipt which had been intrusted to the agent by the insurers, but not for such purpose.

Carpenter v. Canadian Railway Accident Insurance Co., 18 O.L.R. 388.

IV. SICK BENEFIT INSURANCE.

—Benefit Society—"Sick benefits"—Certificate of medical officer.]—The plaintiff, a member of the defendant "court," a subordinate branch of a friendly or benefit society, incorporated by a Dominion statute and registered under the Ontario Insurance Act, applied for "sick benefits," to which he would have been entitled under the laws of the society, upon a satisfactory certificate from the medical officer of the court. The medical officer, however, certified that the plaintiff's illness was caused or contributed to by the excessive use of intoxicating liquors, and the court refused the benefits. This was affirmed by the various appellate bodies having jurisdiction under the laws of the society, but none of them had any evidence before them other than the certificate of the medical officer, and two certificates of a contrary opinion given at the instance of the plaintiff by another physician. There was no tender of other evidence by the plaintiff. In an action brought for the recovery of the amount of the sick benefits, the trial Judge heard evidence as to the cause of illness, and found that it was not caused or contributed to in the way certified to by the medical officer, and that the certificate, though honestly given, was founded upon an erroneous diagnosis:—Held, that the matter was one to be disposed of by the methods of the society, to which the plaintiff subjected himself on becoming a member; and the action of the society was final, unless it was made to appear that it was contrary to natural justice, or in violation of the rules of the body, or done mala fide; an erroneous medical certificate, given honestly, but by mistaken diagnosis, cannot be regarded as fraudulent; "legal fraud" does not exist in a sense distinguishing it from dishonesty or moral wrongdoing.

Thompson v. Court Harmony, 21 O.L.R. 303.

V.—MARINE INSURANCE.

Insurance against total loss of cargo "by total loss of vessel"—Total loss of thing insured.]—By a policy of marine Insurance a cargo of cement was insured against total loss "by total loss of the vessel." In an action thereon the jury found that barge and cargo had been practically if not completely submerged, that there had been an actual loss of the cargo, caused by the wreckage of the barge, which, however, was not found in so many words to have been a total loss, and judgment was entered for $2,700 damages:—Held, that, the findings were amply sustained by the evidence and were to the effect that the loss of the cement insured had occurred in the manner contemplated by the policy; and that the order of the Supreme Court for a new trial directed to the issue whether the barge was a constructive total loss within the meaning of Art. 2522, C.C., must be reversed.

Sedgewick v. Montreal Light Co., 41 Can. S.C.R. 639 reversed.

Montreal Light, Heat and Power Co. v. Sedgwick, [1910] A.C. 598.

—Marine insurance—Policies on hull and freight—Cost of repairs — Constructive total loss—Notice of abandonment—Acts working acceptance—Estoppel—Authority of master.]—Plaintiff's vessel while on a voyage from Trinidad to Vineyard Haven encountered heavy weather and put into St. Thomas, W.I., in a damaged condition. Notice of abandonment was given to the insurers on hull and freight, all of whom replied declining to accept. By the direction of the agent for the insurers the cargo was taken out and stored and the vessel put upon the slip for the purpose of being repaired and carrying the cargo forward to its destination. After repairs were made the vessel was taken off the

slip, and a portion of the cargo reloaded, when it was discovered that the vessel was leaking and that it would be necessary to again remove the cargo and place the vessel on the slip for further repairs. The cost of the repairs up to this time, without including work which remained to be done and could not be done at St. Thomas, was upwards of $4,000, while the vessel was valued at only $6,000. The parties who had made the repairs, in order to preserve their lien, refused to allow the cargo to be taken out a second time, and, in default of payment, proceedings were taken against the ship and cargo under which they were finally sold. The jury found in answer to questions submitted that the vessel was repaired by the underwriters; that the repairs were not sufficient; and that the vessel was sold under the lien of such repairs. Also, that the agent of the insurers, by his acts, prevented plaintiff from dealing with the vessel in respect to repairs as he otherwise would have done. Also that each of the defendant companies, by its acts, reasonably led plaintiff to believe that the furnishing of formal proofs of loss and interest and adjustment was not required. On motion to set aside the verdict for plaintiff and for a new trial:—Held. 1. In view of their subsequent acts that the refusal of the defendant companies to accept the abandonment did not prevent the working of an acceptance. 2. The taking possession of the ship and incompletely repairing her and then allowing her to be sold for the cost of those repairs constituted an acceptance of the abandonment. 3. If the facts stated were not an acceptance of the abandonment they were such a wrongful conversion of the ship as would preclude the insurers from setting up non-acceptance. 4. The extraordinary powers conferred by implication of law upon the shipmaster in case of shipwreck were displaced on arrival of the owner, or of an agent having express authority from the owner to represent him, and that the trial Judge was right in so directing the jury. 5. Misdirection as to the particular agent of defendant companies who waived proofs of loss was immaterial if there was an acceptance of the abandonment. 6. Where the underwriter was wrongfully interfering with the control of the ship there was nothing to prevent the insured from electing at the last moment to hold that the underwriter had accepted the abandonment. 7. If the renewal of the notice of abandonment when the project of insurers to repair failed did not conclude the matter the vessel was lost to the insured by reason of her sale to defray the cost of repairs put upon her by the underwriters.

McLeod v. The Insurance Company of North America, 37 C.L.J. 357, 34 N.S.R. 88.

—Description of voyage — Alteration by agent.]—By a marine policy a cargo was insured for a voyage from "Montreal to New Carlisle," and the agent of the insurance company, of his own motion, changed the description of the voyage by adding thereto the words, "and to Bonaventure River," which was the voyage that the ship intended to make:—Held, that the contract of insurance was void ab initio even when the loss took place between Montreal and New Carlisle, the agent having no power to change the description without special authority and the parties not being ad item as to the port of destination.

Atlantic and Lake Superior Railway Co. v. Empress Assurance Corporation, 11 Que. K.B. 200, affirming 15 S.C. 469.

—Description of voyage—Deviation—Custom.]—When a cargo is insured for a voyage described as "from Montreal to New Carlisle and Bonaventure River," without a provision for touching at intermediate ports, the fact that the ship remained at Levis for six or seven hours, and for four days and six hours at St. Michel de Bellechasse, constitutes a deviation and avoids the contract of insurance. That the custom or necessity may be invoked as authorizing such delay it is necessary that the custom be universally known, or at least sufficiently notorious for it to be known by the assured, and that the necessity should be such that it could have been foreseen before the vessel sailed from Montreal, and no such custom or necessity was proved in this case.

Manheim Ins. Co. v. Atlantic and Lake Superior Railway Co., 11 Que. K.B. 200, reversing 15 S.C. 476.

Prohibited waters — Making port for shelter — Breach of warranty — Waiver—Estoppel.]—

Hackett v. China Mutual Insurance Co., 4 E.L.R. 103 (N.S.).

— Reinsurance — Salvage — "Special Charges."]—The company plaintiff, having insured a large number of cattle, and sheep for the voyage from Montreal to Manchester, re-insured part of the risk with the company defendant—the reinsurance policy or certificate contained the following clause:—"Insured against absolute total loss of vessel and animals, but to pay general average, and "special charges." The ship carrying the animals struck a reef, and was finally abandoned three weeks later. In the meantime part of the animals had been landed on an island, whence they were carried to Halifax and other places. The amount payable

for salvage of the live stock so transferred was fixed at one-third of the gross proceeds of the sale thereof. A large sum was also paid for maintenance of the animals and other expenses until they were sold. The parties insured then assigned all right in the live stock to the company plaintiff, and were paid as for a constructive total loss. The plaintiff claimed that all the expenditure for salvage, transportation and maintenance of the animals, constituted "special charges" within the meaning of the reinsurance policy, and sued the defendant for its proportion of the amount:—Held, 1. The term "special charges" is equivalent to "particular charges," and includes expenses for salvage, preservation and sale of the object insured. The word "special" merely distinguishes an expense incurred in a particular interest from an expense incurred in the general interest, which latter gives rise to general average contribution. Special charges cover all expenses occasioned by a peril insured against, when they have been necessarily incurred in consequence of such peril. 2. The fact that the plaintiff paid the principal insured as for a total loss, and the circumstance that the defendant may not have been interested in incurring all or any of the charges, did not relieve the defendant from liability for contribution to such charges.

Western Assurance Co. v. Baden Marine Assurance Co., 22 Que. S.C. 374 (Doherty, J.).

—Marine insurance—Loss of freight — Detention by ice—Perils insured against.] —A vessel on her way to Miramichi, N.B., was chartered for a voyage from Norfolk, Va., to Liverpool with cotton. She arrived at Miramichi on November 25th and sailed for Norfolk on the 29th. Owing to the lateness of the season, however, she could not get out of the bay and she remained frozen in the ice all winter and had to cancel her charter-party:—Held, reversing the judgment of the Supreme Court of New Brunswick (24 N.B. Rep. 421), Henry, J., dissenting, that the loss occasioned by the detention from the ice was not a loss by "perils of the seas" covered by an ordinary marine policy. Held, per Henry, J., —Contracts of insurance on freight differ essentially in many respects from those on vessels or goods, and when chartered freight is insured and lost through any of the perils insured against it is not necessary to show that the vessel was damaged; that the insured is entitled to recover if the vessel is detained by any of the perils insured against whereby the chartered freight is lost. Per Henry, J.:—When a contract of affreightment cannot be carried out by reason of stress of weather or other causes beyond control within the time contemplated by the parties, there being no fault on either side, both parties are discharged; and if under such circumstances the parties agree to cancel the contract, it cannot be treated as a voluntary cancellation that will disentitle the insured to recover upon his policy of insurance against loss of freight.

Great Western Insurance Company v. Jordan (1886), 1 S.C. Cas. 86.

—Marine insurance—Prohibited waters—Breach of warranty avoiding policy.]—A policy of insurance issued by the defendant company on the plaintiff's steamer "Richard," covered the steamer for the period of one year, from July 6th, 1905, to July 6th, 1906. By a clause in the policy, the steamer was prohibited from using certain waters, including Cape Breton, between December 1st and May 1st, but by a clause written in on the face of the policy, permission was given to use Cape Breton ports until January 1st, 1906. The steamer left Halifax in ballast on the 31st December, 1905, for Port Hastings in the Island of Cape Breton, and arrived there on the 1st January, 1906. She took in a cargo of coal on January 2nd, and left for Yarmouth on the 3rd, having been prevented by the condition of the weather from leaving sooner:—Held, affirming the judgment of the trial Judge, that the use of the Cape Breton port after January 1st was a breach of a plain term in the policy and a breach of warranty that avoided the policy.

Richard SS. Co. v. China Mutual Insurance Co., 42 N.S.R. 240.

—Constructive total loss.]—In order to determine whether or not a ship is a constructive total loss under a policy of marine insurance the value of the hull when broken up should be added to the cost of repairs. Macbeth v. Maritime Insurance Co. (1908), A.C. 144, followed. Every vessel submerged in a river is not ipso facto to be deemed a constructive total loss. The total loss of its cargo rendering the further prosecution of the particular voyage or adventure "not worth pursuing" does not, in itself, warrant a finding that a vessel is a constructive total loss; and the trial Judge having instructed the jury that, if they found such a loss on cargo they might, thereupon, find, under Art. 2522 of the Civil Code, that the vessel itself was a constructive total loss, their finding that the vessel was a constructive total loss was set aside for misdirection, and a partial new trial was ordered. Judgment appealed from, Q.R. 34 S.C. 127, reversed.

Sedgwick v. Montreal Light, Heat and Power Co., 41 Can. S.C.R. 639.

VI. EMPLOYERS' LIABILITY INSURANCE.

Insolvency of employer—Enforcement of award against insurers.]—The plaintiff, a workman employed by the defendant Mining Company was injured in November, 1907. In October, 1908, he obtained an award for compensation under the Workmen's Compensation Act, 1902. At the date of the award the Mining Company were insolvent and in the course of winding up. The plaintiff alleged that the defendants, the Casualty Company, were liable to indemnify the Mining Company against losses or liability under the award, and an order was asked for directing payment by the Casualty Company of the amount of the award into a chartered bank, pursuant to s. 6 of the Act, and a Judge of the Supreme Court granted the order, but it was set aside by the full Court: (1909), 14 B.C. 256. A subsequent application by the plaintiff for an issue to determine the liability of the Casualty Company to indemnify the Mining Company was dismissed (1909), 14 B.C.R. 273. The plaintiff then brought this action for a declaration that he had a first charge upon the moneys which the Mining Company were entitled to receive from the Casualty Company and for an order for payment pursuant to s. 6. The defendants admitted that they had issued a policy which was valid and subsisting at the date of the plaintiff's injuries, by which they agreed to indemnify the Mining Company against loss for damages on account of bodily injuries suffered within the period of the policy by any employee. The trial Judge (Hunter, C.J.), dismissed the action on the ground that there was no privity of contract between the plaintiff and the Casualty Company, in other words, that the plaintiff had no status:—Held, that the judgment should be affirmed. Per Macdonald, C.J.A.:—Unless section 6 gave the plaintiff a status to maintain the action, he had none; and it was not open to the plaintiff to ascertain the liability of the insurers to the Mining Company in an action such as this. The creation of the charge alone, without reference to that part of the section which gives a remedy for enforcing it, does not effect the subrogation mentioned in Northern Employers' Mutual Indemnity Co., Limited, v. Kniveton (1902), 1 K.B. 880, 18 T.L.R. 504, and Morris v. Northern Employers' Mutual Indemnity Company, Limited (1902), 2 K.B. 165, 18 T.L.R. 635. Were it not for the decision of the Full Court in (1909), 14 B.C.R. 256, s. 6 might be construed as intended not only to give the workman a charge on the insurance moneys, but also to provide the means of enforcing it, whether the insurers disputed their liability or not. Per Irving, J.A.:—The liability of the Casualty Company under s. 6 can be determined only in an action by the liquidator of the Mining Company. Per Martin, J.A.:—Section 6 affords a novel measure of relief to the workman, which can be obtained or enforced only in the way specified in the section, which at the same time creates a first charge upon the amount due from the insurer to the employer, and directs how the workman shall assert his rights in the premises, viz.: by means of an application to a Judge of the Supreme Court. An action in the Supreme Court cannot be deemed to be an application to a Judge of the Supreme Court, because the Judge is persona designata: aliter, had the appeal been to the Supreme Court or a Judge thereof: In re Vancouver Incorporation Act, 1900, and B. T. Rogers (1902), 9 B.C. 373; and semble, that the Judge would be a competent tribunal to make a finding that the employer was entitled to a sum from the insurers notwithstanding the absence of rules.

Disourdi v. Sullivan Group Mining Co. and Maryland Casualty Co., 15 B.C.R. 305.

—Allegation of admission by defendant of its liability in other similar cases.]—An allegation of a nature to establish by special instances the general allegation that the defendant has admitted liability for that class of accident is legal and will not be rejected on an inscription in law.

Carter White Lead Company v. Employers' Liability Assurance Co., 8 Que. P.R. 253.

VII.—CASUALTY INSURANCE.

—Mutual hail insurance—Assessment of premium notes—Discount for prompt payment.]—Action to recover the amount of an assessment on a premium note given by defendant for an insurance against loss by hail. Section 35 of the Mutual Hail Insurance Act, R.S.M., c. 106, under which the plaintiff company was incorporated, provides that the assessments upon premium notes or undertakings shall always be in proportion to the amounts of such notes or undertakings. In making the assessment of five per cent. upon the amount of each policy, the directors added a proviso that all members and policyholders who should pay the full amount of the assessment on or before 1st November, 1899, should be entitled to and should receive a discount of 25 per cent. upon the amount of such assessment:—Held, that the company had no power to allow a discount for, or to impose penalties for default in, prompt payment, and being a mutual company, the directors must strictly observe the requirements of the Act and preserve equality amongst the members in assessing them; and that the effect of the resolution was really to assess 75 per cent. of five per cent. upon those who should pay before a certain

date and the full five per cent. upon all others, and that the assessment was therefore void under s. 35 of the Act.

Maintoba Farmers' Mutual Hail Insurance Co., v. Lindsay, 13 Man. R. 352.

—Mutual hail insurance—Assessment of premium notes—Withdrawal from membership — Presumption of continuance of policy after first year.]—In an action by a company incorporated under the Mutual Hail Insurance Act, R.S.M., c. 106, to recover the amount of an assessment imposed by resolution of the directors upon one of its members for the second crop season after the issue of the policy, it is incumbent on the company to show that by the terms of the policy the person called on to pay the assessment is still a member of the company, and if no evidence is given to show what the terms of the policy were in regard to the period covered by it, the action should be dismissed. If a member of such a company is entitled to withdraw from membership upon certain conditions, including the surrender of the policy is sued to him, he cannot exercise such right without surrendering the policy, although the loss of it has rendered it impossible for him to perform that condition.

Manitoba Farmers' Mutual Hail Ins. Co. v. Fisher, 14 Man. R. 157 (Killam, C.J.).

—Sprinkler system—Damage from leakage or discharge—Injury from frost—Application—Interim receipt.]—A policy of insurance covered loss by leakage or discharge from a sprinkler system for protection against fire, but provided that it would not cover injury resulting, inter alia, from freezing. The water in a pipe connected with the system froze, and, the pipe having burst, damage was caused by the consequent escape of water:—Held, affirming the judgment of the Court of Appeal (14 Ont. L.R. 166), that the damage did not result from freezing and the insured could recover on the policy.

Canadian Casualty and Boiler Insurance Company v. Boulter, Davies & Co., 39 Can. S.C.R. 558.

VIII.—FIDELITY INSURANCE.

—Guarantee insurance—Conditions of insurance—Stipulation that insured shall furnish proof to the satisfaction of insurer—Expenses of prosecuting employee at request of insurer—Notice of loss — Waiver of conditions.]—One of the conditions of the guarantee policy sued on required the employer, immediately after the discovery of any fraud or dishonesty on the part of the employee, to give notice thereof in writing to the insurer stating the cause, nature and extent of the loss; no formal notice fully complying with this condition, was ever given, but information of the loss was promptly communicated to the defendants, and they took steps themselves to ascertain the facts fully:—Held, that defendants could waive strict performance of this condition and had in fact waived it. The policy had been issued on the faith of the statements and answers to questions contained in the written application or proposal for the insurance, signed on behalf of the plaintiffs, and contained the condition that "if any suppression, misstatement or material omission shall have been made by the employer in his proposal, or at any time whatever, of any fact affecting the risk of the corporation, or in any claim made under this agreement . . . ., this agreement shall be null and void." As to the proofs of claims for a loss, the stipulations were that the employer should furnish his claim, with such full particulars thereof as should prove to the satisfaction of the insurer the cause, nature and extent of the loss and the correctness of the claim, and that the particulars furnished should include all reasonable verification of the statements made in the proposal and of the compliance therewith, and should be verified by affidavits duly certified if required by the insurer. Two of the answers in the proposal were found to have been incorrect and the evidence showed that the plaintiffs had failed to carry out the promises or undertakings implied in them, namely: (1) that the employee's receipts of money were to be entered in receipt pass-books furnished to borrowers and subscribers for shares, which pass-books would be checked monthly by the head office list, and (2) that the bank pass book would be inspected and checked monthly by the head office. After furnishing certain proofs of the loss the plaintiffs' manager, in response to demands made on behalf of the defendants, sent in several statutory declarations intended to verify the correctness of the answers set forth in the proposal, and to prove compliance, but the trial Judge found as a fact that the proofs furnished were inaccurate and untrue in respect of the two statements last referred to:—Held, 1. The condition requiring the furnishing of proof to the satisfaction of defendants should not be so construed as to compel the employer to establish to the satisfaction of the guarantor the absolute liability of the latter and the absence of any defence. 2 The condition requiring "all reasonable verification of the statements in the proposal and of the compliance therewith" meant subsequent compliance with the indicated future course of conducting the business. 3. That defendants were entitled to rely on the two statements in the answers as to the receipt pass-books and the monthly examinations of the bank

pass-book as indicating and promising the existence of safeguards against loss by embezzlement which in fact never existed; that the plaintiffs had failed to furnish "reasonable verification" of the statements made in the proposal or of "the compliance therewith" in respect to matters which were conditions of the liability of defendants under the policy; and that, upon principles of equity, the surety should be considered as discharged frim his liability by a departure from the course of business indicated by the answers, whether or not the incorporation of the application in the policy should be treated as creating a warranty that the employer would adhere to the indicated course. Lawrence v. Walmsley (1862), 12 C.B.N.S. 799, followed. The plaintiffs had, after being requested so to do by defendants in pursuance of a condition of the policy, prosecuted the employee to conviction for the embezzlement of the various sums of money which he had taken and they claimed payment of the expenses of the prosecution in addition to their other claim. Held, that, defendants were only liable for such expenses so far as said prosecution related to the offences committed before they received notice of the defalcations, but that liability was not dependent upon their liability under the policy. Plaintiff to pay for defendants' costs of contesting the liability for the loss, and defendants to pay plaintiffs' costs of contesting the liability for the expenses of the prosecution.

Globe Savings and Loan Co. v. Employers' Liability Assurance Corporation, 12 Man. R. 531 (Killam, C.J.).

—Appointment of sole arbitrator—Arbitration Act, R.S.O. 1897, c. 62, s. 8.]—A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient":—Held, reversing the decisions of a Divisional Court, 3 O.L.R. 93, and of Street, J., 2 O.L.R. 301, that the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R.S.O. 1897, c. 62, s. 8, and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator. Re Sturgeon Falls Electric Light and Power Company and Town of Sturgeon Falls (1901), 2 O.L.R. 585, approved. Held, also, that the order of Street, J., dismissing an application to set aside the appointment of a sole arbitrator, was not made by him as persona designata, but was a judicial order from which an appeal lay.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation; Re Faulkner, 5 O.L.R. 609 (C.A.).

—Application—False answers—Basis of contract.]—The plaintiff company's manager applied for and obtained from the defendants an agreement guaranteeing his fidelity, and accompanied his application with a declaration of its president, containing answers to questions touching his duties, which answers it was agreed were to be taken as the basis of the contract. The contract recited on its face as follows:—"Whereas the employee has delivered to the company certain statements and a declaration setting forth among other things the duties and remuneration of the employee, and the checks to be kept upon his accounts, and has consented that such declaration and each and every the statements therein referred to or contained shall form the basis of the contract, but this stipulation is hereby limited to such of the said statements as are material to this contract":—Held, that this had the effect of embodying the material facts of the preliminary application and declaration whether by the employee or employer into the face of the contract, and satisfied the requirements of s. 144 (1) of the Insurance Act, R.S.O. 1897, c. 203, that "the terms and conditions of the contract shall be set out in full on the face or back of . . . the contract." Held, however, per Boyd, C., and Magee, J., Meredith, J., contra, that the case fell rather under s. 144 (2) which provides that any term or condition avoiding the contract on account of false preliminary statements, must be limited to cases in which such statements are material to the contract, but does not require that such term or condition shall be contained in or endorsed upon the contract "in full." It is enough if the contract "be made subject" to such stipulation. Judgment of MacMahon, J., 8 O.L.R. 117, reversed on this point. Held, also, that the statements made by the plaintiff's president when seeking the insurance, that "all withdrawals from the savings bank require the joint cheque of the president and manager," and that "a thorough and systematic audit is made by the company's auditors," whereas in fact the cheques were signed in blank by the president in batches, and so given to the manager, and no attempt was made to verify the savings bank amounts, were unquestionably material and affected the risk.

Elgin Loan & Savings Co. v. London Guarantee and Accident Co., 9 O.L.R. 569 (D.C.). [See next case.]

—Guarantee—Application — False answers —Basis of contract—Materiality.]—Held, following Hay v. Employers' Liability Co. (1905), 6 O.W.R. 117, that the application in this case, and the statements made by the plaintiffs' president and fully set out in 8 O.L.R. 117 and 9 O.L.R. 569, were incorporated into the policy or contract of guarantee, and made part thereof, and were, under the circumstances, binding on the plaintiffs' company, though not apparently authorized by any resolution of the company, and that such statements—distinguishing the above case in this respect—were materially untrue, and therefore avoided the policy.

Elgin Loan & Savings Company v. London Guarantee and Accident Company, 11 O.L.R. 330 (C.A.).

—Meaning of words "money or other property"—Whether real estate included.]—The defendants had executed agreements authorizing the plaintiffs in the event which happened "to take possession of any money or other property" which the plaintiffs might find belonging to the defendants, and "to sell such goods or property" and take such other proceedings as the plaintiffs might deem best for recovering the amount of the payment made under guarantee bonds issued for the defendants and expenses, etc. The agreements also contained the following: "The undersigned agrees to do and execute any deed or thing that the company may deem to be necessary in order to give the company the rights and powers herein expressed or intended to be given." The agreements were on printed forms prepared by the plaintiffs:—Held, that the plaintiffs were not entitled, under the agreements, to a lien on any real estate of the defendants for the amount of their claim, and that the words used should not be construed to include land, the rule of ejusdem generis being applicable in this case.

London Guarantee & Accident Co. v. George, 16 Man. R. 132.

—Guarantee policy—Bank officials—Expenses of following defaulter.]—The defendants, a guarantee company, gave the plaintiff bank a bond whereby they agreed to indemnify the plaintiffs to the extent of $5,000 in the case of a paying teller, and of $6,000 in the case of an accountant of the bank, against "all and any pecuniary loss sustained by the plaintiffs directly occasioned by dishonesty or negligence or through disobedience of direct and positive instructions on the part of those persons in connection with their duties in the plaintiffs' service . . ." The bond also contained a provision whereby the defendants were exempted from liability for acts or omissions of any employee in pursuance of any instructions received by him from the employer or a superior officer, or for mere errors of judgment or bona fide mistake on the part of the employee—also a provision requiring the plaintiffs when required by the defendants, and at their cost, to assist them in every way in bringing to justice any employee for a criminal offence entailing loss upon the employer, and procuring the reimbursement to the defendants by the defaulting employee or his estate of any money paid by or recoverable from the defendants by reason of such defalcation. On a Saturday the teller stole from the plaintiffs a large sum of money and absconded from Canada. The moneys were properly in his custody until the close of the day, when it was his duty to deposit them, along with the other moneys and securities in his possession, in the bank vault, having first submitted his cash to examination and checking by the accountant, whose duty it was to perform this office in the absence of, or by the direction of the manager. On the day in question the accountant certified to the correctness of the teller's statement in which the stolen money was included. Its absence was discovered on the opening of the teller's cash box on the following Monday, the teller having taken it with him when he left the bank on Saturday. No steps were taken by the defendants towards following or apprehending the teller, but the plaintiffs, without communication with the defendants, took active steps and finally succeeded in apprehending him and recovering from him a large part of the stolen money. In so doing they incurred expenses to a large amount which they claimed to be entitled to deduct from the recovered money, and to hold the defendants responsible for the deficiency, after making such deduction, up to the amount in which the defendants were liable in respect of both officials:—Held, 1. That the loss of the money was "directly occasioned," not merely by the dishonesty of the teller, but also by the negligence of the accountant, and that the defendants were therefore liable under their bond in respect of both. 2. The contract between the parties was in effect one of indemnity, and the plaintiffs were therefore entitled to deduct all such reasonable expenses as were incurred by them in recovering the money, from the amount recovered from the teller, and were only bound to account to the defendants for the surplus after such deduction. Application of the doctrine of subrogation to guarantee insurance. Hatch, Mansfield & Co. v. Weingott (1906), 22 Times L.R. 366, followed.

Crown Bank v. London Guarantee and Accident Co., 17 O.L.R. 95.

—Counter-bond of guaranty—Authority of manager—Indorsement on bond—Consideration.]—Plaintiffs had given a bond to the municipal commissioner dated 1st May, 1904, to insure the faithfulness and honesty of the defendant Cornish as treasurer of the rural municipality of Brokenhead for a term of three years in the sum of $3,000, and the premium for the three years' insurance was paid in advance. On March 3rd, 1905, the company gave notice, in accordance with a provision of the bond, cancelling the guarantee at the expiration of three months whereby the liability of the company was confined to any defalcations of Cornish prior to 3rd June, 1905. This action necessitated the vacating by Cornish of his position as treasurer; but, on it being intimated to the council that the company would re-instate Cornish on the bond if they got a satisfactory counter-security bond, the other defendants agreed to give such security, and the council voted to reappoint Cornish. The manager of the company for Canada, Mr. Alexander, then had prepared a form of counter security bond for the defendants to sign, and, after it was returned to him signed, he sent to the municipal commissioner a document signed by himself purporting to be an indorsement on the original bond re-instating Cornish for a guarantee of $3,000 dating from 3rd June, 1905, to 1st May, 1907. The defendants were not asked to secure the company by their counter-bond against past defalcations and did not know that there were any such, and the wording of their counter-bond did not clearly show that it was intended to secure the company against past defalcations of Cornish. Shortly afterwards the company was obliged to pay the amount of its original bond to the municipal commissioner in respect of defalcations of Cornish committed prior to 3rd June, 1905. They then sued defendants upon the counter-bond:—Held, that, under all the circumstances, defendants were not liable, as their bond should be held to have relation only to the liability of the company under its re-instating contract, and not to that under the cancelled bond. Held, also, that as there was no evidence that Mr. Alexander had authority from the company to make the indorsement he gave the plaintiffs had failed to establish that they had continued the guarantee bond previously in existence, and consequently there was a total absence of consideration for the defendants' counter-bond, and for that reason also they were not liable upon it.

London Guarantee and Accident Co. v. Cornish, 17 Man. R. 148.

—Fidelity of employee — Duty of employer.]—The insured under a contract guaranteeing the fidelity of an employee is bound to a strict surveillance over the latter's conduct to require him to conform to the provisions of the law respecting the keeping and auditing of his accounts and, in case of defalcation, to have prompt recourse to the law both civilly and criminally. Failure to comply with these obligations will deprive him of a right to the indemnity stipulated for in the policy.

School Commissioners of St. Edward v. Employers' Liability Assurance Corporation, Q.R. 16 K.B. 402.

IX. LIVE STOCK.

Live stock insurance—Animal not in good health when contract made—Premium paid only in part.]—In an action in the County Court of Victoria upon a policy of insurance of live stock, it appeared that the defendants' head office was at Vancouver, but that the plaintiff lived at Victoria, where he signed the application, paid a part of the premium, and received the policy; there was nothing in the policy to indicate that payment should be made at any place other than that at which the plaintiff lived:—Held, that the cause of action arose at least partly in Victoria (County Courts Act, s. 57), and the County Court of Victoria had jurisdiction. By the terms of the policy it was to come into force at noon on the 18th July. According to the application, which was a part of the contract, the stock must be in perfect health and condition at the time the contract takes effect. Held, on the evidence, that one of the two horses insured (the one that first died) was, before noon on the 18th July, inoculated with the disease from which it died, although the symptoms were not noticed till the following day; and, therefore, the plaintiff was not entitled to recover in respect to this horse. The plaintiff paid only half of the premium in cash, and made a promissory note in favour of the agent for the other half. In the application it was stated that the premium was to be paid in cash, and the defendants did not in fact know until after both horses were dead that it had not all been paid in cash. The defendants said that the policy was never in force. Held, that, as there never was any risk as to the horse which died first, payment of half the premium brought the policy into force in respect to the other; and the plaintiff was entitled to recover in respect to that horse.

Demal v. British American Live Stock Association, 14 W.L.R. 250 (B.C.).

INTERDICTION.

Interdiction made in one district with order to confine in another.]—The Superior Court, at Quebec, has no jurisdiction to try a petition for release from confinement in a sanatorium in the district, ordered by a decree of interdiction for habitual drunkenness, made in another district. The petition, under Art. 170 C.P., must be referred to the Court of the district where the interdiction took place.

Audet v. Audet, 37 Que. S.C. 322.

Opposition to annul—Curator to an interdict.]—1. The curator to an interdicted person ought to be made a party in a pending suit with reference to proceedings taken therein subsequent to the interdiction. 2. A motion asking that such curator be made a party to assist defendant will be granted, and an opposition to a seizure lying on the only ground that said curator was not made a party will be summarily dismissed on motion to that effect.

Fortier v. Villeneuve, 12 Que. P.R. 53.

—Curator—Account of administration.]—The curator to an interdict must account for the whole of his administration when it comes to an end. As his account should cover the entire period the curator who is ordered by the Court to render it does not comply by filing an account for the latter part of the period and alleging, with filing of copies in support thereof, that he had already rendered an account for the prior part.

Caisse v. Caisee, Q.R. 19 K.B. 220.

—Under liquor laws.]—See LIQUOR LAW.

—In lunacy.]—See LUNACY.

Action for removal of curator to interdict—Death of plaintiff while suit is pending—Right of relations of interdict to intervene.]—The plaintiff brought suit for the removal of the curator appointed to his son-in-law, interdicted for prodigality. While the case was proceeding the plaintiff died, and his testamentary executors petitioned to be permitted to take up the instance. The heirs of the deceased, who were relations by affinity of the interdict, also petitioned to be allowed to intervene and continue the suit for the removal of the curator defendant:—Held (reversing the judgment of the Superior Court, Lynch, J.), 1. While an action to remove a curator forms a part of the plaintiff's succession and is not transmissible to his heirs, nevertheless the claim against the defendant for costs incurred in the action is a claim which formed part of the patrimony of the plaintiff, and was transmitted under his will to his executors who, therefore, were entitled to take up the instance, not to have the defendant removed from the ownership, but in order to determine his liability for costs. 2. The heirs were entitled to intervene to continue the action, and in virtue of any right transmitted to them, but in virtue of their quality of relatives by affinity of the interdict, and in this quality were entitled to ask for the removal of the defendant from his office of curator.

Wilson v. Giroux, 21 Que. S.C. 56 (C.R.).

—Action against curator by interdict.]—If a woman interdicted for drunkenness, wishes to take action in separation from bed and board, against her husband and curator and the grounds stated in the petition are sufficient to justify such an action, the Court will order that a family council be held to advise as to the appointment of a curator ad hoc.

Clermont v. Charest, 4 Que. P.R. 427.

—Interdiction for prodigality—Procedure—Curator not in cause.]—(1) Interdiction for prodigality renders the interdict incapable of administering his estate, or of being lawfully served with or of lawfully appearing in judicial proceedings. (2) Where a writ has issued against an interdict for prodigality instead of against his curator, the defect cannot be cured by adding his curator as a defendant. Greene & Mappin, M.L.R. 5 Q.B., p. 108, followed.

Leroux v. DeBeaujeu, 20 Que. S.C. 235 (Davidson, J.).

—Change of curator during time case is under consideration—Appeal—Motion to reject.]—While a case is under consideration by the Court, if one of the parties, an interdict, is relieved from interdiction, and, subsequently, again placed under care of a curator, an appeal against an unfavourable judgment cannot be taken in the name of the old curator; neither will a stay of proceedings be granted for the purpose of allowing the new curator to obtain the requisite legal authority.

Leduc v. The Parish of St. Louis de Gonzague, 5 Que. P.R. 446.

—Habitual drunkenness—Power of curator—Removal—Family council.]—The curator of an interdict for habitual drunkenness can bring an action for payment of the provision for maintenance of such interdict, and his refusal to do so when such payment is absolutely necessary, is a ground for his removal from the curatorship. The advice of a family council, when cause has arisen for the removal of the curator, is of no value when the council has not assisted in procuring evidence on the demand for his removal or when the evidence has not been communicated to it.

Gagnon v. Gauthier, Q.R. 22 S.C. 310 (Ct. Rev.).

—Judicial adviser—Appeal from decision of prothonotary.]—(1) The prothonotary or a Judge, upon a petition for interdiction for lunacy, has the discretion of merely naming a judicial adviser to the respondent. (2) There is an appeal to a Judge from the decision of the prothonotary so given naming a judicial adviser.

Ledoux v. Meunier, 5 Que. P.R. 249.

—Judicial adviser—Powers—Records destroyed by fire.]—Where a person to whom a judicial adviser has been appointed, because of her mania for spending money, and with a prohibition to incur any debts, buys on credit, the creditor must prove that the goods sold were necessary and useful before he can recover. Query:—When the records of the Court are burnt (force majeure), is it necessary to reinscribe the name on a new list of interdicts?

Borbridge v. Eddy, 26 Que. S.C. 81 (Rochon, J.).

—Interdict—Curator ad hoc—Advice of family council.]—Where it appears that an interdict has matters to litigate with his curator, he is entitled to have a curator ad hoc appointed to him for the purpose of such litigation and the Judge ought to reject the advice of the family council not to name a curator ad hoc to said interdict.

Cantlie v. Cantlie, 7 Que. P.R. 193.

—Husband and wife.]—A husband has the right, and is even obliged, to apply for the interdiction of his wife who is addicted to the excessive use of intoxicating liquor.

Archambault v. Camirand, Q.R. 27 S.C. 30 (Sup. Ct.).

—Curator to an interdict—Summary account—Petition.]—The curator to an interdict may be ordered, upon petition to that effect, to produce a summary account of his gestion certified by him containing and setting forth the date, amount and character of each loan made on behalf of the interdict, the time at which it is payable, the security held therefor and the name and residence of the borrower; also the several deposits made on his behalf, and the name and residence of the persons or institutions with whom they are made.

Cardinal v. Cardinal, 7 Que. P.R. 153 (Davidson, J.).

—Curator—Interdict for insanity—Rights of mother.]—(1) Under Art. 339 C.C., curators to the person are appointed with the formalities and according to the rules prescribed for the appointment of tutors. (2) Mothers and female ascendants are entitled during their widowhood to the curatorship of their child interdicted for insanity, when the father is dead, the child unmarried, and there is no valid reason against their appointment. (3) The nomination of a curator to an interdict, made upon the strength of a declaration by the prothonotary that his mother was not capable of being named his curatrix, is null and void. (4) A new family council, and not the Court, has the right to appoint a new curator.

Charbonneau v. Mercier, 7 Que. P.R. 326 (Doherty, J.).

—Prescription—Judgment for interdiction—Action to set aside.]—The demand by action for annulment of an interdiction on the ground that it was obtained by fraudulent devices and without proper service on the interdict (plaintiff in the action) is not subject to the prescription of six months under Article 1178 C.C.P. Though a judgment for interdiction will not be annulled because of the acquisition after the judgment by the interdict of a new domicile abroad this circumstance may, nevertheless properly be set up in the action to annul as forming part of the res gestæ.

Cantlie v. Cantlie, Q.R. 15 K.B. 530.

— Petition—Appeal from dismissal — Articulation of facts—Service—Guardian.]—There is a direct appeal to the Court of Review from an order by a Judge in Chambers dismissing an application for appointment of a legal guardian. The petition for appointment of a legal guardian to a party because of his prodigality should contain an articulation of the acts of prodigality of which he is accused. Such petition should be served on the person to be interdicted or for whom a legal guardian is proposed before presentation to the Judge to give to the latter an opportunity to object to the sufficiency of the allegations and the capacity of the person asking for appointment of a guardian. Semble, in this case the petitioner who owed to the respondent (interdict) the sum of $4,000 (nearly the whole fortune of the latter) should not have been appointed curator.

Ste. Marie v. Bourelle, 8 Que. P.R. 221 (Ct. Rev.).

—Interdict—Drunkenness—Discharge.] — An interdict for drunkenness can only be relieved from the interdiction after a year of habitual sobriety. The petition to remove the interdiction should state that the interdict has been habitually sober for a year.

Morency v. Gleason, 9 Que. P.R. 230 (Sup. Ct.).

—Duties of curators — Investment of monies belonging to the interdict.] — A

curator who becomes indebted in a sum of money to the interdict committed to his care, is bound, under Arts. 295 and 981o C.C., to invest it in the same manner as all capital sums which are paid into his hands and failure to do so, within the prescribed delay, amounts to the breach of duty (infidélité) which, under Art. 285, renders him liable to removal from office. The Court, upon suit brought for purpose, may order him to make the investment within a fixed delay, reserving further adjudication in case of his failure to do so.

Prud'homme v. Beaulieu, 18 Que. K.B. 97, reversing 33 Que. S.C. 198.

—Order out of Court—Review.]—Where an order for interdiction is made out of Court it will not be reviewed for defects of form which do not involve absolute nullity nor prevent the Judge from giving his decision with full knowledge of the matter. Mental weakness not amounting to idiocy or insanity, the failure of faculties which makes a person incapable of governing himself or managing his affairs, is ground for interdiction. For the Judge who has to consider the facts and analyze the examination he has made of the person to be interdicted the latter's demeanor, gestures, etc., in the course of such examination have a value and weight greater than the opinion of witnesses, even specialists, whom he has permitted to be called though not obliged to do so.

Gingras v. Richard, Q.R. 18 K.B. 154, affirming 34 S.C. 62.

INTENT.

See CRIMINAL LAW; ARREST; ATTACHMENT; BANKRUPTCY.

INTEREST.

Contract — Interest — Effect of taking judgment for claim.] — The defendant Preston, in October, 1889, contracted with one Charlebois to build certain fences and gates along the line of the G.N.W. Central Railway, and, after associating the defendant Musson with him, they sublet the contract to the plaintiffs by a written agreement which provided for payment to the plaintiffs as follows: "Estimates for the said work shall be made monthly by the company's engineer . . . , and . . . shall be forthwith paid upon same being paid to said Preston and Musson by said company." Charlebois was the contractor for the whole of the railway work being done by the company, and the evidence showed that the word "company" in the above provision was used by mistake for Charlebois. After payment of two estimates for part of the plaintiffs' work difficulties arose, and the company's engineer who also acted as engineer for Charlebois, to prevent the bringing of an action, withheld further estimates; but in September, 1891, after litigation between Charlebois and the company had commenced, Preston accepted a judgment against the company for the balance due to him by Charlebois upon his fencing contract. This judgment, however, was not paid until 1898, and then it was paid without interest: — Held, that the plaintiffs were not entitled to interest on their claim before action, as it was not payable by virtue of a written instrument at a time certain within the meaning of the Act 3 & 4 Wm. 4, c. 42, s. 28. London, Chatham & Dover Ry. Co. v. South-Eastern Ry. Co., [1892] 1 Ch. 120, followed.

Sinclair v. Preston, 13 Man. R. 228.

—Mortgage — Rate of interest — Payment by instalments.] — A mortgage given to secure payment of $20,000 with interest at nine per cent. payable half yearly, contained these provisos: "Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable. . . . Provided that on default of payment of any of the instalments hereby secured, or insurance or any part thereof at the time provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid": — Held, reversing the judgment of the Court of Appeal (26 O.A. R. 232) that the principal sum of $20,000 becoming due for non-payment under the first of the above provisos was not an instalment in arrear under the second on which the mortgagee was entitled to interest at the rate of nine per cent. per annum.

Biggs v. Freehold Loan and Savings Co., 31 Can. S.C.R. 136.

—Liability of Crown.] — The Crown is not liable to pay interest except upon contract therefor, or where its liability therefor is fixed by statute.

Algoma Central v. The King, 7 Can. Exch. R. 239.

— Debt certain and time certain — 3 and 4 Wm., c. 42, s. 28 (Imp.).] — To entitle a creditor to interest under 3 & 4 Wm., c. 42, s. 28 (Imp.) the written instrument under which it is claimed must show by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. Appeal from the Court of King's Bench for Manitoba, 13 Man. L.R. 228, 1901, C.A. Dig. 231, dismissed.

Sinclair v. Preston, 31 Can. S.C.R. 408.

—Advance of money — Claim of interest—Promissory note — Action on original consideration.] — The plaintiff sued the surviving member of a firm, together with the representatives of a deceased member for money loaned by him in the lifetime of the deceased, to the firm for the purposes of the firm. He also claimed interest, as having been stipulated for at the time:—Held, that inasmuch as there was a corroboration as to the main fact, namely the borrowing of the principal, this was sufficient to entitle the plaintiff to recover the interest claimed. When a promissory note is taken from a borrower as collateral security for money loaned to him, and not in payment, action can be brought for the money lent, notwithstanding that owing to the form of the note it may not be maintainable thereon.

Secor v. Gray, 3 O.L.R. 34.

—Moneys retained under irregular judgment — Absence of fraud or misconduct—Order to refund.] — Where executors, who were also residuary legatees, acting bona fide under a judgment afterwards held by the Court of Appeal to be irregular and not binding on the parties concerned, retained a greater sum of money than they were subsequently held entitled to, but were exonerated from all fraud, or misconduct, they were held not chargeable with interest.

Boys' Home v. Lewis, 3 O.L.R. 208.

—Post diem interest on mortgage—Splitting cause of action.] — Plaintiff, on November 2, 1901, brought an action in a Division Court for one year's interest due February 1, 1901, and for interest on that sum, amounting together to $81.50, due on a mortgage, the principal of which was some years overdue:—Held, that the interest sued for, being interest post diem, as to which there was no covenant to pay, was not due the plaintiff qua interest, but was recoverable only by way of damages, and the case did not come within the provisions of sub-s. (2) of s. 79 R.S.O. 1897, c. 60. Held, also, that the plaintiffs, if entitled to recover interest from February 1, 1900, were entitled to recover as damages interest down to the date of the issue of the summons amounting to about $140, which sum was divided for the purpose of suing in the Division Court, which is forbidden by s. 79. Prohibition granted.

Re Phillips v. Hanna, 3 O.L.R. 558.

—Premium to building society not interest.]

See MORTGAGE.

(Lee v. Canadian Mutual, 3 O.L.R. 191.)

—Interest Act (Can.) 1897—Rate of interest.] — A chattel mortgage provided for the payment of $125 principal money in consecutive monthly instalments of $5 each and for payment of $5 more with each instalment for interest and did not state the yearly rate to which this was equivalent, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897:—Held, that this being an Act passed on grounds of public policy for the benefit of borrowers its application could not be waived and that the mortgagee was entitled to interest only at the legal rate. Judgment of Snider, Co.J., affirmed by the Divisional Court.

Dunn v. Malone, 39 Can. Law Jour. 788 (Street, J., and Britton, J.).

—Mortgage running over five years—Payment—Tender of amount—Agency.] — Action to compel a mortgagee in Great Britain under the provisions of R.S.C. 1886, c. 127, s. 7, to accept the principal money and interest due on a ten-year mortgage, which had run over six years:—Held, that the section was intra vires of the Dominion Parliament and is not restricted in its application to such mortgages as are mentioned in s. 3 of the Act, but applies to every mortgage on real estate executed after the 1st of July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage." Held, also, that the words of s. 25 of c. 205 R.S.O. 1897, are wide enough to apply to mortgages executed prior to the passing of that Act. Held, also, that the loan having been made, the property being situate, and the mortgage giving the option of payment, in Canada, the law of Canada must govern in relation to the contract and its incidents and that the tender made as described in the judgment was sufficient.

Bradburn v. Edinburgh Life Assurance Co., 5 O.L.R. 657 (Britton, J.).

—Award of arbitrators—Interest on award—Agreement as to date from which interest should be computed.]—In certain arbitration proceedings between the Dominion of Canada and the Provinces of Ontario and Quebec, the first-mentioned Province was found to be indebted to the Dominion in the sum of $1,815,848.59, on the 31st December, 1892. While proceedings before the arbitrators were pending, correspondence between the Dominion and the two Provinces, concerning the rate per centum and the time from which interest was to run on the amount of the award, was opened by the Deputy Minister of Finance for Canada in a letter to the Treasurer of Quebec, of the 21st December, 1893, in which, among other things, he asked that the Province of Quebec should agree to pay to the Dominion, from the 1st January, 1894, simple interest at 5 per cent. upon the balances in account standing in favour of the Dominion on the 31st December, 1892. Quebec declined to accede to this proposal, and the correspondence in the matter was eventually closed by a let-

ter from the Assistant Treasurer of Quebec to the Deputy Minister of Finance for Canada, of the 6th July, 1894, in which he, in effect, stated that the interest to be paid by Quebec upon any balances found by the arbitrators to be due on the 31st December, 1892, and existing on the 1st July, 1894, should be at the rate of 4 per cent. Similar correspondence between the Dominion Government and the Province of Ontario was concluded by a letter of the 18th August, 1894, from the acting Deputy Attorney-General of that Province to the acting Deputy of the Minister of Finance for Canada, stating, in effect, that Ontario accepted the same conditions as Quebec in respect of the payment of the interest. Prior to the date of this letter the Premier of Ontario had addressed a letter to the Premier of the Dominion, dated 26th July, 1894, as follows:—"I understand that your Government has paid to Quebec the subsidy due July 1st instant, on the consent of the Government to pay 4 per cent. on any balance of account that might be found between the Province and the Dominion, such interest to be reckoned from and after the said 1st of July, 1894. I presume this means the balance of account in respect of the items which have already been brought before the arbitrators, and which now stand for judgment. This Government is willing to accept the subsidy on these terms." Upon a case stated to determine whether interest was payable by the Province from the 31st December, 1892, when a balance was struck in favour of the Dominion, or from the 1st July, 1894, only:—Held, that the correspondence showed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned.

The Dominion of Canada v. The Province of Ontario, 8 Can. Exch. R. 174.

— Money retained under irregular judgment.]—A testator by his will gave to two trustees his estate, real and personal, and directed the trustees to pay, (1) to a sister a legacy of $500, and in case of her death to her daughter, and in case of the death of the daughter to the daughter's children in equal shares; (2) to a niece a legacy of $500; (3) to the children of another niece a legacy of $500, and (4) to a charitable institution a legacy of $500; with a direction that should there not be sufficient to pay all the legacies there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions":—Held, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each. Judgment of Moss, J.A., 3 O.L.R. 208, affirmed. Proceedings were taken in the year 1882 for the administration of the estate, and without, as was held in the previous judgment of this Court, 27 A.R. 242, proper proceedings being taken whereby they might have been bound, the children of the niece were ignored and their legacy and their share in the residue were divided between the charitable institution, the trustees, and one of the other legatees: — Held, that the trustees and the charitable institution were bound to repay the excess which they had received, with interest from the date of proceedings taken by the children of the niece. Per Maclennan, J.A., dissenting: Interest should be allowed from the date of distribution under the report in the administration proceedings. Judgment of Moss, J.A., 3 O.L.R. 208, reversed.

Uffner v. Lewis (No. 2); Boys' Home v. Lewis (No. 2), 5 O.L.R. 684 (C.A.).

—Contract — Sum certain — Rental of track — Interest by way of damages — Demand of payment.] — By the agreement in question in the action the defendants agreed to pay to the plaintiffs $800 per annum per mile of single track, and $1,600 per mile of double track occupied by the defendants' railway, not including "turnouts," in four equal quarterly instalments on the first of January, April, July and October in each year. Disputes arose between the parties as to the meaning of the word "turnouts," and as to what tracks were to be measured and as to the manner in which they were to be measured, and this action was brought in reference to these questions and was finally determined on appeal to the Judicial Committee. In the result the contention of neither party was given effect to, the mileage in respect of which rental was payable being held to be less than that contended for by the plaintiffs and greater than that contended for by the defendant. The plaintiffs had from time to time demanded payment of the sums payable to them according to their construction of the agreement. The mileage and the sums consequently payable were fixed by the Master in accordance with the principles laid down in the judgment:—Held, that the defendants were bound at their peril to ascertain the sums properly payable and to pay or tender these sums to the plaintiffs; and that not having done so the plaintiffs were entitled to interest upon these sums from the times at which they should have been paid; not under s. 114 of the Judicature Act, R.S.O. 1897, c. 51, as being sums certain payable by virtue of a written instrument at certain times capable of ascertainment by arithmetical computation, but upon the ground that the case was one in which it would have been usual for a jury to allow interest and therefore within s. 113 of that Act.

City of Toronto v. Toronto Street Railway Company, 7 O.L.R. 78.

—Contractor and sub-contractor — Disputed accounts.] — A contract between C., the defendant, a contractor with the Department of Railways and Canals of the Dominion Government, and M., the plaintiff, a sub-contractor, provided that for $145,000 to be paid to him he was to complete certain work for the defendant, and that the payments should be made (less ten per cent.) monthly as the work progressed according to the estimate of the Government engineer in charge. The work on the principle contract was to be completed on the 30th of September, 1899. It was not completed for more than one year after that date, but the delay was not the fault of the plaintiff. There was no stipulation in the contract in reference to the payment of interest on any sums due but not paid. M.'s claim was disputed. On an action being brought, it was established that he was entitled substantially to what he claimed:—Held, per Hanington, Landry, Barker, and McLeod, JJ. (Tuck, C.J., and Gregory, J., dissenting), that the plaintiff was not entitled to interest, his claim not being for a sum certain payable by virtue of a written instrument at a time certain within the meaning of s. 175 of 60 Vict. c. 24. Held (per Tuck, C.J., Hanington and Gregory, JJ), that if the plaintiff had been entitled to interest the rate would not be restricted to five per cent. under the Statutes of Canada, 63-64 Vict. c. 29, the contract having been entered into before the passing of the Act.

Mayes v. Connolly, 35 N.B.R. 701.

—Promissory note — Interest — Evidence.] —In an action on a note not bearing interest on its face evidence cannot be given, even after commencement of proof in writing, that it was agreed when the note was made that interest would be payable thereon.

Dombroski v. Laliberté, Q.R. 27 S.C. 57 (Ct. Rev.).

—Purchaser of land—Eviction — Interest.] —One who has acquired immovables from which he is subsequently evicted owes interest on the portion of the price due during the time he was in possession.

Bérian v. Stadacona Water, Light and Power Co., Q.R. 25 S.C. 525 (Ct. Rev.).

—Moneys made under execution—Reversal of judgment — Liability to refund — Rate of interest.] — Under a judgment against the defendant, the plaintiff issued execution and realized a sum of money which was in his hands when the judgment was reversed, and he became liable to repay it to the defendant. The money, however, was claimed by another executor creditor, and the plaintiff gave notice of an application for an interpleader order, but did not proceed with it. By consent of all parties the money was paid to the solicitor for the defendant, but without interest:—Held, that the plaintiff was liable for interest, notwithstanding the conflict as to who was entitled to the money, for he could have protected himself by paying the money into Court or obtaining a waiver of the right to interest; and the interest should be at the legal rate of 5 per cent., for the same reason.

Adams v. Cox, 10 O.L.R. 96, M.C.

—Unliquidated demand — Default judgment.] — See JUDGMENT.

—Demand note.]—Interest on a demand note runs from the date thereof.

Bank of Ottawa v. McLean, 26 Que. S.C. 27 (Rochon, J.).

—Interest on interest post diem — Mortgage clause.] — See MORTGAGE.

Imperial Trusts Co. v. New York Security & Trust Co., 10 O.L.R. 289, D.C.

—Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51) s. 113.—Construction —Interest on payments in arrear.]—The Ontario Judicature Act, (R.S.O. 1897, c. 51), s. 113 enacts that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it:"—Held, that under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been properly withheld, and compensation therefor seems fair and equitable. An order by the Ontario Court of Appeal that the appellant company should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed.

Toronto Railway Co. v. City of Toronto (1906), A.C. 117, 42 Can. Law Jour. 205.

—"Liabilities" prior to Interest Amendment Act.] — See MORTGAGE.

(British Canadian v. Farmer, 15 Man. R. 593.)

—Interest—Mortgage—Absence of provision for payment of interest after maturity.]—The Act 63 & 64 Vict. c. 29 (D.), which provides for the statutory rate of interest being 5 instead of 6 per cent., amending the Interest Act, R.S.C. 1886, c. 129, contains a proviso that the former Act is not to apply to "liabilities" existing at the time of its passing:—Held, that the proper construction of the word "liabilities" is liabilities respecting the rate of interest, and that in a mortgage made in 1884, payable in 1900, bearing interest at 7 per cent., in which there was no provision for the payment of interest after maturity, the damages allowable as interest after maturity were not within the proviso.

Plenderleith v. Parsons, 14 O.L.R. 619 (Boyd, C.).

—Mortgage—Interest—Acceleration clause.] —Bonds dated July 1, 1902, provided for payment of the principal in ten years from date, and that in the meantime interest thereon should be paid at the rate of 10 per cent. Default having been made in payment of the interest, the trustee under a mortgage given to secure the bonds, made on January 1, 1905, a declaration calling in the principal and interest, under an acceleration clause in the mortgage:—Held, that interest at the rate provided for, and not at the statutory rate, was payable after the date of the declaration.

Eastern Trust Company v. Cushing Sulphite Fibre Company, 3 N.B. Eq. 392.

—Bank Act—Maximum rate under.]—
See BANKING.

—Interest—Variation of judgment.]— Held, on consultation of the Judges of the Court of Appeal, that, where any judgment of a Court below has been changed, interest should only be allowed on the judgment from the date of the judgment of the Court of Appeal, notwithstanding s. 2 of the King's Bench Act.

Sheldon v. Egan, 18 Man. R. 221.

—Usury — Money Lenders Act.]—
See USURY.

INTERLOCUTORY JUDGMENT.

See APPEAL; JUDGMENT.

INTERPLEADER.

Purchase-money of land—Adverse claim to land.]—The defendant, being sued in this action for a balance due upon a purchase of land, admitted her liability, but stated that R. claimed the land as against the plaintiff and had begun an action and registered a certificate of lis pendens, and had notified her (the defendant) that he would hold her liable for any moneys paid by her under the agreement for purchase, after notice. Upon this the defendant applied for an interpleader order, and the Referee made an order staying proceedings in this action pending the result of the action brought by R., making the plaintiff a defendant in that action, and requiring the defendant to pay into Court a part of the purchase-money claimed:—Held, on appeal, that there was no ground for an interpleader, and not sufficient material to justify the order actually made; and the order was set aside, without prejudice to R. moving to amend his statement of claim in his own action, and for a stay of proceedings in this action, upon proper grounds.

Davison v. Lehberg, 13 W.L.R. 719.

Issue—Party plaintiff—Sheriff remaining in possession—Place of trial—Security for costs—Execution creditor — Insolvency.]— Where the claimant is in possession of the goods at the time of seizure, the execution creditor is made plaintiff in the interpleader issue directed on the sheriff's application. And this rule applies where the claimant is the wife of the execution debtor, and the goods are seized upon the premises in which a business is carried on by her in which she is assisted by him, but in which he has no interest. Where the goods seized were manufactured materials, the product of a going concern, a direction in the interpleader order that the sheriff should continue in possession until the final disposition of the issue, was upheld against the contention of the execution creditor that the sheriff should be directed to sell the goods, or the claimant to pay into Court or give security for the appraised value. An interpleader issue should ordinarily be tried in the county where the goods are seized, but where the sheriff is to remain in possession of the goods of a going concern, a speedy trial is so important that for the purpose of securing it, the issue may be sent to another county, having regard to considerations of expense and convenience. Under the discretionary powers given by Rule 1122, the execution creditor, being in insolvent circumstances, may be ordered to give security for the sheriff's costs.

Farley v. Pedlar, 1 O.L.R. 570.

—Sheriff enforcing writ of possession — Claim—Mortgagee in possession of land.]— Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, the sheriff was served with a notice by B. claiming the land mentioned in the writ, and informing the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest:—Semble, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. But, held, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order. Costs of the sheriff ordered to be paid in the first instance by the party putting him in motion.

Hall v. Bowerman, 19 Ont. Pr. 268.

—Claimant—Security to produce the goods —Sole bond of chartered bank.]—The sole bond of a chartered bank, the claimant of the goods in question in an interpleader, approved of by the proper officer of the Court, is sufficient security for the forthcoming of the goods; it is not necessary to produce sureties, nor to give proof by affidavit of the responsibility of the bank.

Ontario Bank v. Merchants Bank of Halifax, 1 O.L.R. 235.

—Shares—Certificate and transfer—Claim for damages—Parties out of jurisdiction—Laches.]—A transfer of certain shares in a company was executed by the holder of the shares in favour of her brother-in-law on the 29th September, 1900, and application to the company was at once made by the transferee for a certificate, but he did not receive one, and on the 25th October he was informed by the company that his transferor had set up a claim that the transfer was procured by fraud. On the 19th November the transferor brought an action against the company and the transferee to restrain the company from transferring the shares, for a declaration that the shares belonged to the plaintiff, and to set aside the transfer executed by her. On the 23rd November the transferee began an action against the company to compel the delivery of a certificate or for damages equal to the value of the shares, and for a mandatory injunction. On the 28th November the company applied for an interpleader order. Pending the application the transferee discontinued his action, and asserted his claim against the transferor and the company as a counterclaim in the action brought by the former:—Held, that the company were entitled to relief by way of interpleader, notwithstanding the claim against them for damages made by one of the claimants. Held, also, that although both claimants were out of the province, and the company's head office was also outside of the province, there was jurisdiction to make an interpleader order, the claimants themselves having brought the company into the jurisdiction, and the documents being within the jurisdiction. Held, also, that the laches of the company had not been so great as to disentitle them to the relief claimed, and the charge of collusion between the company and the transferor was not sustained. Held, also, that the transferee was entitled to have preserved to him any claim he might have for damages against the company.

Re Underfeed Stoker Company of America, 1 O.L.R. 42.

—Interpleader issue—Power to direct trial by jury—North-West Territories Act, s. 88.]—Neither a Judge nor the Court in banc has power to direct an interpleader issue in the N. W. Territories to be tried by jury.

McIntosh v. Shaw, 4 Terr. L.R. 97.

—Sheriff — Delay — Indemnity.]—A delay of three weeks after receipt of claimant's notice before making interpleader application will not disentitle sheriff to relief unless the party objecting has been prejudiced. Quære, whether a sheriff who has taken indemnity from one of the parties after seizure would now be held by that fact alone to have lost his right to interplead. Held, that in any event it is not open to the party giving the indemnity to take such objection.

McCallum v. Schwan; Gould v. Schwan, 5 Terr. L.R. 471 (Scott, J.).

—Lis pendens—Adverse claims to purchase money.]—A certificate of lis pendens is not an incumbrance within the meaning of R. S.O. 1897, c. 119, s. 15. One who had contracted to purchase land was sued by his vendor for the purchase money, and an action was brought in respect of the same land by creditors of the vendor's husband, seeking to set aside a conveyance of the land by the husband to the wife:—Held, that although the purchase money was not actually claimed in the latter action, yet, as the plaintiffs therein appeared upon an interpleader application by the purchaser and stated their willingness that the purchase should be carried out, the purchase money being applied to pay the debts of the husband, they were making an "adverse claim" to the purchase money, within the meaning of Rule 1103 (a), and the purchaser was entitled to an interpleader order.

Molsons Bank v. Eager, 10 O.L.R. 452, D.C.

Stakeholder — Demand and refusal of indemnity—Replevin.]—

McCallum v. Williams, 1 W.L.R. 257 (N. W.T.).

—Application by stakeholder—Wager.]—

Re Hyndman, 12 W.L.R. 166 (Alta.).

—Sheriff — Seizure of goods under execution — Right to interpleader order — Burden of proof — Plaintiff in issue.]—

Brownlee v. Eads, 2 W.L.R. 123 (Y.T.).

—Business carried on by husband in his own name—Seizure of plant and stock of business under execution against husband—Claim by wife—Interpleader issue.]—

Davison v. Schwartz, 7 W.L.R. 338 (Y. T.).

—Application by sheriff—Grounds for refusing relief—Sale of goods seized without advertising—Prejudice to claimant.]—

Hogan v. Boozan, 8 W.L.R. 548 (Sask.).

—Application by sheriff for order—Property seized in apparent possession of execution debtor—Claim by wife.]—

Schwartz v. Davison, 6 W.L.R. 699 (Y. T.).

—Sheriff — Seizure of goods — Claim of third party under chattel mortgages and for rent — Withdrawal by seizure as to property covered by mortgages.]—

McNaughton Co. v. Hamel, 1 W.L.R. 169. (N.W.T.).

—Proof of judgment at trial of interpleader issue—Attaching order.]—(1) When a third person claims goods seized by the sheriff under an attaching order and the sheriff applies for an interpleader order, any ob-

jection by the claimant as to the want or insufficiency of the material on which the attaching order was obtained should be raised in answer to the sheriff's application, and it will be too late to raise such objection at the trial of the interpleader issue. (2) It is not necessary at the trial of such an interpleader issue for the plaintiff, although he is plaintiff in the issue, to prove the defendant's indebtedness, at least in the absence of evidence on the part of the claimant to show that it did not exist. The attaching order having been set aside by the referee after the making of the interpleader order and the sheriff having relinquished possession of the goods, the claimant contended that the latter order then lapsed; but the attaching order had been reinstated on appeal to a Judge, when the sheriff again took possession of such of the goods formerly seized as he found to be still in the claimant's possession:—Held, that the plaintiff had a right to have the interpleader issue disposed of and that, as the merits were in his favour, the verdict for him should stand, but limited in its effect to the goods seized by the sheriff after the attaching order was restored.

Turner v. Tymchorak, 17 Man. R. 687.

INTERPRETATION.

Of statutes.] — See CONSTRUCTION OF STATUTES.

—Of wills.]—See WILLS.

INTERROGATORIES.

See DISCOVERY; EVIDENCE.

INTERVENTION.

Intervention—Death of party—Substitution of curator.]—Plaintiff, a wife séparée de corps, sued to have annulled a sale by her husband of an immovable of which she claimed to be owner. She died pending the action, her succession was declared vacant, and the curator took up the instance. The husband intervened asking that the guardianship be set aside and himself substituted as curator and given possession of his wife's property. The curator opposed the intervention. 1. Because the husband was already in the cause as mis en cause. 2. Because the guardianship could only be set aside by direct action:—Held, without admitting that the intervention was well-founded, that it could not be dismissed on the grounds above stated.

Carrière v. Saint Pierre, 3 Que. P.R. 299 (S.C.).

—Default—Arts. 154, 222 C.P.Q.]—If the intervenant, after having declared his intention, does not have his intervention allowed by the Judge, dismissal for default may be demanded as in case of non-return of a writ.

Nadon v. Richmond, Drummond & Yamaska Mutual Ins. Co., 3 Que. P.R. 306 (S.C.).

—Death by personal injuries—Delit—Action by widow.]—When the wife of a person who has died in consequence of a délit or quasi delit has, under Art. 1056 C.C. brought an action for compensation, one of the other relatives of deceased named in said article may intervene in the instance and claim from defendants damages which he personally suffered from such death and may, by his intervention, even contest plaintiff's right to the indemnity which she claims.

Morin v. Mills, 18 Que. S.C. 196 (S.C.).

—Preliminary grounds—Delay—Deposit.]—An intervenant has not the right, at any stage of the case and without deposit, to re-open it on questions pleadable only by preliminary exceptions.

Bisaillon v. St. Valentin, 4 Que. P.R. 191 (Davidson, J.).

—Interest of intervenant—Art. 220 C.P.C.]—A creditor of a bank in liquidation can intervene in an action brought by the liquidator against a debtor of the bank and adopt the conclusions taken by the liquidator and the grounds thereof without setting up any new matters, subject to the power of the Court to condemn him to costs if his intervention proves to have been improperly filed.

Sisters of Charity v. Bastien, 11 Que. K.B. 64.

Intervention — Insolvency — Settlement with contesting creditor.]—1. If a creditor who has obtained against an insolvent a judgment condemning him to imprisonment for fraudulent statement, settles with said insolvent, and there is a desistment of the inscription in Review (but no judgment yet on that desistment), another creditor may ask to intervene to continue the proceedings against the insolvent. 2. But as any further action on said intervention should be taken before the Superior Court, the record shall be transmitted there.

Superior v. Hutchins, 12 Que. P.R. 174.

—Intervention—Service—Art. 223 C.P.Q.]—A certificate of the prothonotary stating that an intervenant did not serve his intervention within the delay of three days after it was filed will be set aside on motion therefor if it is shown that the parties have received a copy, service of the intervention not being necessary.

Montreal Loan & Mortgage Co. v. Heirs of Adolphe Mathieu, 6 Que. P.R. 459 (Sup. Ct.).

—Motion to reject—Contestation on merits —Art. 220 C.P.Q.]—An intervention cannot be rejected upon motion, even when it is

alleged that the case was settled between the parties at the time of the filing of the intervention; the question is a matter for contestation upon the merits.

Paquette v. Dominion Bridge Co., 7 Que. P.R. 391 (Loranger, J.).

—Discontinuance — Subsequent intervention —Regularity.]—A discontinuance (désistement) of an action filed by the plaintiff does not put an end to the suit (instance), so as to prevent an interested party from intervening therein.

Gaze v. Dominion Bridge Company, 15 Que. K.B. 379.

INTESTACY.

See EXECUTORS AND ADMINISTRATORS; SUCCESSION.

INTOXICATING LIQUORS.

See LIQUOR LAW.

INVENTION.

See PATENT OF INVENTION.

IRRIGATION.

See DRAINAGE.

IRON AND STEEL.

Bounties on manufacture of "pig-iron" and steel—60-61 Vict. c. 6—62-63 Vict. c. 8—Interpretation.]—It is a general practice in the art of manufacturing steel to use the iron product of the blast furnaces while still in a liquid or molten form for the manufacture of steel, the hot metal being taken direct from the blast furnaces to the steel mill. Among iron-masters and those who are familiar with the art of manufacturing iron and steel, the term "pig-iron" has come to mean that substance or material in a liquid as well as in a solid form. A question having arisen as to whether iron when used in a liquid or molten form for the manufacture of steel was "pig-iron" within the meaning of the term as employed in the Acts 60 & 61 Vict. c. 6 and 62 & 63 Vict. c. 8:—Held, that it was, and that a manufacturer of steel ingots therefrom was entitled to the bounties provided by the said Acts in respect of the manufacture of pig-iron and of steel ingots.

The Dominion Iron and Steel Company v. The King, 8 Can. Exch. R. 107.

JOINDER.

Joinder of actions—Arts. 291-2 C.C.P.]—Arts. 291 and 292 C.C.P. have only in view the hearing of causes pending and inscribed at the same time and the evidence taken in a cause already decided cannot be used in an action pending.

Quebec Central Railway Co. v. Dionne, 4 Que. P.R. 424 (K.B.).

—Actions for the same cause—Misjoinder—Exception to the form.]—When two actions arise from the same cause and the right of action invoked in each proceeds from the same matter complained of and their conclusions are similar, they may be consolidated by the parties who may bring a single action together, and, in such case, the action cannot be dismissed upon exception to the form.

Slater Shoe Co. v. Trudeau, 5 Que. P.R. 314.

—Joinder of cases—Jury.]—Joinder will not be granted of two cases where the parties have made an option for jury trial.

Schwab v. Montreal Light, 6 Que. P.R. 50 (Doherty, J.).

—Of plaintiffs in slander action.] — See SLANDER.

—Peremption—Joinder of actions.]—When two causes have been joined for enquête and hearing on the merits the inscription of one for enquête and hearing is an answer to a motion for peremption in the other.

Paterson v. Chandler & Massey Co., 10 Que. P.R. 89.

—Causes of action—Option.]—When the purchaser of a horse in an action against the seller joins the two remedies given by law in the case of latent defect in the thing sold either to ask for resiliation of the sale or for a reduction in the price the defendant by dilatory exception can obtain a stay of proceedings until the plaintiff exercises his option between the two.

Latourelle v. Charlebois, Q.R. 35 S.C. 101.

—Of parties.]—See PARTIES.

—Of issue.]—See PLEADING.

JUDGMENT.

Petition in revocation of judgment—Personal fraud.]—1. The articles of the Code of Civil Procedure concerning the requete civile must be strictly interpreted, especially where the parties have been heard contradictoirement at enquete and merits. 2. If it is alleged that fraud and artifice were employed by the adverse party, it must be fully described in what consisted the fraud and that the opponent was a

party to it. 3. The allegation that new evidence has been discovered, namely the evidence taken before the coroner's jury, is no ground for the granting of a requete civile, especially when the petitioner's attorney was present at the taking of such evidence.

Duchaine v. Dussault, 11 Que. P.R. 254.

—Summary judgment—Affidavit in answer—Cross-examination.]—An application under Con. Rule 603 for judgment is a summary application, and should be given effect to only in a plain case. Upon such an application it is incumbent upon the defendant, by affidavit or otherwise, to satisfy the Judge hearing the application that he has a good defence to the action on the merits, or has disclosed such facts as may be deemed sufficient to entitle him to defend. And where a local Judge, in the exercise of his discretion, has given leave to defend, an appeal will not in general be allowed. Papayanni v. Coutpas [1880], W.N. 109. But the question whether a Judge has or has not a discretion to grant or refuse an enlargement of the motion for the purpose of allowing the plaintiff to cross-examine the defendant upon his affidavit is one of sufficient importance to justify an appeal. Under Con. Rule 490 a Judge has no discretion, but must grant the enlargement. Kingsley v. Dunn, 13 P.R. 300, and Townsend v. Hunter, 3 C.L.T. 310, followed. An appeal from an order of a local Judge refusing an enlargement, and giving the defendant leave to defend, was allowed, and the motion referred back to the local Judge to dispose of it after cross-examination of the defendant.

Morrison v. Wright, 1 O.W.N. 727.

—Amendment after passing and entry.]—The judgment at the trial, as pronounced, declared that a partnership existed between the plaintiff and defendant, but in drawing up the judgment the partnership was in terms limited to a certain block of land, which was not intended:—Held, that the judgment should be amended, after passing and entry, so as to conform to the judgment as pronounced. Ainsworth v. Wilding [1896], 1 Ch. 673, followed.

Mitchell v. Sparling, 1 O.W.N. 297 (Riddell, J.).

—Application to commit debtor—Lack of income.]—

McKenzie v. Curry, 7 E.L.R. 235 (N.S.).

—Re-opening judgment—Grounds.]—

Matthews v. Smith, 7 E.L.R. 332 (N. S.).

—Registration against land in which judgment debtor has interest—Prior unregistered assignment not affected.]—

Mooney v. McDonald, 1 E.L.R. 78 (N. S.).

— Practice—Default—Judgment entered for more than amount claimed in writ.]—

Fawcett v. Norton, 2 E.L.R. 146 (P.E. I.).

—Opening up judgment—Delay in moving.]—

McKay v. Chisholm, 6 E.L.R. 241 (N. S.).

—Striking out appearance—Power of Judge to strike out sham defences.]—On an application for summary judgment, the Judge, while giving leave to defend, has power to strike out such defences as are sham defences, but it would be an improper use of the practice to make such an application with this end in view. Before a summons is granted a prima facie case should be made out, showing that the defendant has no defence whatever.

Trumbell v. Taylor, 3 Terr. L.R. 305.

—Reserving further directions.] — The judgment pronounced after trial reserved "all further directions that may be necessary." Relying on this, the defendant some six months after judgment was pronounced applied for further consideration, the matter so to be considered being certain costs and expenses of the defendant's bailiff for keeping possession of the property in dispute after service of an interim injunction order and before the appointment of a receiver. The request for such further consideration was made and the proceedings therefor taken according to the English practice in the Chancery Division:—Held, 1. That such practice was correct. 2. That a reservation of further directions does not entitle a party to move for further consideration. 3. That, in any event, the Court will not take into consideration at a further hearing any matter which was not raised by the pleadings, and which should have been brought under the notice of the Court at the trial.

Adams v. Hutchings (No. 3), 3 Terr L. R. 242.

Judgment—Amendment of after entry.]—When the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended, it may upon motion interfere after the passing and entering of the judgment.

Mitchell v. Sparling, 15 O.W.R. 37, 1 O.W.N. 297.

Judgment on default of appearance—Application to set aside.]—Upon an application, made in 1910 (under sub-sec. 2 of s. 57 of the Judicature Act), to set

aside a judgment of the Supreme Court of the North-West Territories, entered in 1898, for default of appearance to a writ of summons personally served upon the defendant, upon the ground that the writ was void by reason of being issued out of the office of the clerk of the Supreme Court for the judicial district of East Assiniboia, instead of out of the office of the deputy clerk of the said judicial district at Yorkton, where the defendant resided and the cause of action arose:—Held, that, under the Rule in force in 1898, the writ could be issued either from the office of the clerk or the deputy clerk; or, if not, that the issue from the office of the clerk was a mere irregularity, which was cured by the laches of the defendant; and, no merits being shown, the application should be dismissed. Saskatchewan Land and Homestead Co. v. Leadlay, 6 Terr. L.R. 82, distinguished.

Lawler v. Ashdown, 14 W.L.R. 330 (Sask.).

—Action against several defendants, one only defending — Discontinuance.] — Final judgment cannot be signed against a defendant for want of a defence, if there is an untried issue pending between the plaintiff and another defendant in the same action who has entered a defence. A notice of discontinuance of an action as against defendant B., served more than a year after the irregular entry of final judgment against defendant A. is a nullity and A. may, within a reasonable time after the service of such notice, move to set aside the judgment against him. Such a discontinuance cannot be effected under Rule 538 of the King's Bench Act except under subsec. (c), and then only by leave of the Court or a Judge.

Macdonald v. Fairchild Co., 19 Man. R. 129.

—Default in delivery of defence—Motion for judgment—Affidavit of merits.]—Plaintiff brought an action against defendant for rescission of a contract for sale and return of purchase money on account of vendor's default. The vendor appeared, but did not deliver a defence within the time limited. On a motion for judgment, an affidavit was filed by defendant's solicitor stating that in his belief defendant had a good defence on the merits, but no grounds for this belief were stated. It was also objected by counsel for the defendant that in any event in point of law the plaintiffs' claim was not sufficient to entitle him to the relief asked for:—Held, that an affidavit of merits filed by defendant on an application for judgment in default of defence must disclose facts showing a good defence, and if sworn on information and belief must disclose the grounds of such information and belief. 2. That if there appears to be a substantial question of law to be determined and arising out of the plaintiffs' claim, the Court may, even in the absence of an affidavit, allow the defendant in to defend.

Miller v. Ross, 2 Sask. R. 449.

—Judgment recorded to bind lands—Release of portion of lands bound—Effect as regards remainder—Apportionment of liability.]—Where a judgment debtor in his lifetime and his personal representatives after his death alienate portions of the land bound by the judgment, and the judgment creditor releases a portion of the land sold from any claim under the judgment, the full amount of the judgment cannot be enforced against the owners of the unsold portions of the land, who are only liable to be called upon to pay pro rata according to the value of the lands released. Where the enforcement of the lien of the judgment creditor against the unsold land, involves questions of value and deductions by reason of the releases, it must be made the subject of an action, and, where the proper parties are not before the Court, cannot be accomplished on motion for leave to issue execution.

Re Bank of Liverpool, 43 N.S.R. 205.

—Setting aside—Defective notice—Laches.] —Defendant failed to appear on the trial of the action against him, and judgment was entered against him. An application to set aside the judgment so entered was dismissed, on the ground that defendant had not sufficiently accounted for his delay in moving, and no merits were disclosed in his affidavit. Before the order was taken out, defendant discovered that the notice of trial given by plaintiff was insufficient, and gave notice that when the order was applied for, he would oppose the granting of it on that ground:—Held, that such notice was both irregular and too late. All the grounds should have been stated in the first notice. The Court will not entertain repeated applications of this sort, when proper inquiry would have disclosed all the information desired in the first instance.

McKay v. Chisholm, 43 N.S.R. 227.

—Judgment debtor—Consent order made in absence of debtor.]—Where a debtor, in order to avoid an examination before a commissioner, under the Collection Act, touching his ability to pay a debt for which judgment had been recovered against him, gave his consent in writing to the making of an order against him for the payment of the debt by instalments, and admitting possession of means to pay the instalments agreed upon:—Held, that he would not be permitted, subsequently, to take advantage of the fact that he was not present personally or by counsel when the order so assented to was made by the commissioner.

Re S. G. Piers, 44 N.S.R. 254.

—On motion—Action for possession of land —Counterclaim.]—Plaintiff brought an ac-

tion for possession of certain property and mesne profits. Defendant appeared and filed a counterclaim, but no defence. Plaintiff then applied at the regular sittings of the Court by notice of motion for judgment:—Held, that a Judge in Chambers or a local Master had jurisdiction to make the order, and the application should have been made to either a Judge in Chambers or local Master, and while a Judge in Court doubtless had jurisdiction to entertain the motion, such jurisdiction should not be exercised.

Tunnicliffe v. Pollard, 3 Sask. R. 153.

—Interlocutory judgment—Review.]—An interlocutory judgment ordering the defendant to file a plea to the merits of an action when an exception to the form is pending does not fall within any of the cases specified in Art. 52a C.P.Q. and cannot be taken to the Court of Review.

Serling v. Levine, 11 Que. P.R. 144 (Ct. Rev.).

—Interlocutory or final—Setting aside.]—An interlocutory judgment is irregular if it awards damages and omits to state that such damages are to be assessed, or if such judgment awards costs. It is not necessary to produce any affidavit of merits on an application to set aside an irregular judgment.

Perry v. Hunter, 3 Terr. L.R. 266.

— Regular judgment—Setting aside — Merits.]—(1) Mere delay is no answer to an application to set aside a judgment on the merits, unless an irreparable wrong be be done. (2) The affidavit of merits should be made by the party having personal knowledge.

Hanson v. Pearson, 3 Terr. L.R. 197.

— Judgment—Setting aside—Terms.] — Mere delay is not a bar to an application to set aside a regular judgment on the merits unless it be shown that an irreparable injury will be thereby done to the plaintiff. The applicant moved to set aside a regular judgment signed against a partnership in the firm name on the ground that there never was such a firm and that the applicant had never been served with writ of summons, and was not a member of such firm. The plaintiff's counsel raised no objections to the applicant's want of locus standi to attack the judgment, but consented to the judgment being set aside as on the merits and on the usual terms sufficient to protect the plaintiff. It appeared that certain goods of the applicant had been seized by the sheriff under an execution issued on the judgment against the firm. The judgment was ordered to be set aside upon the applicant paying the amount thereof into Court and paying the costs.

Westman v. Ogmundson, 3 Terr. L.R. 442.

—Order for payment of judgment debt by instalments—Default—Motion to commit.] —Upon the 25th August, 1908, the defendant was examined as a judgment debtor under the Collection of Debts Ordinance, 1904, and was ordered to pay $25 a month, beginning on the 5th September, 1908. In October, 1910, the plaintiff moved to commit the defendant, under s. 9, sub-s. 4, of that Ordinance, for contempt in not paying the instalments ordered. The defendant made the first three payments, in September, October, and November, 1908, since when he had paid nothing. The plaintiff's motion was dismissed, because notice of it was given in the name of a firm of solicitors not on the roll of the Territorial Court. A second motion was then made, upon the same material, properly served and filed:—Held, that the dismissal of the first motion was not a bar to the second, the merits not having been passed upon so as to make them res adjudicata. Held, also, that copies of the affidavits in support of the motion having been served with the notice of motion and the affidavits filed before the return day, the motion was regularly made: Rules 292 (a) and 467; and it was not necessary that the affidavits should be filed before the notice of motion was served. Held, as to the merits, that it is not compulsory upon the Judge to make an order of commitment upon an affidavit proving default, as provided for in s. 9, sub-s. 4, of the Ordinance; and the Judge has no power to vary or suspend the order for payment by instalments, or to give a new date; the powers of the Judge are confined to the making of the first order and enforcing it strictly on default; but he has a discretion to refuse to commit. And held, that, if the plaintiff had moved promptly on default, he would have been entitled to a committal order; but he had himself suspended the order for payment and allowed it to lie dead for two years, and he must have done so because he conceived that the defendant was unable to pay; and he had, by his own laches, put himself in a position where he could not ask for a committal order; and the motion was refused.

Palm v. Thompson, 15 W.L.R. 433 (Y. T.).

—Setting aside judgment—Irregularity — Time for appearance.]—Where the defendant, after the time limited for appearance, tendered to the clerk of the Court, an appearance, and the plaintiff had previously tendered to the clerk the necessary papers for the entry of default judgment, but judgment had not been yet

signed, and the clerk refused to accept the appearance and signed judgment, the judgment was set aside for irregularity.

Massey-Harris Co. v. Ott, 3 Terr. L.R. 438.

—Default—Motion to set aside—Irregularity—Computation of time for appearance.]—

Scott v. Hoffner, 3 W.L.R. 247 (Terr.).

—Judgment summons — Issue of second summons while first pending—Necessity for special motion.]—

Brownlee v. Eads, 2 W.L.R. 216 (Y.T.).

— Judgment before appearance — Grounds.]—

Tuckett Cigar Co. v. Wickett, 12 W.L.R. 210 (Alta.).

—Summary judgment—Default of reply.]—

Cosgrave v. Duchek, 3 W.L.R. 194 (Terr.).

—Motion to strike out appearance and defence—Verification of cause of action.]—

Codville v. Smith, 3 W.L.R. 197 (Terr.).

—Summary judgment—Ex parte proceeding—Proof of plaintiff's case.]—

Moose Mountain Lumber & Hardware Co. v. Anderson, 6 W.L.R. 354 (N.W.T.).

—Judgment debtor—Order and appointment for examination—Failure to attend—Insufficient payment of conduct money.]—

Douglas v. Omand, 4 W.L.R. 331 (Terr.).

— Default judgment—Failure to comply with order for security for costs—Judgment issued ex parte.]—

Thomas v. Clark, 2 W.L.R. 126 (Y.T.).

—Default judgment—Motion to set aside—Striking out part of judgment—Failure to give credit.]—

American-Abell Co. v. Snider, 4 W.L.R. 542 (Terr.).

—On default—Motion to set aside—Delay in applying—Questionable defence.]—

Sandhoff v. Metzer, 4 W.L.R. 18 (N. W.T.).

—Default—Motion to set aside—Defence —Counterclaim.]—

Moyie Lumber and Milling Co. v. May, 1 W.L.R. 152 (N.W.T.).

—Satisfaction—Evidence — Arrangement between solicitors out of Court.]—

Putnam v. Kiffin, 11 W.L.R. 559 (Y.T.).

—Admissions in pleadings—Judgment for amount admitted—Leave to proceed for balance.]—

Ross v. McBride, 3 W.L.R. 561 (Terr.).

—Motion to vary after entry—Misapprehension as to facts—Award of costs — Alteration or amendment.]—

Munroe v. Heubach, 10 W.L.R. 416 (Man.).

—Action for purchase money of land — Covenant to pay—Acceptance of title by defendants.]—

Mansell v. Moore, 7 W.L.R. 808 (Sask.).

Judgment quasi non-suit.—Plaintiff resisted a motion for judgment quasi nonsuit on the ground that no replication had been filed, though one had been served:—Held, that though the failure to file was the plaintiff's default, it was the defendant's duty to search the clerk's office, and to see that the issue was complete before moving.

Gallagher v. Wilson, 37 C.L.J. 44 (S.C. N.B.).

—Petition in revocation of judgment—Declaration that judgment is rendered by consent—Improbation.]—Held, that a judgment declaring the contestation to an opposition maintained by consent, cannot be revoked by way of requête civile, unless it is also attacked by way of improbation.

The Beaubien Produce and Milling Company v. Corbeil, 3 Que. P.R. 435.

—Mortgage action—Settlement after judgment—Failure to carry out—Account—New day—Reference.]—A motion by the plaintiff in a mortgage action for an order for a new day and a new account, and to change the relief sought from sale to foreclosure, was opposed by the defendant upon the ground of a settlement or compromise after judgment, under which money had been paid to the plaintiff, the mortgagee:—Held, that if the defendant mortgagor had made default in payments according to the agreement, the unmodified burden of the mortgage existed and was enforceable. Such an arrangement should be investigated in the Master's office, and not by independent litigation. The matter had passed into judgment, and the only contest was as to how much was due and payable in respect of the mortgage, having regard to the arrangement manifested in the correspondence and dealings subsequent to the Master's report. It was foreign to the policy of the Judicature Act to contemplate new litigation in such a case as this: s. 57, sub-s. 12.

McCollum v. Caston, 1 O.L.R. 240.

—Motion for judgment on admissions — Withdrawal—Leave.]—After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. One of the defendants then moved for judgment on the statement of facts, which had

not been filed:—Held, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts, which had not been acted upon or brought before the Court; after the filing of the statement of claim and the notice of withdrawal, it was not competent for the plaintiff to get judgment on the statement of facts; and if the sanction of the Court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion.

East v. O'Connor, 19 Ont. Pr. 301.

—Speedy judgment—Abridging time for return of summons.]—Notwithstanding the provisions of Rule 548 a Judge has no power to abridge the time for the return of a summons for speedy judgment taken out under Rules 103 and 104 of the N.W.T. Judicature Ordinance.

Toronto Railway Company v. Bain, 4 Terr. L.R. 28.

—Fraudulent judgment—13 Eliz. c. 5—Assignment—Equities.]—The assignee of a judgment, void as against creditors under 13 Eliz., c. 5, takes the judgment subject to the rights of the creditors, notwithstanding the assignment is for value, and without notice. Totten v. Douglas, 18 Grant 341, discussed.

Shorey v. Stobart, 1 Terr. L.R. 262.

—Summary judgment—Ont. Rule 603—Promissory note—Unconditional leave to defend.]—In an action upon a promissory note the defendant set up, in answer to a motion for summary judgment under Rule 603, that the consideration for the note consisted in whole or in part of the purchase money of a patent right, and that the note had not the words "given for a patent right" written or printed across the face, and was, therefore, void under the Bills of Exchange Act, s. 30, sub-s. 4, in the hands of the plaintiff, who was alleged to have notice of such consideration. The plaintiff denied that the note was given for such consideration:—Held, that the defendant was entitled to unconditional leave to defend.

Davey v. Sadler, 1 O.L.R. 626.

—Interlocutory judgment — Assessment of damages—Writ of summons—Statement of claim—Non-conformity.]—By the indorsement on the writ of summons the plaintiff claimed damages for a breach of an agreement by the defendant to convey certain land to the plaintiff. By the statement of claim and the plaintiff's evidence it appeared that her real claim was for breach of a subsequent parol contract to the effect that if she would join the defendant (her husband) in a conveyance of the land to a purchaser, he would pay the purchase money over to her. Under an order of a local Judge service of the writ and statement of claim were effected by posting them on the 30th November, 1900, in an envelope addressed to the defendant at a place in Ontario. On the 28th December, 1900, judgment was entered for the plaintiff for default of appearance to the writ, for damages to be assessed. No proceedings were taken upon the statement of claim to enter judgment or a default note. Upon the action coming down for assessment of damages, no one appearing for the defendant:—Held, that, according to the practice, no assessment could be made except upon the judgment for default of appearance, for nothing else was ripe for assessment; and the plaintiff could not have damages pursuant to the claim indorsed on the writ, because it appeared by the evidence that she had consented to the defendant conveying the land in breach of his covenant. The action was, therefore, dismissed, but without costs and without prejudice to a new action being brought upon the causes of action set forth in the statement of claim. Semble, that the order for service by posting should not have been made, the material being quite insufficient, and there being no probability that the papers would reach the defendant.

Alexander v. Alexander, 1 O.L.R. 639.

— Defence—Denial—Unconditional leave to defend.]—

Prince v. Richards, 7 W.L.R. 836 (Sask.).

—Default judgment—Application to set aside—Delay—Failure to explain.]—

Regina Trading Co. v. Godwin, 7 W.L.R. 651 (Sask.).

—Application by defendant to set aside—Trial in absence of defendant.]—

Siemer v. Johanson, 6 W.L.R. 156 (Y. T.).

—Order setting aside—Merits—Discretion—Appeal—Delay.]—

Anticknap v. City of Regina, 7 W.L.R. 163 (Sask.).

—Motion to set aside—Default judgment—Consent — Mistakes — Laches — Estoppel.]—

Canadian Bank of Commerce v. Syndicat Lyonnais du Klondike, 6 W.L.R. 424 (Y.T.).

—Judgment for default of plea — Setting aside—Terms as to payment of costs.]—

Defendant was permitted by the Appeal Court (30 N.S.R. 393), to supplement his affidavits and renew an application to set aside a judgment entered against him in the County Court for default of plea. Defendant, thereupon, filed an affidavit disclosing a good defence on the merits, and renewed his application, which plaintiff opposed. The learned Judge of the County Court, being

of the opinion that plaintiff, in opposing the application, acted unreasonably and oppressively, set aside the judgment with costs to be paid by plaintiff:—Held, that he erred in doing so, and that plaintiff's appeal must be allowed with costs. Held, that the order must be so far modified as to give plaintiff the costs of the judgment, and execution, if any, and allowing defendant the costs only occasioned by plaintiff in opposing the renewed application. Held, that the judgment having been regularly entered defendant's application was to the indulgence of the Court, and could only be allowed on payment of costs thrown away.

Piper v. King's Dyspepsia Cure Co., 33 N.S.R. 287.

—Default judgment—Motion to set aside—Order reducing amount—Power of Judge to make.]—In an action brought by plaintiff against defendant to recover an amount claimed for taxes, an agreement was entered into on behalf of defendant to pay the amount claimed for debt and costs within a day or two from a time fixed, May 16th or 17th, 1901. On the 18th May an amount was paid on account of costs, and on the 21st, the balance not having been paid, judgment by default was entered for the full amount claimed for debt and costs, without giving credit for the amount paid on account. On an application to the Judge of the County Court to set aside the judgment, the learned Judge refused the motion, but made an order reducing the judgment to the proper amount:—Held, that under O. xiii., r. 10, he had power to do so. Held, that, inasmuch as the application was a necessary one, defendant should have had the costs of the motion below, but that, as there was a substantial condition in respect of which he had not succeeded, there should be no costs of the appeal. Semble, that if the judgment had been entered in breach of good faith the amendment should not have been granted, but that in this case it was defendant's duty to have seen that the terms of the arrangement as to payment were complied with.

The City of Halifax v. Bent, 33 N.S.R. 546.

—Interlocutory or final judgment—Order to proceed with execution—Leave to appeal.]—1. An interlocutory judgment is one which is rendered in a cause between the institution of the suit and the final judgment therein, and is given in an intermediate state of the cause on some intermediate question before the final decision. 2. A judgment revoking the stay of execution previously ordered by the Court, and ordering the bailiff to proceed with the execution of the property seized, is a final judgment, and a petition for leave to appeal therefrom cannot be granted.

Shannon v. Turgeon, 4 Que. P.R. 49.

—Judicial hypothec—Time of registration.]—A judgment may be registered and create hypothec on property acquired by the judgment debtor after it has been rendered.

McClure v. Croteau, 18 Que. S.C. 336.

—Setting aside judgment—Leave to defend—Substitutional service.]—The plaintiffs in 1896 issued a writ against the defendant company, and six individual defendants who were shareholders in the company, and in their statement of claim asked that the individual defendants be declared trustees for the defendant company of certain mining locations in Alberta; that the lands be sold under the order of the Court, and the proceeds applied in payment of the plaintiff's claim against the defendant company under a prior judgment which was still unsatisfied. Healy, one of the defendants, was a foreigner and resided out of the jurisdiction. An order for the substitutional service of the writ by prepaid registered letter was obtained, but the writ, as a matter of fact, never came to his notice; judgment was entered in default of defence against all the defendants, the lands were sold to one Sills, the sale was confirmed by an order of the Court and a certificate of title was issued by the registrar to Sills under the Court's direction. On an application in June, 1899, by the defendant Healy to have the judgment and sale set aside and for leave to defend upon the grounds: (1) that the material upon which the order for substitutional service had been made was insufficient; (2) that he had no actual notice of the proceedings under which the judgment had been pronounced; (3) that the judgment had been fraudulently obtained; (4) that notice of the writ and not a copy of it, should have been served upon him:—Held, (1) That the material upon which the order for substitutional service had been made was sufficient. (2) That the alleged fraud had not been proven. (3) That following Moore v. Martin, 1 Terr. L.R. 236, the service of the writ itself upon Healy, though a foreigner, and out of the jurisdiction, was neither a nullity nor irregular, inasmuch as the form of writ provided in the Territories is itself a notice. (4) That although Healy had no actual notice of the proceedings, yet as the substitutional service was effected in the mode prescribed in the order, and the order was made on sufficient material, the Court had jurisdiction to deal with his interest in the property; that the purchaser Sills was not bound to ascertain that the substitutional service provided for had the effect of bringing the proceedings to the notice of Healy, and that the purchaser's rights should therefore not be disturbed. (5) That as Healy had disclosed a defence upon the merits, he should be allowed in to defend upon giving security for the plaintiff's costs without prejudice to the purchaser's rights.

Conrad v. Alberta Mining Company, 4 Terr. L.R. 322.

—Summary judgment—Leave to defend—Allegations of fraud.]—When a defendant intends to rely on a defence of fraud, he should set it up definitely in his statement of defence and, in meeting a motion for leave to sign judgment under Rule 593 of the King's Bench Act, he should file an affidavit in answer showing such definite facts pointing to the alleged fraud as to satisfy the Judge that it would be reasonable that he should be allowed to raise such defence. In this case the only evidence in support of the allegation of fraud consisted of some general statements of defendants in their examinations on their affidavits filed in answer to the plaintiff's motion, and it was held on appeal from the referee that his order allowing plaintiff to sign judgment was right. Wallingford v. Mutual Society (1880), 5 A.C. 685, followed. Costs of appeal refused partly on account of the great mass of material heaped up, including diffuse examinations on affidavits.

Canadian Moline Plow Co. v. Cook, 13 Man. R. 439.

—Examination of debtor for discovery in aid of execution—Admissibility of depositions on motion to commit — Exhibiting original.]—

Fraser v. Kirkpatrick, 4 W.L.R. 1 (Terr.).

—Summary judgment—Delay in applying —Delivery of defence.]—

Victoria Lumber Co. v. Magee, 2 W.L.R. 1 (Terr.).

—Setting aside default judgment—Defence on merits—Affidavit— Discretion — Appeal —Practice.]—

Jones v. Murray, 9 W.L.R. 204 (Sask.).

—Collection of Debts Ordinance—Power to issue second judgment summons—Functions of clerk—Power of Judge to direct—Power to amend defective summons.]—

McLellan v. Thompson; Irwin v. Kelly, 9 W.L.R. 41 (Y.T.).

—Application to re-open judgment and let in fresh evidence—Corroborative evidence —Inconclusiveness.]—

Duck v. Daniels, 9 W.L.R. 19 (B.C.).

—Debtor—Committal—Neglect or refusal to pay—Examination of debtor.]—

Fraser v. Kirkpatrick, 4 W.L.R. 317 (N W.T.).

—Default judgment—Application to set aside—Affidavit—Merits of defence — Arrangement between solicitors—Conditional leave to defend.]—

Imperial Life Assurance Co. of Canada v. Best, 7 W.L.R. 446 (Alta.).

—Summary judgment—Rule 616—Dismissing action.]—Upon a motion by the plaintiff for summary judgment under Rule 616, where all the facts were before the Court, and the conclusion was against the plaintiff, it was proper to pronounce judgment dismissing the action, instead of merely dismissing the motion.

Hill v. Hill, 2 O.L.R. 541 (D.C.).

—Summary judgment—Promissory note—Holder for value—Fraud—Onus.]—Where the maker and one of the indorsers of the promissory note sued on, in answer to a motion by the plaintiff for summary judgment under Rule 603, swore that they were induced to become parties to the note by fraudulent misrepresentations made by their co-defendants, particulars of which they set out, whereof they had reason to believe the plaintiff had notice:—Held, having regard to s. 30, sub-s. 2, of the Bills of Exchange Act, that they were entitled to unconditional leave to defend, notwithstanding the plaintiff's affidavit that he was a holder for value. Fuller v. Alexander (1882), 47 L.T.N.S. 443, followed.

Farmer v. Ellis, 2 O.L.R. 544 (Street, J.).

—Action on judgment — Consideration — Note — Arts. 208-9 C.P.Q.]—If a defendant by his pleas denies that a note signed by him was the consideration for a judgment under which plaintiff seeks to recover, such plea will not be struck out of the record for want of an affidavit to corroborate it.

Penfield v. Piggott, 3 Que. P.R. 361 (S. C.).

— Revocation — Requete civile.]—When a judgment has been rendered, without one of the parties having been heard, owing to a misunderstanding between the attorneys, such party may be requête civile, demand that such judgment be revoked.

Fabien v. Gougeon, 18 Que. S.C. 242 (S. C.).

—Requete civile — Application of Act — Mistake.]—If the parties to an action and the Judge have, by error, considered as in force and applicable an Act then passed by the Legislative Assembly, but amended by the Legislative Council so as to make it not applicable to pending actions, proceedings may be taken by requête civile against the judgment rendered in conformity with said Act.

Lamalice v. Electric Printing Co., 4 Que. P.R. 63 (S.C.).

—Requete civile—Newly discovered evidence —Arts. 505, 1177 C.P.Q.] — Proceedings against a judgment may be taken by a requête civile when new witnesses have been found who can prove facts essential to the action.

Brousseau v. Déchéne, 3 Que. P.R. 397 (C.C.).

—Examination of debtor — Privilege from arrest — Punitive process.] — The pro-

ceedings for the oral examination of a judgment debtor under s. 36 of 59 Vict. c. 28, should be by summons and order; and not by an ex parte order in the first instance. A Judge of the Supreme Court of New Brunswick has no privilege against an attachment for any contempt which is of a criminal and not of a civil kind. The process of attachment which may be issued under the provisions of s. 36 of 59 Vict., c. 28, against a judgment debtor for contempt of an order calling upon him to appear and be examined orally as to any and what property he has, which by law is liable to be taken in execution, is punitive or criminal in its nature; therefore, a Judge of the Supreme Court can not protect himself by his privilege against an attachment issued against him for refusing to obey such an order.

Ex parte VanWart, in re Burkhardt v. VanWart, 35 N.B.R. 78.

—Examining of — Incurring debt by fraud.] —Defendant received from plaintiff several sums of money, part of which were to be invested and part expended on plaintiff's farm. Defendant placed these monies to his wife's credit, made no investment, kept no accounts and could not account at all for a large portion, although he said it had been expended on the farm. Before the plaintiff got judgment and while the action was pending defendant allowed his wife and sister-in-law to get judgments against him:—Held, by the Full Court, reversing Drake, J., that the defendant had not incurred the debt by fraud or false pretenses within the meaning of s. 15 of the Arrest and Imprisonment for Debt Act. An appeal lies direct from an order committing a debtor to gaol and no preliminary motion to the Judge for discharge is necessary.

Bullock v. Collins, 8 B.C.R. 23.

—Dominion official—Order to pay judgment debt by instalments — Jurisdiction of local legislature — Judicial discretion.] — K., M. and W. were in receipt of annual salaries amounting to $1,800, $400, and $700 respectively. K., upon being examined before the Judge of the County Court of W., was, under the provisions of 59 Vict. c. 28, s. 53, ordered to pay the amount of the judgments against them by instalments at the rate of five and ten dollars per month respectively. Orders nisi having been obtained to bring up the three orders for the purpose of quashing them, upon the returns thereof, it was held (per Tuck, C.J., Hanington, VanWart and McLeod, JJ., Landry, J., dissenting):—1. That the provisions of 59 Vict., c. 28, s. 53 authorizing the Judge or other officer before whom the examination is held, upon it being made to appear to him that the judgment debtor is unable to pay the whole of the debt in one sum, but is able to pay the same by instalments, to make an order that the debtor shall pay the amount of the judgment debt by instalments, in so far as it is sought to apply the same to salary or income derived from office or employment under the Government of Canada, is ultra vires of the Provincial Legislature, and, therefore, that the orders against K., M. and W. should be quashed; and, 2. That in the cases of M. and W., there being no evidence or charge of fraudulent conduct on their parts, the circumstances showed such an improper exercise of discretion on the part of the Judge of the County Court of S., that the orders made by him should be quashed on that ground as well.

Ex parte Killam, Ex parte McLeod, and Ex parte Wilkins, 34 N.B.R. 530.

—Division Court — Order for committal — Previous order for payment — Affidavit.]— The plaintiff recovered judgment against the defendant in a Division Court action for a debt contracted before the passing of the Act, 61 Vict., c. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith:—Held, that the Court had jurisdiction under sub-s. 5 of s. 247 of the Division Courts Act, R.S.O. 1897, c. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal, without a previous order for payment based upon such an examination and default thereunder. Where it appears that a judgment debtor has been examined before the Judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication as to that which must be made to appear to warrant the making of an order under sub-s. 5 of s. 247. Semble, that if the affidavit of the plaintiff required by s. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to raise an objection to the jurisdiction on that ground; and, the defect not appearing on the face of the proceedings, prohibiton in such a case would not be granted.

Re Hawkins v. Batzold, 2 O.L.R. 704 (D. C.).

—Summary — B.C. Order XIV.—Cross-examination of plaintiff — Discretion to refuse.] — On a summons for judgment under Order XIV., it is only in exceptional cases that defendant will be permitted to cross-examine plaintiff on his affidavit, and then only after defendant has filed an affidavit of merits.

Ward v. Dominion Steamboat Line Co., 9 B.C.R. 231.

—Extension of delay to render account.]— The Court will not extend the delay, fixed by judgment, for the defendant to render an account, unless special and sufficient reasons be adduced. The fact that the defendants, co-partners, pleaded separately, and that judgment was rendered against

one defendant before the delivery of judgment in the case of the other, is not sufficient ground for extending the delay to account fixed by the first judgment so that the defendants may account together.

Jeannotte v. Pariseau, 20 Que. S.C. 229 (Archibald, J.).

—Effect of taking judgment for claim.]—One Charlebois was contractor for building the Great North-West Central Railway and Preston was a contractor with him for the fencing. Preston and Sinclair entered into an agreement by which the latter was to do the work of fencing, the agreement containing the following provision: "Estimates for said work shall be made monthly by the company's engineer, or at such other times as the said engineer shall deem reasonable and proper, and such estimates less ten per cent. rebate shall be paid forthwith upon same being paid to said Preston and Musson by said company, and the said ten per cent. rebate shall be paid forthwith upon same being paid to said Preston and Musson by said company." Preston obtained judgment, which by consent was entered against the railway company direct for the price of his work and received satisfaction therefor by assigning it to other persons. Sinclair was paid the price of his work but demanded interest, claiming that his right to payment attached under the above clause on the judgment being assigned. He sued for the interest which the trial Judge allowed but the Full Court overruled his judgment, holding that interest could not be recovered under the statute in force, 3 & 4 Wm. IV., c. 42, s. 28:—Held, affirming the latter decision (12 Man. L.R. 228), 1901 C.A. Dg. 231, that under said statute it must appear by the written instrument that there is a debt certain payable at a time certain before interest will be allowed, and it does not so appear by the contract in this case. Appeal dismissed with costs.

Sinclair v. Preston, 31 Can. S.C.R. 408.

—Saisie-arret after judgment — Delays — Arts. 693, 1155 C.C.P.]—In summary causes the defendant has had two days to plead to the saisie arrêt; if he does not plead within the time the plaintiff has two days to contest the declaration of the treis-saisie; after this delay he may, if he does not contest it, inscribe for judgment according to the declaration.

Goldberg v. Giffin, 4 Que. P.R. 376 (Sup. Ct.).

—Requete civile — Arts. 182, 1177-8, 1182 C.C.] — A requête civile can only be entered by leave of a Judge, and will only be allowed when a prima facie case is made out. The requête civile should not be supported by general allegations. It will not be granted if the judgment complained of does not prejudice the petitioner.

Leveillé v. Charette, 4 Que P.R. 470 (Sup. Ct.); Smith v. Charette, 4 Que. P.R. 469 (Sup. Ct.).

—County Court — Speedy judgment—Leave to defend.]—On a motion for speedy judgment in the County Court it is open to a defendant to set up other defences than those disclosed in his dispute note:—Held, on the facts, reversing Leamy, Co.J., that the defendant should have unconditional leave to defend. Per Irving, J.—Defendant should have been allowed to cross-examine plaintiff on his affidavit.

McGuire v. Miller, 9 B.C.R. 1.

— Revocation — Action — Arts. 192, 1177, C.C.P.]—Revocation of a judgment may be sought by direct action when a requête civile could be taken. A party attacking a judgment against him for fraud, and alleging that it greatly prejudiced him, is not obliged to establish by his declaration that without the alleged fraud the judgment would have been other than it was. The requête civile should be accompanied by an affidavit, but if an inscription en droit against the direct action such informality is not invoked the Court cannot take judicial notice of the absence of the affidavit.

Charette v. Leveille, 4 Que. P.R. 310 (Sup. Ct.).

—Summary judgment — Bill of exchange —Conditional delivery — Notice — Innocent holders—53 Vict. c. 33, s. 21, sub-s. 3 (D.).] —On a motion for summary judgment under Con. Rule 616 by the payee of a promissory note against the maker, who alleged on his examination for discovery that he made and delivered the note to a trading company for a purpose other than that for which the company deposited it with the plaintiffs, but did not state that the plaintiffs had notice thereof. Held, that the plaintiffs were entitled to judgment.

Ontario Bank v. Young, 2 O.L.R. 761.

— Amendment — Death of plaintiff between argument and judgment — Administrator ad litem.] — The plaintiff died after the argument of an appeal by him from the judgment of the High Court dismissing his action with costs, but before judgment was given on such appeal. The Court was not informed of the death, and gave judgment dismissing the appeal with costs. The defendants, in ignorance of the death, obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced. Upon an application made by the defendants some months later, the Court directed that the certificate should be amended by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of that day. Turner v. London and South-Western Ry. Co. (1874), L.R. 17 Eq. 561, and Ecroyd v. Coulthard, [1897] 2 Ch. 554, followed. The

defendants were entitled to have an administrator ad litem appointed to represent the plaintiff's estate in order that the costs of the action and appeal might be recovered.

Gunn v. Harper, 3 O.L.R. 693 (C.A.).

—Manitoba County Courts — Proof of.]— To prove a County Court judgment the plaintiff produced the procedure book of the County Court showing the entries therein of the different proceedings in the action in which such judgment was alleged to have been recovered, and also filed a copy of such entries, certified as a true copy by the clerk of the Court pursuant to s. 46 of the County Courts Act. Amongst the entries so proved was one of judgment by default, which entry itself, by s. 103 of the Act, constituted the judgment of the County Court:—Held, that, as the entry of the judgment in the procedure book constituted the judgment, and as the Court itself was a Court of record, the entry of the judgment became a record of a Court of record. If so, its production, or the statutory proof of it by a certified copy, proved the jurisdiction of the Court over the matters in respect of which the judgment was recovered, and the recovery, existence, and validity of such judgment. Held, also, that although the procedure book did not show the note required by s. 105 to be made in such book, that the making of such note was only a ministerial act to be performed by the clerk; it was not a part of the judgment itself; the validity of the judgment did not depend on such note being made.

Dixon v. Mackay, August, 1902, not reported (Richards, J.).

—Examination of transferee—Third mortgagee — "Exigible under execution" — Ont. Rule 903.] — A third mortgage upon real estate made by a judgment debtor is not a transfer of property "exigible under execution," within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver.

Canadian Mining and Investment Co. v. Wheeler, 3 O.L.R. 210.

—Judgment of distribution—Art. 793 C.P.] —The power to pay the money without report of distribution is given to the prothonotary alone, and not to the Judge or Court.

Gravel v. Mélancon, 5 Que. P.R. 388 (Doherty, J.).

—Examination of debtor after judgment—Art. 590 C.P.] — (1) The examination of the debtor, after judgment, can only take place in the cases mentioned in Art. 590 C. P. (2) A debtor who has made default to appear upon a summons wrongly issued, may nevertheless demand, by motion, the setting aside of the summons.

Alden Knitting Mills v. Hershfield, 5 Que. P.R. 390 (Fortin, J.).

—Motion for, after verdict.] — Failure to move for judgment in accordance with the verdict of a special jury until after the lapse of the time prescribed by Art. 491 C.C.P.

Grand Trunk v. Miller, 12 Que. K.B. 1, 2 C.L.R. 490.

—Motion for judgment — "Debt or liquidated demand."] — The defendant having entered into an agreement to manufacture for and deliver timber to the plaintiff received from him certain advances in money exceeding the value of the timber actually delivered; and failed to complete his contract. No adjustment of accounts took place, nor was the amount to be paid for the delivered timber ascertained. In an action to recover the balance of the advances unpaid:—Held, that the claim was not a "debt or liquidated demand" within the meaning of Con. Rule 138; and an order of a local Judge, giving leave to sign judgment under Con. Rule 603, was set aside.

McIntyre v. Munn, 6 O.L.R. 290 (Meredith, J.).

—Interpretation — Motifs.] — If the reasons (motifs) of a judgment show that there is error, ambiguity, or obscurity in the result (dispositif), they should be considered in determining and settling the meaning of the judgment.

Adam v. Gagne, Q.R. 22 S.C. 367 (Sup. Ct.), affirmed on review, 31st Jan., 1903.

—Right to attack judgment — Absence of fraud and collusion.]—In an action brought by a judgment creditor against the judgment debtors and one L. for the recovery, by way of equitable execution of moneys claimed to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances under which the judgment was recovered, cannot in the absence of fraud and collusion in the recovery thereof, be insisted upon. A motion that one of the plaintiffs, who, on examination for discovery, had refused to answer questions relating to such circumstances should be compelled to attend and be examined at his own expense, was therefore refused.

Smith v. McDearmott, 5 O.L.R. 515 (M. C.).

—Registered judgment — Fraudulent conveyance.] — See FRAUD.

(Roberts v. Hartley, 14 Man. R. 284.)

—Motion for judgment under Rule 603 — Company—Admission of amount—Excess of statutory limit.] — In an action against a company incorporated under R.S.O. 1897, c. 199, for goods sold and delivered, the

amount claimed being admitted, in which the defendants set up that their indebtedness when the goods were purchased largely exceeded the limtis prescribed by ss. 11 and 40 of that Act, and that the directors were personally liable and not the company, a motion for summary judgment was dismissed. Jacobs v. Booth's Distillery Co. (1901), 85 L.T.R. 262, followed.

Canadian General Electric v. Tagona Water and Light Co., 6 O.L.R. 641 (M.C.).

—Succession — Aliments — Transmission to heirs.]—The obligation to furnish maintenance is not transferable to the heirs as a debt of the succession of the person subject to it even when the latter has, in his lifetime, been condemned thereto by a judgment for maintenance in an action en séparation de corps brought by a wife against her husband condemning him to pay her an allowance during his life. On this case the costs, even on appeal, were divided on account of the relationship of the parties, and because they had proceeded on a joint factum under Arts. 509 et seq., C.P.Q.

Davidson v. Winteler, .R. 13 K.B. 97. Appeal to Supreme Court quashed, 34 S.C. R. 274.

— Motion for judgment — Admissions — Pleading.] — Consolidated Rule 616 is not intended to apply to the case of alleged insufficiency in law of the statements of fact pleaded in the defence. A motion for judgment should not under such circumstances be made under that Rule, but the procedure indicated in Rule 259 or Rule 261 should be adopted.

Edward v. Cole, 8 O.L.R. 140 (Anglin, J.).

—Procedure — Requete civile.]—A requête civile against a judgment the rendering of which is disputed will not be received when the petitioner has not inscribed en faux against such judgment.

In re Clement, 6 Que. P.R. 60 (Lavergne, J.).

—Judgment by default — Interest—Rule 90 (N.W.T.).] — In an action for $108.07 for goods sold and delivered, the plaintiff claimed 4.66 as interest, but did not show upon what the claim for interest was founded: —Held, on an application to set aside a judgment, signed in default of appearance under Rule 90, that, in the absence of an allegation in the statement of claim of some contract, expressed or implied, to pay interest, it is an unliquidated demand, and cannot be included in such judgment. Judgment set aside accordingly.

King v. Latimer, 40 C.L.J. 124 (Scott, J.).

—Petition in revocation of judgment—Supplementary contestation.] — If a petition in revocation of judgment is received and a party allowed to contest an account by means of newly discovered evidence, he cannot nevertheless insert in the contestation which he is allowed to file, grounds of contestation not set forth in the petition in revocation.

Hill v. Campbell, 6 Que. P.R. 424 (Davidson, J.).

— Revocation — Documentary evidence — Objections — New evidence — C.P. 1177.]— (1) A party who has declared, in compliance with a judgment ordering him to file particulars, that he was suing upon a verbal contract, may, without fraud, file documentary evidence at trial, in support of such so-called verbal contract. (2) At any rate, it is the duty of the adverse party, when such documents are filed, to object to their production and take proceedings to have the case reopened while it is under advisement, and a requête civile will not be received when the party might have had the case reopened before judgment. (3) A judgment will not be revoked by reason of the discovery of new evidence, unless it is shown that the party made reasonable efforts to discover it before the trial, or could have discovered it by reasonable diligence.

Union Home and Real Estate Co., Limited, v. Estates, Limited, 6 Que. P.R. 383 (Archibald, J.).

—Practice—Judgment on admissions.]—The words "admissions of fact in the pleadings" in Rule 615 of the King's Bench Act, R.S. M. 1902, c. 40, are not confined to such admissions made by an opposite party, and this Rule may be availed of by the party making the admissions and an order made accordingly; and when the defendant in his statement of defence consents to the relief asked for by plaintiff and offers to give the conveyance required by him, such consent and offer, although strictly speaking not an admission of fact, should be treated as one for the purposes of the rule, as its object is to save further proceedings and further costs when the need of trying issues is removed by admissions. The statement of defence, besides the consent and offer referred to, denied the allegations of the statement of claim:—Held, that, as defendant, by making an application under Rule 615, had put it out of the power of the plaintiffs to prove their allegations and out of the power of the Court to decide, on the merits, who should pay the costs of the action, the case should be treated, for the purpose of awarding costs, as if the defendant had admitted the truth of the plaintiff's pleadings as well as submitted to the relief asked for, and that the defendant should pay the main costs of the action, including the costs of the motion.

Houghton v. Mathers, 14 Man. R. 733 (Richards, J.).

—Purchase of judgment — Equities affecting.] — See PRINCIPAL AND AGENT.

—Previous judgment — Plea of.] — See RES JUDICATA.

—Execution to enforce.]—See EXECUTION.

—Setting aside—Undue preference — Collusion — Affidavits in proof of.] — An order allowing the plaintiff to sign judgment on a specially indorsed writ may be made under s. 73 of 60 Vict. c. 24, Supreme Court Act, though the time limited for appearance by the writ has not expired. A judgment will not be set aside on the ground of collusion and undue preference where the affidavit in proof of the collusion is founded on information and belief only, and does not state the origin of the information, and no circumstances are assigned for deponent's belief.

The Dominion Cotton Mills Company v. Maritime Wrapper Company, 35 N.B.R. 676.

—Questions submitted — Answers by jury —Entry of judgment on.] — S. 158 of 60 Vict. c. 24, Supreme Court Act of New Brunswick, authorizing the Judge on the trial of a cause to direct the jury to answer questions submitted and enter a verdict on the answers given, applies to the County Courts. When this course is adopted it is the Judge's duty to enter the verdict for the party in whose favour the questions are answered.

Steeves v. Dryden, 35 N.B.R. 555.

—"Final judgment"—Yukon Territorial Act, 1899, s. 8.] — In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items and adjudicated on the evidence taken that the action in respect thereof be dismissed:—Held, that this was within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of twenty days.

McDonald v. Belcher, [1904] A.C. 429, reversing 33 Can. S.C.R. 321.

—Review from Justice's Court (N.B.) — Jurisdiction of the County Court Judge.]— A Judge of a County Court has jurisdiction to hear a case on review from a Justice's Court, though the case was tried in a county for which he is not the County Court Judge. The King v. Wilson; Ex parte Irving, 35 N.B.R., p. 461, explained.

Ex parte Graves, 35 N.B.R. 587.

—Judgment by default — Debt — Interest.] —Where in an action for a debt or liquidated demand, there is also a claim for interest as accruing prior to the issue of the writ, but no allegation in the statement of claim of any contract, express or implied, to pay it, it cannot, being an unliquidated demand, be included in a judgment signed by default under Rule 90. Such judgment will be set aside as irregular.

Ewing v. Latimer, 5 Terr. L.R. 499 (Scott, J.).

—Setting aside judgment — Leave to defend — Absence of defence on the merits—Judicial discretion.] — When a judgment is regularly entered in default of a defence, a good defence on the merits should be shown on an application to set it aside and allow a defence to be filed, even if it was by the error of a clerk of the defendant's solicitor, in not carrying out his instructions, that the defence intended was not filed in time. Watt v. Barnett (1878), 3 Q.B.D. 363, approved. Where, however, the referee has exercised his discretion in favour of the defendant and made an order giving leave to defend, such order should not be reversed on appeal, although the Judge cannot find that any defence on the merits has been shown. Moore v. Kennedy (1898), 12 M.R. 173, followed.

McCaul v. Christie, 15 Man. R. 358 (Perdue, J.).

—Part of claim — Summary judgment.]— Under Rule 228 of the Yukon Territorial Court a summary judgment may be granted for part of the plaintiff's claim, with leave to proceed for the residue.

Lisle v. DeLion, 1 W.L.R. 274 (Dugas, J.).

—Action summary in part only.] — Where plaintiff's claim is in part summary and in part ordinary the action as a whole is susceptible of different methods of procedure and defendant's remedy is to have plaintiff optate and not to move for the dismissal of the action by exception to the form.

Sun Life Ass. Co. v. Piché, 7 Que. P.R. 227 (Davidson, J.).

—Inscription en droit — Grounds.] — The inscription en droit should contain, not only the grounds of law but also the conclusions intended to be taken by the party inscribing.

Delisle v. McCrea, Q.R. 27 S.C. 76 (Sup. Ct.).

—Judgment debtor — Examination.]—That the Imperial Debtors Act, 1869, is in force in the North-West Territories, and that upon the examination of the defendant as a judgment debtor he must state the exact location of bank notes which he admitted he had in his house, and the disposition of chattels which he formerly possessed.

Iverson v. Enwright (N.W.T.), 2 W.L.R. 20.

—Speedy judgment — Affidavit leading to.] —The materials used in support of a mo-

tion for speedy judgment in a County Court action in which the plaintiff sued on an account stated, were an affidavit of the plaintiff verifying his cause of action, and an affidavit of plaintiff's solicitor verifying defendant's signature to the account and stating that he believed the plaintiff had a good cause of action and that the defendant had no defence:—Held, that the materials were sufficient to support a judgment for plaintiff. Quære, whether an affidavit of plaintiff verifying his cause of action and an affidavit of his solicitor stating that defendant had no defence would be sufficient under s. 94 of the County Courts Act to support a speedy judgment.

Bremner v. Mitchells, 11 B.C.R. 35.

—Settlement of action — Order enforcing —Jurisdiction.] — Since the passing of the O.J. Act the compromise of an action will be enforced by an order of the Court, and where the motion in such case is for judgment and, analogous thereto, for judgment on the pleadings, the proper practice is by motion to a Judge in Court.

Pirung v. Dawson, 9 O.L.R. 248 (Meredith, C.J., C.P.).

—Practice — Amending judgment after entry.] — The minutes of judgment as settled by the registrar directed that the appellants' costs should be paid out of certain moneys in Court, and in this form the judgment was duly entered and certified to the clerk of the Court below. Subsequently it was made to appear that there were no moneys in Court available to pay these costs, and upon the application of the appellants the Court amended the judgment, directing that the costs of the appellants should be paid by the respondents forthwith after taxation.

Letourneau v. Carbonneau, 35 Can. S.C. R 701.

—Declaratory action — Stay of proceedings on judgment in County Court.]—Where no consequential relief is claimed the Court's jurisdiction to make a declaratory order will be exercised with great caution. A declaration that the defendant is not entitled to proceed on a judgment recovered by him in another action against the plaintiff will not be granted if on a proper case being made out the proceedings could have been stayed in the original action, except in special circumstances. A County Court Judge has jurisdiction to stay proceedings on a judgment in his Court on a proper case for a stay being made out such for instance as that the judgment has in effect been satisfied. In such case an action in the Supreme Court to restrain the defendant from proceeding with his action in the County Court will be dismissed.

Williams v. Jackson, 11 B.C.R. 133 (Martin, J.).

—Judgment obtained by fraud — Fresh action to set aside.] — Where a judgment has been obtained by fraud, the Court has jurisdiction in a subsequent action brought for that purpose, to set the judgment aside.

Richards v. Williams, 11 B.C.R. 122.

—Amending as to costs—Minutes of judgment — Clerical error.] — The dispositif of a final judgment, disposing of the costs in a manner quite contrary to that intended by the Judge as evidenced by the considerants and context of the judgment may be corrected on application to the Judge, such correction being deemed that of a "clerical error" provided for by Art 546 C.P.Q. (See Gevais v. Seely, Q.R. 1 S.C. 44.)

Bérian v. Stadacona Water, Light & Power Co., Q.R. 25 S.C. 525 (Ct. Rev.).

—Enquete and merits—Interlocutory judgment.] — The Judge at the enquête cannot revise an interlocutory judgment rendered by the Superior Court since, although he may preside at the enquête and merits, it is only in deciding the merits that he can revise the interlocutory judgment. So long as the cause is en délibéré before him he is not in a position to adjure upon the merits and cannot modify the interlocutory judgment given on an inscription en droit.

Galindez v. The King, Q.R. 26 S.C. 171 (Sup. Ct.).

—Estoppel by judgment in former action.] —See ESTOPPEL.

(Mumford v. Acadia Powder Co., 37 N. S.R. 375.)

—Execution to enforce.]—See EXECUTION.

—After reference for trial—Motion for judgment — Costs.] — Where there is a reference to a Master or Referee to try an action and dispose of the costs, a motion to the Court for judgment on his report is necessary.

Murphy v. Corry, 12 O.L.R. 120 (Clute, J.).

—Summary judgment — Motion for — Delay — Con. Rule 603.] — The intention of Con. Rule 603 is that a motion for summary judgment shall be made within a reasonable time after the appearance of the defendant; and a motion for judgment in an action in which the writ was issued in June, the appearance entered in July, and the motion not launched until November—the delay not being explained—was refused. McLardy v. Slateum (1890), 24 Q.B.D. 504, followed.

German American Bank v. Keystone Sugar Co., 12 O.L.R. 555.

—Judgment by confession — Proceedings to set aside — Consideration — Burden of proof.] — In an action to set aside a confession of judgment for the sum of $1,545, given by a father to his son, on the ground

that it was a preference within the meaning of the Assignment Act, R.S. (1900), c. 145, and given to defeat or delay creditors, the evidence showed that the judgment debtor owned a house and land valued at from $1,000 to $1,300, another piece of land worth about $400, and, in addition, a piece of land the value of which was not ascertained. He had besides some personal property the value of which was not proved. His liabilities, in addition to the amount for which the confession of judgment was given, were a disputed claim of $200, and a note for $75, not then matured:—Held, that these facts were not sufficient to constitute proof of insolvency, and, further, that the Act requires that the party taking judgment by confession should have notice of the insolvency at the time, and while in certain cases this might be inferred, there was no evidence in this case from which such an inference could be drawn. A creditor under the Statute of Elizabeth, attacking another's judgment, cannot succeed merely by showing that the judgment was one by confession, and that in such a case no consideration is to be presumed, but the burden is upon him to show that there was no debt due. Assuming that the judgment by confession must be presumed to be without consideration, the party attacking it must still show that by it, the judgment, the debtor was subtracting from his assets so much of his property that there was not enough left to pay the claims of other creditors. The appeal was allowed with costs, but, as it appeared that there were many facts not in evidence, plaintiff was allowed a new trial, costs to be costs in the cause.

Comeau v. White, 38 N.S.R. 553.

—Clerical error — Rectification — Affirmation on appeal — Judgment in conformity with rights of parties.] — Where a judgment has simply been affirmed by the Court of Appeal the Court which rendered the judgment on the trial ceases to be seized of the issues raised in the cause and has no right to make a correction of a clerical error in its judgment. 2. A judgment, which is in conformity with the rights of the parties and the whole of the issues raised in the action, cannot be affected by a clerical error on account of the conclusions failing to claim all that a party was in law entitled to.

Robert v. Montreal & St. Lawrence Light and Power Co., 7 Que. P.R. 480 (C.R.).

—Registered judgment — Lien — Agreement of purchase of land — Relief against forfeiture.] — The binding effect of the registration of a certificate of a County Court judgment against the lands of the judgment debtor, under s. 213 of the County Courts Act, R.S.M. 1902, c. 38, is not nearly so extensive as in the case of a registered judgment of the Court of King's Bench under the Judgments Act, R.S.M. 1902, c. 91; and, when the only interest or estate of the judgment debtor in the land in question is under an agreement of purchase providing for payment by delivery of one half of each year's crop and in no other way, the judgment creditor, having only a registered County Court judgment, does not acquire all the rights or position of an assignee of the benefits of the agreement, and is not necessarily entitled to notice of a cancellation of the agreement by the vendor in pursuance of a stipulation contained therein, or to insist on taking the place of the purchaser in all respects or to redeem the vendor, nor is he entitled to an order for the sale of the land after such cancellation. When the vendor in such a case declares the agreement forfeited and cancels same by notice under one of its terms, whether or not the purchaser could get relief in equity against the forfeiture, the judgment creditor has no standing to claim such relief.

McGregor v. Withers, 15 Man. R. 434.

—Registration of judgment — Property sold by unregistered deed.] — The registration of a judgment against immovable property which, by the cadastre of the division in which it is situate, appears to belong to the judgment-debtor, creates a legal hypothec thereon, even though the judgment-creditor is aware of the existence of an unregistered deed, by which the property had been sold to a third party.

Aumais v. Ranger, 28 Que. S.C. 269 (Archibald, J.).

—Judgment of inferior Court — Attacking in collateral proceedings — Confession.] — A judgment of an inferior Court signed on a confession obtained by fraud is void and may be attacked collaterally.

Rogers v. Porter, 37 N.B.R. 235.

—Opening up judgment — Breach of faith.] —Where a judgment is entered in breach of good faith between solicitors, and without notice, and pending negotiations for a settlement, it is not necessary to disclose a good defence on the merits in order to have the judgment opened up.

Tupper v. Sutcliffe, 38 N.S.R. 332.

—Judgment on admissions — Payment into Court of part "in full satisfaction" — Payment out.] — In an action for a balance alleged to be due in respect of a contract, the defendants paid money into Court with their statement of defence under Con. Rule 419, alleging it in their pleading to be "balance due in respect of all the said matters," and that they brought it "into Court in full satisfaction of the plaintiffs' claim herein":—Held, that the plaintiffs were not entitled on motion under Con. Rule 616, to judgment with leave to proceed for the balance of their claim, and for payment out of the money paid in, for by so moving they accepted the statement of defence, and were not entitled to the benefit of it severed

from the accompanying statement that the account admitted was the entire sum due. Held, further, that whatever discretion the Court may have under the words "subject to further order" in Con. Rule 419 it should not be exercised to enable the plaintiffs to take as payment on account moneys which the defendants had offered only "in full satisfaction."

Barrie v. Toronto and Niagara Power Co., 11 O.L.R. 48 (Anglin, J.).

—Procuring judgment by fraud—Attack in subsequent action.]—See FRAUD.

(Johnston v. Barkley, 10 O.L.R. 724 (D. C.).

— Foreign judgment.] — See that title.

—Signing judgment for want of statement of defence—Necessity for affidavit.] — It is necessary to file an affidavit of default when judgment is signed for want of statement of defence.

Hyslop v. Ostrom, 14 O.L.R. 136 (M.C.).

—Equitable execution — Registered judgment — Interest of heir in lands of intestate, whether realty or personalty—Parties to action.] — Z., the owner of the lands in question, having died intestate, his widow A., took out letters of administration to his estate. B., the only child of Z. and A., subsequently married the defendant and then died childless and intestate. The plaintiff, having recovered a judgment in the King's Bench against the defendant, registered in the proper Land Titles office a certificate of the judgment and then brought this action for a sale of the defendant's interest in the lands to realize his judgment. A. had not disposed of the land in any way under her letters of administration, nor had letters of administration of the estate of B. been taken out:—Held, that the defendant had no interest in the lands in question which was bound by, or could be sold under, the registered judgment. Held, also, that an administrator of the estate of the defendant's wife was a necessary party to any proceedings affecting her estate or the defendant's interest in it. Semble, even if the estate of the defendant's wife had been represented in the action, it would have to be held that the defendant, while the land remained vested in the administrator, had no interest in it which would be bound by the judgment. S. 3 of the Judgments Act, R.S.M. 1902, c. 91, with the interpretation of the word "land" given in sub-s. (f) of s. 2, refers to a present existing interest in land, and does not cover an interest which may come to a beneficiary as real estate or may come to him as money according to the actions of the administrator and the unknown exigencies of the administration.

McDougall v. Gagnon, 16 Man. R. 232.

—Privy Council—Enforcing judgment on appeal from a Provincial Court. — The judgment of the Judicial Committee of the Privy Council on appeal from the Supreme Court of New Brunswick may upon motion be entered as a judgment of the latter Court.]

Robertson v. Fairweather, 37 N.B.R. 497.

—Voluntary execution of judgments.]—Art. 1147a. C.C.P. is of general application as a mode of voluntary execution of judgments of the Superior Court as well as of those of the Circuit Court.

Bank of St. Hyacinthe v. Desaulniers, Q. R. 30 S.C. 512 (Sup. Ct.).

—Examination of judgment debtor.] — Under Rule 610, of the B.C. Supreme Court Rules, 1906, the debtor must answer all questions affecting his property anterior to the recovery of the judgment. S. 19 of the Arrest and Imprisonment for Debt Act has not been displaced by Rule 610.

Jackson v. Drake, 13 B.C.R. 62.

—On default of appearance — Irregularity —Account stated — Interest.] — The claim for interest on an account stated was not a proper subject of special indorsement under Con. Rule 245 of 1888 and is not under the present Con. Rule 138, inasmuch as an account stated does not of itself entitle the creditor to interest. Interest is not chargeable upon such an account unless a fixed time for payment was agreed upon or a demand for payment was subsequently made, or upon an account indorsed showing that the parties have themselves in adjusting their accounts allowed interest upon balances outstanding, though a jury might and probably would allow such interest as damages. A judgment signed for default of appearance to a writ, the indorsement upon which is not a special indorsement authorized by the rules of Court would be a nullity and not merely irregular, and susceptible of cure by amendment, but by virtue of Con. Rule 711 of 1888, and now of Con. Rule 575 of 1897, notwithstanding such a claim for interest, final judgment may be rightly signed for the liquidated demand upon the account stated, while as to the rest of the claim, the judgment should be interlocutory only; and if under these circumstances judgment for the whole claim has been entered, it is not a nullity but merely irregular, and terms may be rightly imposed on setting it aside:—Held, also, that the requirements of Con. Rule 764 and 775 (1888) (cf. now Con. Rules 628 and 637, 1897) as to the signing and entry of judgments, were satisfied by the proper officer placing his signature upon the back of the judgment under the words "judgment signed October 6th, 1890," followed by a memorandum in the judgment book in his office signed by him, although he did not sign the judgment on its face. The propriety of directing that a question

as to the validity of a default judgment impugned because of alleged defects in the indorsement of claim upon the writ should be determined by the trial of an issue is open to grave doubt.

George v. Green, 13 O.L.R. 189 (D.C.), 14 O.L.R. 578 (C.A.).

—Declaratory judgment — Discretion.]— See ELECTRIC RAILWAY.

(Toronto Ry. Co. v. Toronto, 13 O.L.R. 532.)

—Default judgment — Setting aside —Affidavit of merits.] — Held, that on an application to set aside a regular judgment on default, a mere statement that the defendant has a good defence on the merits is not sufficient; but there must be facts set forth which will enable the Court or Judge to decide whether or not the defendant has a probable defence to the action.

Stewart v. McMahon, 1 Sask. R. 209.

—Alimentary pension — Application for relief from.] — It is not by petition but by an action that the person obliged to pay for support of another, can ask to be relieved of such obligation. When the debtor of the allowance for support proceeds by petition his right to do so should not be attacked by inscription en droit and, if it is, the person attacking it will only be entitled to the costs of an oral contestation.

Michaud v. Moreau, 9 Que. P.R. 330 (Sup. Ct.).

—Revivor — Unauthorized discharge from arrest no answer.] — Defendant having been arrested under execution issued on a judgment recovered against him by plaintiff was discharged from arrest without the authority of plaintiff or her solicitor: — Held, that such unauthorized discharge did not constitute a satisfaction of the judgment, and was no answer to an action by plaintiff to revive the judgment.

Conrad v. Simpson, 41 N.S.R. 468.

—Special indorsement on writ.] — Where a party is placed in the position of having judgment signed against him summarily, he is entitled to have sufficient particulars to enable him to satisfy his mind whether he should pay or resist.

Bank of Montreal v. Thomson, 13 B.C.R. 218.

—Motion for speedy judgment — Filing of defence — Accounting for delay.] — Upon a motion for speedy judgment launched after the statement of defence has been delivered, it is not essential that the delay in moving should be accounted for.

Victoria Lumber Co. v. Magee, 6 Terr. L.R. 187.

—Admissions — Motion for judgment — Special circumstances.] — A motion for judgment under Rule 326 will only be entertained where special circumstances exist which necessitate a hearing out of the ordinary course.

White v. Edgar, 1 Alta. R. 102.

—Motion for judgment on admissions — Pleading.] — A defence stating in answer to each of the paragraphs of the statement of claim, "The defendant specifically denies the allegations contained in paragraph—of the statement of claim," may be deemed a specific denial; and will not be treated by the Court as an admission (Scott, J.). Such a defence is not a specific denial and will be treated by the Court as an admission (Stuart, J.).

Lougheed v. Hamilton, 1 Alta. R. 16.

—Speedy judgment — Sufficiency of affidavit — Defence of fraud.] — Held, that on an application for speedy judgment under order X. of the Judicature Ordinance, it is sufficient to verify the cause of action generally. (2) That on an application for speedy judgment (following Ward v. Plumbley (1889), 6 Times R. 198), if the defendant shows a fair probability of a good defence he should be allowed to plead.

Alloway v. Pembranke, 1 Sask. R. 127.

—Judgments by default — Petition in revision.] — A petition for the revision of a judgment by default under Art. 1175 C.C.P. lies in favour of a defendant who has not been summoned in any one of the ways provided by law generally, and is not restricted to cases where a defendant is ordered to appear by advertisement in newspapers under Art. 136 C.C.P.

Awed v. Gimaill, 32 Que. S.C. 111.

— Revocation of judgment — Subsequent discovery of falsity of evidence adduced.]— When an action or petition in revocation of judgment is founded on the subsequent discovery of the falsity of documents, or of evidence adduced at the trial, or on the subsequent discovery of new evidence of a conclusive nature not then available, it is essential that the documents or evidence in question should be material and such that, accordingly as they would have been omitted in the first case, or adduced in the second, the judgment sought to be revoked would have been different. Hence, an action to revoke a judgment settling boundaries will not be maintained on the ground that the report and evidence of a surveyor, heard at the trial, was subsequently discovered to be false, if it appears that the judgment would have been the same, had the report and evidence in question not been put before the Court.

American Asbestos Co. v. The Johnsons Co., 34 Que. S.C. 185.

—Imperial Debtors' Act, 1869 — Application to Alberta.] — The Imperial Debtors'

Act, 1869, is in force in the Province of Alberta.

Fraser v. Kirkpatrick, 6 Terr. L.R. 403. But see now 7 Edw. VII. c. 6, s. 1 (Alta.).

— Execution — Judgment — Con. Rule (1897) No. 843.] — Under Ontario Con. Rule (1897) No. 843, a judgment creditor is entitled to sue out execution instanter upon judgment being signed, and without waiting until it is duly entered. For purposes of execution a judgment under which a sum of money is payable is complete when it is signed.

Rossiter v. Toronto Street Ry. Co., 15 O. L.R. 297.

—Form — Imprisonment — Rule nisi — Costs.] — It is not necessary for a judgment to be signed by the Judge who renders it, it is sufficient that it contains his name. To obtain a rule nisi for imprisonment on a judgment in an action for slander service of a bill of costs is not required. The plaintiff has a right to demand payment of his attorney's costs if the consent of the latter as to execution for the costs sufficiently appears from the fiat demanding the issue of the writ of execution and from the motion for the rule nisi.

Rennie v. Mace, 9 Que. P.R. 169 (Ct. Rev.).

—Judgment by default — Art. 94 C.C.P.]— The Court will give judgment in favour of the plaintiff when the defendant has not appeared even when it has no jurisdiction over the subject matter of the action.

Massey-Harris Co. v. Bélanger, 9 Que. P. R. 303 (Sup. Ct.).

—Confession of judgment — Delay.] — The confession of judgment by the defendant filed and served before the expiration of the time allowed to plead to the action operation as an interruption of the delay for pleading until service of notice of acceptance by plaintiff of the confession. A certificate of failure to plead issued by the prothonotary the day after the confession of judgment was filed and an inscription for judgment ex parte made on the same day are premature and will be set aside on motion therefor.

Bruneau v. Magnan, 9 Que P.R. 318 (Ct. Rev.).

—Confession of judgment — Particulars.]— The defendant will not be compelled to give the particulars of the amount for which he offers to confess judgment.

Lusher v. Watson, 9 Que. P.R. 328 (Sup. Ct.).

—Summons for judgment—Omission to indorse solicitors' address.]—Held, that when not otherwise provided the forms in use in the administration of civil justice in England, with such modifications as may be necessary to make them conform to the practice of the Supreme Court of Saskatchewan, must be followed in the Supreme Court of Saskatchewan, and therefore the omission to indorse the name and address of the solicitors issuing a chamber summons, as required by form of summons No. 1, in Appendix K to the English rules, is an irregularity. Quære, whether it is open to a solicitor to appear on the return of a summons and take such an objection, without thereby waiving the irregularity.

Beaver Lumber Co. v. Eckstein, 1 Sask. R. 134.

—Summary judgment — Affidavit verifying claim.] — Plaintiff applied to strike out appearance and enter judgment against the defendant under Rule 103 of the Judicature Ordinance. The affidavit filed alleged a judgment recovered against the defendant in the Alberta Court for a certain sum, but did not set out that he was still indebted to the plaintiff in that or any sum: —Held, that the affidavit did not sufficiently establish the cause of action.

Gaetz v. Hall, 2 Sask. R. 184.

— Setting aside judgment — Leave to amend.] — In an action for a money demand, after pleadings had been delivered and the defendant examined for discovery, the plaintiff moved for and obtained under Con. Rule 616 a judgment for the amount of his claim, based on the pleadings and the defendant's depositions. The defendant appealed to a Divisional Court, and at the same time moved for leave to amend his defence and to counterclaim against the plaintiff. The Divisional Court made an order directing that, upon payment into Court of the amount of the judgment, it should be set aside and the defendant allowed to amend his defence and to file a counterclaim; the defendant to pay the costs of the motion and appeal. The defendant then appealed to the Court of Appeal:—Held, that the terms imposed upon the defendant were too onerous; they should not extend beyond what might be reasonably necessary for the protection of the plaintiff pending the final disposition of the action; otherwise they might amount to a denial of justice to the defendant. The order was varied by directing that the judgment should stand for the protection, quantum valeat, of the plaintiff, and that the defendant should be at liberty, upon payment of the costs of the original motion and of the appeal to the Divisional Court, to amend his defence and file a counterclaim.

Auerbach v. Hamilton, 19 O.L.R. 570.

—Examination of judgment debtor — Commitment for contempt.] — The defendant, on her examination as a judgment debtor under Rule 748 of the King's Bench Act, R.S.M. 1902, c. 40, admitted that she had upon her person more than enough money to pay the judgment, but refused to an-

swer whether she would pay it or to say why she would not. Afterwards upon the plaintiff's application, under Rule 755, the defendant was ordered by Mathers, J., to be committed to gaol for twelve months on the ground that, within the meaning of that rule, she had not made satisfactory answers to the questions. On appeal to this Court:—Held, per Howell, C.J.A., and Perdue, J.A., following Merrill v. McFarren (1881), 1 C.L.T. 133, and Metropolitan Loan Co. v. Mara (1880), 8 P.R. 360, that the order was justified and should not be set aside. Per Richards and Phippen, JJ.A., that the word "satisfactory" in Rule 755 only means "full and truthful" and that, as Rule 748 does not provide for any questions as to the debtor's willingness to pay or as to his reasons for refusing to pay, there should be no order to commit under Rule 755 for refusal to answer such questions. The Court being equally divided, the appeal was dismissed without costs. Subsequently an order was made on consent providing for the release of the defendant, pending an appeal to the Supreme Court, on terms satisfactory to the plaintiff.

Bateman v. Svenson, 18 Man. R. 493.

—Revocation of judgment — Appeal.] — A direct action for revocation of a judgment does not lie if the judgment in question is susceptible of appeal.

Crépault v. Provencher, Q.R. 35 S.C. 377.

—Equitable execution — Life of judgment —Statute of Limitations.] — A judgment for payment of money was recovered by the plaintiffs against the defendant in 1883, and, nothing having been paid thereon, an order was made in 1892 appointing a receiver to receive the defendant's share or interest in the estate of his father, to the extent of the judgment. That interest was not available until the death of the defendant's mother, which did not occur until 1908; and it was then contended by the defendant that the judgment was barred under the Statute of Limitations, and the receiver should be discharged:—Held, that the order for a receiver was in effect equivalent to a judgment for equitable relief, and gave a new point of departure for the Statute of Limitations, if that was material. But the statute had no application to the actual condition of affairs; the process of equitable execution had been current in respect of the debtor's possible assets, and nothing more could be done than to let the receiving order remain in statu quo till the death of the life-tenant and the survival of the reversioner made it possible for the machinery of the Court to become again active.

Kinnear v. Clyne, 18 O.L.R. 457.

—Application to vacate.] — Appeal from decision, 14 O.L.R. 578, dismissed, on motion to quash.

Green v. George, 42 Can. S.C.R. 219.

—Confession of judgment by corporation.] —A writing sous seing prive signed by the manager and secretary of a company defendant without a special authorization of the board of directors, is not signed by a competent officer and is not available as a valid confession of judgment, authorizing the defendant's attorneys to confess judgment on its behalf. A motion by plaintiff to reject this paper from the record will be granted.

Bessette v. Equitable Mutual Fire Insurance Co., 10 Que. P.R. 260.

—Setting aside — Meritorious defence — Defence to part only of claim.]—The plaintiff secured judgment, regularly, against defendants in default of pleadings. The claim was for $5,000 for commission on sale of bonds and for securing legislation validating such bonds, the amount claimed in respect to each of such services not being specified. The defendants moved to set aside the judgment disclosing a defence as to the claim for commission, but not as to the other part of the claim:—Held, that a meritorious defence sufficient to warrant the setting aside of a regular judgment is such a defence as would entitle the defendant to have the matter inquired into by the Court. (2) That, as the plaintiff had not severed his claim for different services, the disclosure of a meritorious defence as to one part of the claim was sufficient to warrant the judgment being set aside.

Straton v. City of Saskatoon, 1 Sask. R. 426.

—Acquiescence — Payment of costs without reservation.] — If an opposant has been declared proprietor of a lot of cattle under seizure, but condemned to pay one half of the costs of the care and keeping of said animals, and there is an application for the taxation of these costs, he acquiesces to the judgment in producing a statement purporting to be his share in said costs, without any reservation or declaration of intention to appeal.

Beauchamp v. Poitras, 10 Que. P.R. 229.

JUDGMENT DEBTOR.

See ARREST; ATTACHMENT; BANKRUPTCY; EXECUTION.

JUDICIAL SALE.

Leave to bid—Sales with the approbation of a Judge.]—Apart from a sale by private contract sanctioned by a Judge, there are two methods which may be adopted to effect sale, when an order for sale is necessary: 1. a sale "by proceedings altogether out of Court," or, 2. by auction or tender "with the approbation of a Judge."

—Rules 450, 451 Jud. Ord., English Order 51, Rules 1a and 3. It is the duty of the Judge to determine who shall have the carriage of the sale, to ascertain the particulars of the property and encumbrances thereon; whether encumbrancers will consent to the sale; the nature of the title; whether special conditions are necessary and what is the best method of sale. None of these duties shall be delegated. It is contrary to our practice to give leave to bid to the person having conduct of the sale.

Cummings v. Semerad, 2 Alta. R. 82.

Judicial sale—Order setting aside—Defective advertisement—Absence of notice.] —In an action by the vendors against the purchasers for specific performance of an agreement for the sale of land, judgment was given for the plaintiffs, by the terms of which the defendants were to pay into Court the amount due for principal and interest, when ascertained by the clerk of the Court, at the time and place appointed by him, and, in default of payment, the lands were to be sold under the directions and with the approval of a Judge, and the purchase-money was to be paid into Court, and thereafter a sufficient sum paid out to satisfy the plaintiff's claim, and, if the purchase-money should not be sufficient, the defendants were to pay to the plaintiffs the amount of the deficiency. The account was taken, the amount due ascertained, and a day and place appointed for payment; the defendants failed to pay; and the plaintiffs proceeded to bring the lands to a sale. After some negotiations between the solicitors for the plaintiffs and defendants, an order was drawn up for sale of the land by sealed tenders. Conditions of sale were inserted in the order and the reserve bid was fixed therein at $10,500. The order was consented to by the solicitors for the plaintiffs and defendants, and was thereupon signed by a Judge. No copy was served upon the defendants or their solicitors. The land was advertised for sale by tender, but the advertisement was settled without notice to the defendants, and was not approved by a Judge. It contained no information as to the location and condition of the property, and did not state where further information might be obtained. The defendants had no notice of the sale, and did not hear of it till some months after it had taken place. There was only one tender, that of the plaintiffs, for the amount of the reserve bid, $10,500; the plaintiffs had obtained leave to tender. The tender was accepted by the clerk, and the plaintiffs declared the purchasers. Two months later the plaintiffs entered a part satisfaction of the judgment, acknowledging that $10,500 had been paid thereon, and signed judgment, without leave of a Judge, against the defendants, for the balance due to the plaintiffs over and above the $10,500. The order for sale provided that one-third of the accepted bid should be paid into Court, and the remainder paid from time to time. This term was absolutely disregarded, and, without any leave being obtained, the plaintiffs simply entered satisfaction for the amount of the bid. The bid was only two-thirds of the original price of sale to the defendants, and more than $2,000 less than the price at which the plaintiffs sold to another purchaser a few weeks later. No application was made to confirm the sale:—Held, that, if there is any case where a strict compliance with rules and orders should be insisted on, it is in such a case as this, where the plaintiffs attempt to purchase at a sale of which they have the conduct; and, as there had been neither a strict nor a substantial compliance with the ordinary requirements, and an injustice would be done the defendants if the sale should be confirmed, the order of Stuart, J., setting aside the sale and the judgment and other proceedings, should be affirmed.

Whitney v. Burn, 15 W.L.R. 392 (Alta.).

—Judgment for sale of land—Sale under direction of clerk of Court—Invalidity—Refusal of motion to confirm.]—

Cummings v. Semerad, 8 W.L.R. 644 (Alta.).

—Decree authorizing sale of defendant's interest—Sale of whole estate—Refusal to confirm.]—

Butler v. Forbes, 4 W.L.R. 579 (Terr.).

—Under execution.]—

See EXECUTION.

—In mortgage proceedings.]—

See MORTGAGE.

—Of railway.]—

See RAILWAY.

—Of vessel.]—

See SHIPPING.

JUDICIAL SEPARATION.

See HUSBAND AND WIFE.

JURISDICTION.

Small debts court—Debt or damages.]—Under the Small Debts Act the magistrate's jurisdiction is limited to actions for debt. Where defendant agreed to hire plaintiff's boat for a trip on certain terms, but before the trip commenced, notified plaintiff that he could not use the boat and same was not used, the plaintiff sued in the Small

Debts Court:—Held, that this was not an action for debt, but rather for damages, and that the Small Debts Court had no jurisdiction. Where want of jurisdiction is shown on the proceedings, even though the Court below has attempted to give itself jurisdiction by coming to an erroneous conclusion of law, a writ of prohibition will issue notwithstanding that the defendant appeared at the trial and launched an appeal which he subsequently abandoned. Affidavits may be used on applications for prohibition to shew what the facts necessary to found jurisdiction were.

Simpson v. Widrig, 15 B.C.R. 5.

Removal of action to County Court.]—Upon an application by the defendant P. to transfer an action begun in the Supreme Court of British Columbia to a County Court for trial:—Held, that it was immaterial whether the action fell within sub-sec. 2 or sub-sec. 3 of s. 40 of the County Courts Act, 1905, as both made provision only that the action might be originally launched in a County Court; when launched in the Supreme Court, ss. 73 and 74 are applicable; the former is applicable only in cases of contract, and, while the plaintiff here founded his action upon a contract, it was not a contract to which the defendant P. was a party; and s. 74 applied only to an action for tort, which this was not; the application was, therefore, refused.

Soper v. Pemberton, 14 W.L.R. 200 (B.C.).

—County Court action—Transfer to King's Bench — Refusal — Res judicata.]—1. A County Court Judge has no jurisdiction under section 90 of the King's Bench Act, R.S.M. 1902, c. 40, to transfer an action to the Court of King's Bench unless "the defence or counterclaim involves matters beyond the jurisdiction of the Court," and, when it is clear that such matters are not involved, the Court of Appeal will set aside an order allowing such transfer. Doll v. Howard (1896), 11 M.R. 21, distinguished. 2. A County Court Judge should not entertain an application for such a transfer, if it has been already refused by a Judge of the King's Bench on an application under the same section, as the matter is res judicata.

Town of Emerson v. Forrester, 19 Man. R. 665.

—Districts—Transfer of action.]—It is only on application of the defendant in any case and suo motu in the case of incompetence ratione materias that a Court without jurisdiction can remit a case to one with jurisdiction. Thus when, in an action en déclaration d'hypotheque brought in the district of Montreal the immovable being situate in the district of Quebec, the defendant, domiciled in Quebec, does not appear, the Superior Court at Montreal, incompetent ratione personæ cannot transfer the cause to Quebec, and must nonsuit the plaintiff.

La Fonciere v. Bolduc, Q.R. 38 S.C. 128.

—Superior Court—Circuit Court.]—Except in the districts of Quebec and Montreal in which the Circuit Court has exclusive jurisdiction, the Superior Court has concurrent jurisdiction with it to entertain a personal hypothecary action for a sum of $33.34.

Campeau v. Deschambault, Q.R. 37 S.C. 542.

County Court Judge — Acting Judge in case of illness.] — Under the provisions of the Acts of Nova Scotia, 1889, c. 9, s. 12, whenever by reason of sickness, disability, etc., any Judge of a County Court shall be unable to act, or shall be disqualified from acting, such Judge may call in and designate any other Judge of any other County Court in this Province to act therein, and such Judge so called in and designated as aforesaid shall have the same powers as the regular Judge of such Court would have otherwise had. S., who was designated by the Judge of the County Court for district No. 1, to act for him in his absence on account of illness, heard an application for a writ of possession. After the death of the district Judge, S. gave judgment in favour of the applicant for the writ, and application was thereupon made to Townshend, J., at Chambers, for a writ of prohibition to prohibit S. from signing the order on the ground that his authority to act terminated with the death of the Judge of the district:—Held, that a Judge once called in and designated under the provisions of the Act was fully invested with all the authority of the Judge of the Court to try and dispose of any cause or matter upon the trial of which he had entered, and that one of the powers he would have was that of giving judgment and signing the order necessary to give effect to it, after the recovery of the Judge or removal of the disability, etc. Held, also, that the making of an order for the possession of land under a sheriff's deed, was not a question of title to land within the meaning of s. 19, sub-s. 1, and so excluded from the jurisdiction of the Court.

In re Gough, 37 C.L.J. 129 (Townshend, J.).

--County Courts Act, R.S.M. c. 33, ss. 74, 204—Replevin in County Courts — Jurisdiction.] —S. 204 of the County Courts Act, R.S.M. c. 33, does not authorize the issue of a writ of replevin out of the County Court of any County Court Division except that in which the goods to be replevied are situate. For the construction of the provision in that section as to the Court out of which the writ is to issue it is proper to look at the prior enactments of which that section is a revision; and, in that light, the words "otherwise ordered" should be held to apply only to an order chang-

ing the place of trial and not to give power to order the issue of the writ out of the Court of any County Court Division other than that in which the goods to be replevied are situate. An order of a County Court Judge for the issue of a writ of replevin out of such other County Court and the writ issued thereunder are wholly ultra vires and void and afford no protection to the officer attempting to execute the writ, and the owner of the goods described in the writ cannot be convicted under s. 144 of the Criminal Code, 1892, for unlawfully obstructing or resisting the officer in the execution of his duty, because he by force prevented the bailiff from taking the goods under the writ. Morse v. James (1738), Willis, 122, followed. Parsons v. Lloyd (1773), 2 W. Bl. 845, and Collett v. Foster (1857), 2 H. & N. 360, distinguished.

Rex v. Finlay, 13 Man. R. 383.

—Foreign land — Trusts.] — An action will not lie in Ontario for a declaration that, under a transaction entered into outside the Province, land outside the Province is held by the defendants as mortgagees and for redemption, even though the defendants reside in the Province at the time of the bringing of the action against them, and took from the original grantee with notice of the plaintiff's rights. Judgment of Meredith, C.J., 30 O.R. 650, affirmed.

Gunn v. Harper, 2 O.L.R. 611 (C.A.).

—Circuit Court— Execution — Seizure of immovable — Sum recovered — Addition of costs.] — The Circuit Court, sitting at Montreal, cannot proceed to execution of its judgment on immovables for a sum not exceeding $40 and the want of jurisdiction in such a case is absolute and material. The taxed costs of the action given by the judgment can be added to the damages to make the amount exceed $40; but "the subsequent costs," that is the costs incurred by a fi-fa, or the cost of such writ, or of a seizure of crops thereunder, or of a return of nulla bona as to movables cannot be added. The clerk of the Circuit Court has no authority, in such a case, to issue a writ of fi-fa de terris and such writ is therefore void. The seizure and adjudication (décret) of the defendant's immovable under such a writ are nullities. An hypothecary créditor of the debtor (saisi) who has not been aware of the seizure nor of the sale, and has been prejudiced thereby has a right to obtain, by petition, the annulment of the sale and setting aside of the adjudication.

Masson v. Dansereau, 18 Que. S.C. 141 (S. C.).

—Circuit Court — Landlord and tenant — Costs.]—An action by which a tenant asks from his landlord certain repairs or otherwise the resiliation of the lease and, in any event $12.50 damages, is within the exclusive jurisdiction of the Circuit Court and the incompetence of the Supreme Court being ratione materiæ that Court should remit the cause to the proper tribunal. In this case the plaintiff's action having been declared ill-founded by the Court of first instance he was ordered to bear the costs of the contestation in the Superior Court and also those in the Court of Review, although the incompetence of the Court had not been pleaded.

Lafranchice v. Caty, 19 Que. S.C. 185 (C. R.).

—Division Courts—Garnishee resident out of Ontario — Attornment.] — Only debts by persons residing or carrying on business in Ontario are subject to garnishee proceedings under s. 190 of the Division Courts Act, R.S.O. 1897, c. 60, and the acceptance of service of a summons on behalf of a garnishee residing out of the Province by a solicitor in the Province and his appearance at the hearing and raising no objection, does not confer jurisdiction on the Division Court. In re McCabe v. Middleton (1895), 27 O.R. 170, distinguished.

Wilson v. Postle, 2 O.L.R. 203.

—Election of domicile — Bill or note — Place of payment — Art. 85 C.C.—63 Vict. c. 36 (Que.).] — Though the provision of Art. 85 C.C., by which the indication of a place of payment in a promissory note or any writing wherever it was made is equivalent to an election of domicile at the place so indicated, has been repealed by 63 Vict. c. 36 (Que.), such repeal does not affect the election of domicile thus made in a note signed before it came into force. Therefore defendant could be sued at Montreal on a note dated at and payable there though it had, in fact, been signed by him in the Province of Ontario where he had his domicile.

Merchants Bank of Halifax v. Graham, 19 Que. S.C. 319 (S.C.).

—Domicile — Place of service — Succession.] — An action concerning a succession against a testamentary executor as such is within the exclusive jurisdiction of the Court for the district in which the succession was opened, that is to say, of the deceased's last domicile, though he may have died in another district or have temporarily dwelt there at the time of his death; advantage cannot be taken of the provisions of Art. 94 C.P.Q. to take the executor out of the jurisdiction of his proper judges by serving the action upon him personally in the district in which he happens to be.

Bichard v. Bernier, 17 Que. S.C. 540 (S.C.).

—Application to Judge in Chambers instead of to Court.]—A Judge sitting in Chambers has no jurisdiction to deal with an application that should properly have been made to him in Court, but such application must be dismissed.

Campbell v. Fisher, 3 Terr. L.R. 297.

—Service of process outside of jurisdiction.]—

See SERVICE OF PROCESS.

—Summons not served by constable or peace officer—Service by prosecutor—Effect of.]—

Re William Kennedy, 3 E.L.R. 554 (P. E.I.).

—Pending action for return of excessive fees—Disqualification of magistrate.]—

Rex v. Lorrimer, 7 E.L.R. 117 (N.S.).

—County Court—Cause of action—Proper district.]—

Rea v. Lockett, 7 E.L.R. 24 (N.S.).

—Yukon Territorial Court—Sittings of Court in banc—Authority for—Court of Appeal.]—

Munroe v. Morrison, 2 W.L.R. 132 (Y. T.).

—Clerk of executive council—Election of member of Legislative Assembly—Jurisdiction of Court—Interference with jurisdiction of Legislature.]—

Re Dubuc, 3 W.L.R. 248 (Terr.).

—Account—Counterclaim—Jurisdiction of County Court.]—

Klemmer v. Birmingham, 11 W.L.R. 9 (B.C.).

—Action for conversion of cattle—Replevin—Value of cattle—District Courts Act.]—

Desautels v. Hebert, 9 W.L.R. 336 (Sask.).

—Yukon law — Order of reference — N.W.T. orders XXIII., rr. 233 and 236, and XXXIII., r. 401 — Co. Or. N.W.T. 1898, Cap. 21.] — The power to make an order of reference in an action is a matter of jurisdiction and not merely a question of "procedure and practice," within the meaning of s. 3 of the Judicature Ordinance, and therefore the Yukon Court has no power under this section to make an order of reference.

Williams v. Faulkner, 8 B.C.R. 197.

—Action on award — Service.] — The Superior Court at Montreal has no jurisdiction in an action to enforce an award of arbitrators, although the agreement for arbitration, submission and announcement of the award had taken place in the district of Montreal, if the award has been served on defendants in the district of St. Hyacinthe, the whole cause of action in such case not having arisen in the district of Montreal.

Roman Catholic Episcopal Corporation of Nicolet v. Paquet, 17 Que. S.C. 447 (S.C.).

—Circuit Court — Resiliation of lease.] — An action claiming the resiliation of a lease and damages estimated at $85, is within the exclusive jurisdiction of the Circuit Court. Yon v. Vallée, 17 Que. S.C. 446 (S. C.).

—Declinatory exception — Waiver — Cause of action.] — In forming an opposition or petition in revocation of judgment the defendant, in order to comply with Art. 1164 C.P.Q., is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim, and, unless he does so, he cannot afterwards file it as of right. A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the Court. In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. The judgment appealed from, affirming the decision of the Superior Court, district of Quebec. Auger vfl. Magann (Q.R. 16 S.C. 22, 1900, C.A. Dig. 186), was reversed.

Magann v. Auger, 31 Can. S.C.R. 186.

—Incidental demand — Submission to the jurisdiction.] — A person may constitute himself incidental plaintiff in respect of a cross-demand which is of its nature merely alternative, in the event of his exception to the jurisdiction not prevailing, without thereby waiving his exception to the jurisdiction.

Magann v. Auger, 31 Can. S.C.R. 191, reversing Auger v. Magann, 2 Que. P.R. 120.

—County Court — Attachment of debts—Pr. 294 — Issue — Amount in controversy — Residence of garnishee — Receiving order.] — Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work:—Held, that the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor; to entitle the creditor to an issue, it was not necessary to bring home a case of fraud to the persons against whom it was charged; it was sufficient to show unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised. Held, also, that the Judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a County Court, to make the garnishing summons returnable

before himself, even where the garnishee resides in another county. Semble, that the proper construction of Rules 917, 918 and 919 is, that the Judge of a County Court in which a judgment has been recovered has power, when the amount claimed to be due from a garnishee residing in another county is within the jurisdiction of the County Court or the Division Court, to order the garnishee to attend before the Judge of the County Court or clerk of the division within which he lives. Held, also, that an order for a receiver should not be made in respect of a fund which may be reached by garnishing process.

Millar v. Thompson, 19 Ont. Pr. 294.

—Foreign judgment — Warrant of attorney —Confession — Jurisdiction.] — The general rule is that a judgment valid by the laws and practice of the state where it is rendered or confessed may be sued upon as a ground of action in any other state. A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the Court whereby competence is acquired to deal with the matter submitted:—Held, that a judgment recovered in the State of Pennsylvania, after the defendant had ceased to reside in that state, upon a warrant of attorney in favour of any attorney of a Court of record, executed while the defendant was a resident of the state, was valid, and that the Courts there had jurisdiction to deal with the matter, and over the person of the defendant.

Ritter v. Fairfield, 32 O.R. 350.

—Declinatory exception — Deposit — Art. 170 C.P.Q.] — A defendant who objects to the jurisdiction must demand the dismissal of the action before the proper Court. He can demand a dismissal by depositing the sum claimed in the action but if his conclusion is for dismissal and the deposit is not made his declinatory motion will be declared irregular and will be dismissed with costs.

Beauport Brewery Co. v. Belisle, 18 Que. S.C. 433 (S.C.).

—Action for alimony — Service out of the jurisdiction — Domicil.] — See ALIMONY.

Bonbright v. Bonbright, 1 O.L.R. 629.

— Of Division Court in Ontario.] — See DIVISION COURT.

—B.C. County Court — Equitable jurisdiction — Action for rent — Void lease.] — It is part of the equitable jurisdiction of the Court to enforce payment of rent when the lease is void, and when the value of such lease if valid would exceed $2,500.00 the County Court has no jurisdiction.

B.C. Board of Trade Building Association, Limited Liability v. Tupper and Peters, 8 B.C.R. 291.

—County Courts — Amount in controversy —Judgment creditor — Setting aside chattel mortgage.] — Where the plaintiff, having recovered judgment for $92.05 and costs against the defendant in a Division Court, brought an action in a County Court to set aside as fraudulent as against him a chattel mortgage for $520 made by the defendant:—Held, on motion for prohibiton, that the subject matter involved was the amount due on the judgment—it not being alleged or proved that there were any other debts of the defendant than that due to the plaintiff; and the County Court had jurisdiction by virtue of s. 22 (13) of R.S.O. 1897, c. 55. Forrest v. Laycock (1871), 18 Gr. 611, followed. Dominion Bank v. Heffernan (1886), 11 P.R. 504, and Re Lyons (1884), 10 P.R. 150, distinguished.

Re Thomson v. Stone, 4 O.L.R. 333 (Meredith, C.J.).

Affirmed by Divisional Court, 4 O.L.R. 585.

—Vacation — C.P. 15.] — The Court has no jurisdiction during vacation to hear a petition to annul a city by-law.

Franklin v. City of Montreal, 5 Que. P. R. 76 (Curran, J.).

—Surrogate Courts — Administration — Order of — Application for, in more than one Surrogate Court.] — When applications for letters of administration to the estate of a deceased person are made in more than one Surrogate Court, preference will be given to that made by the party nearest in the order in which administration is usually granted, and jurisdiction to proceed was conferred on the Surrogate Court in which application was made by a mother as next-of-kin against that on behalf of creditors, in another county.

Re Tougher, 3 O.L.R. 144.

—County Courts — Title to land brought in question — Property in sand and gravel on highways — Municipal Act, R.S.M. c. 100, ss. 641, 644 — Costs when action fails for want of jurisdiction.] — 1. A claim of a municipality for damages for the taking by a railway company of quantities of sand and gravel from alleged highways and allowances for roads in the municipality not in its actual possession or occupation, if disputed, raises a question of the title to a corporeal hereditament within the meaning of s. 59 of the County Courts Act, R. S.M. c. 33, and the jurisdiction of the County Court to adjudicate on such claim is ousted when such a question of title is bona fide raised, notwithstanding the provisions of ss. 615 and 644 of the Municipal Act, R.S.M. c. 100, giving the right of possession of such roads to the municipality and power to pass by-laws for preserving or selling timber, trees, stone, or gravel on any of such roads. 2. Under the enactment substituted for s. 315 of the County Courts Act by 59 Vict. c. 3, s. 2, an appeal to this

Court lies from the decision of a County Court Judge on the question of jurisdiction as well as from all other decisions in actions in which the amount in question is twenty dollars or more. Fair v. McCrow, (1871) 31 U.C.R. 599, and Portman v. Patterson (1861), 21 U.C.R. 237, followed. 3. Although the action in the County Court failed for want of jurisdiction, the plaintiff should be ordered to pay the costs of it under s. 1 of c. 5 of 1 Edw. VII. and also the costs of the appeal.

Municipality of Louise v. Canadian Pacific Ry. Co., 14 Man. R. 1 (Killam, C.J., Bain and Richards, JJ.).

—Disqualification of justice of the peace — Interest.] —

See CANADA TEMPERANCE ACT.

(Daigneault v. Emerson, 20 Que. S.C. 310, 5 Can. Cr. Cas. 534.)

—Of justice of the peace — Canada Temperance Act.]—

See CANADA TEMPERANCE ACT.

R. v. Wipper, 34 N.S.R. 202.)

—Service of process — Property in the district.]—

See SERVICE OF PROCESS.

(McCurry v. Reid, 4 Que. P.R. 261 (Doherty, J.).)

— Trade-mark — Forum — Exchequer Court.] — The amendments to the Exchequer Court Act since the decision in Partlo v. Todd (1886), 12 O.R. 175, (1887), 14 A.R. 444, (1888), 17 S.C.R. 196, have not had the effect of giving that Court exclusive jurisdiction to adjudicate as to the validity of a registered trade-mark, and in answer to an action in the High Court of Justice for Ontario to restrain the infringement of a registered trade-mark, its invalidity may be shown.

Provident Chemical Works v. Canada Chemical Manufacturing Co., 4 O.L.R. 545 (C.A.).

—Appointment of official stenographers.]— The prothonotary of the Superior Court alone has the choice of official stenographers, which he is obliged to furnish, for taking evidence in causes brought before the Superior Court, and in appealable cases brought in the Circuit Court, the competence of these stenographers having been first established by examination before a committee of the Bar appointed by the Council of the District, the sole judge of such competence, and the Court has no jurisdiction to interfere in this purely discretionary matter, and to order the prothonotary to add to his list the name of a stenographer to whom the Bar has granted a certificate of competence.

Perault v. Turcotte, Q.R. 23 S.C. 436 (Sup. Ct.).

—Marriage of minors — Order to officer to celebrate marriage.] — The Court or a Judge has no authority to order one of its officers to celebrate a marriage, unless such officer is properly brought before the Court or Judge.

Ex parte Fiset, 6 Que. P.R. 42.

—Personal action — Arrears of rent.] — The Circuit Court, sitting au chef lieu, of a district, has no jurisdiction to hear and decide a personal action for $12 arrears of an annual rent. The Superior Court has such jurisdiction, and the action, therefore, may originate in the latter.

Lebel v. Langlois, Q.R. 22 S.C. 239 (Sup. Ct.).

—Waiver amounting to consent — Failure to object.] — Where an inferior Court has jurisdiction to try only by consent, and the trial proceeds and judgment is given without any objection to the jurisdiction being raised, the objection will not be heard on appeal.

Robitaille v. Mason, 9 B.C.R. 499.

—Inferior Courts — Judgments of — Estoppel — Review.] — The Supreme Court has jurisdiction to try an action against bail given in a cause originating in an inferior Court, and has power to give such relief to the bail as justice may require. The former practice of the King's Bench in England of refusing to try such actions, and of compelling them to be brought in the inferior Court, has never been followed in this Province. The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction; therefore, where an action was brought in the Supreme Court against bail given in a cause, which had been commenced and tried in the City Court of Saint John, and the defendant by plea denied the jurisdiction of the said Court, and at the trial gave evidence in support of his plea: —Held, that the defendant was not estopped by the judgment of the City Court from offering such proof, and that as the plaintiff had chosen to rely entirely upon the estoppel he must fail. The fact that the judgment relied upon by way of estoppel had been affirmed upon review by a County Court Judge, made no difference.

Jack v. Bonnell, 35 N.B.R. 323.

—Master in Chambers — Summary dismissal of action.] — The Master in Chambers has no power under Rule 261 or otherwise to order the dismissal of an action upon the ground that no cause of action is shown upon the plaintiff's own statement.

Knapp v. Carley, 7 O.L.R. 409 (Street, J.).

—Goods ordered by letter or telegram — C.P. 94.] — When goods are ordered by letter or telegram sent from the Province of Ontario to Montreal, the whole cause of

action arose there, and if other goods which were ordered by the defendant personally at Montreal have been paid for, the Courts of Quebec are without jurisdiction.

Timossi v. Palangio, 6 Que. P.R. 253 (Davidson, J.).

—Place where the contract was made — Election of domicile — Selected tribunal — C.P. 94.] — An action cannot be tried before the Court of the district where the contract was made, if the parties, in their contract, have elected domicile in another district and agreed that all suits at law arising therefrom should be tried in the latter district.

Compagnie de Laiterie de St. Laurent v. Coté, 6 Que. P.R. 153 (Curran, J.).

—Bill of lading — Condition giving foreign Court sole jurisdiction over disputes.] —A condition in a contract made in a foreign country, which was moreover executory in largest part outside of this Province, stating that all disputes arising therefrom shall be settled by a certain foreign tribunal, is positively restrictive in form and precludes the parties from relief in our Courts.

Michaelson v. Hamburg American Packet Co., 6 Que. P.R. 165 (Davidson, J.).

—Place of contract — Incomplete sale, C.P. 94.] — Action cannot be brought before the Court of the place where the order was accepted, where it appears that the party who accepted on behalf of defendant had not due authority to do so, and defendant has repudiated the order, especially if said order did not constitute a complete contract of sale.

Superior v. Columbia Phonograph Co., 7 Que. P.R. 211 (Davidson, J.).

—Place of contract — Acceptance — Correspondence.] — Though offers for the sale of goods may be sent from the Province of Ontario by letter or telegram they are, as regards the vendor, deemed to be made at the place where received and the contract becomes perfect or complete by their acceptance there. Hence the Court of the place of such acceptance, which in this case was also the place where the goods were delivered, has jurisdiction in an action for their price.

Timossi v. Palangio, Q.R. 22 S.C. 70 (Ct. Rev.).

—Commission agent — Action to reclaim amounts over-paid — Completion of contract.] — An action by a merchant to recover monies advanced to his commission agent for purchases which were not made, must be taken before the Court of the defendant's domicile, where the contract was completed and the advances made, and where the purchases were to be made.

Archambault v. Laroche, 7 Que. P.R. 165 (Davidson, J.).

— Foreign succession — Reddetion de compte.] — A non-resident defendant may be summoned to render an account of the property of a succession opened in a foreign country before the Court of the district in which the action was served on him and where he is alleged to have property.

Debigaré v. Debigaré, 7 Que. P.R. 179 (K.B.).

—Quorum of Judges.]—The Supreme Court of Nova Scotia composed of a quorum of four Judges only, has jurisdiction to hear and decide a Crown case reserved.

George v. The King, 35 Can. S.C.R. 376.

—Disqualification of Judge — Art. 1241 C. P.]—Four Judges of the Court of King's Bench, Montreal, may give the judgment of the Court in a case heard before five, if the remaining Judge, after hearing the case argued, recused himself as disqualified.

Angers v. Mutual Reserve, 35 Can. S.C.R. 330.

—Want of jurisdiction, ratione personae vel loci — Judgment by default.] — 1. Want of jurisdiction ratione personæ vel loci is only waived by the appearance of the defendant and his default to plead it within the delays: it does not give a Court power to condemn by default a defendant improperly summoned. 2. If want of jurisdiction is pleaded on appeal by the defendant, the duty of the Court is to put the parties out of Court, reserving plaintiff his recourse before the competent tribunal.

Canadian General Electric Company v. Canada Wood Manufacturing Company, 7 Que. P.R. 140, C.R.

—Contract providing enforcement in another jurisdiction.] — A bill of lading which formed the contract for the carriage of goods by defendant from Halifax, N.S., to Liverpool, Eng., and their delivery there to a steamer of the Cunard line, to be carried to a port in Italy, contained a condition that "any claim or dispute arising on this bill of lading, shall be determined according to English law in England." Defendant failed to deliver the goods to a steamer of the Cunard line, as agreed, at Liverpool, but delivered them to a slow and inferior steamer of another line, on account of which, acceptance of the goods was declined, and the contract of purchase cancelled. An action claiming damages was brought in the Supreme Court at Halifax: —Held, affirming the judgment of Graham, E.J., that the Court had no jurisdiction and that the action must be dismissed.

Hart v. Furness Withy & Co., 37 N.S.R. 74.

—Supreme Court (Can.)—Reference of constitutional question.] — See CONSTITUTIONAL LAW.

— Jurisdiction of Referee in Chambers — King's Bench Act (Man.).] — 1. The referee in chambers has no power to rescind his own order not made ex parte. 2. An appeal will not lie from the refusal of the referee to rescind such an order. 3. The referee has no jurisdiction, under Rule 449 of the King's Bench Act or otherwise, even with the consent of the parties, to make an order for the entry of judgment for the defendant, after the action has been entered for trial. Such a judgment can then only be pronounced by a Judge sitting in Court. 4. The referee would have power, under Rule 422 (d) of the Act, to dismiss an action by the consent of the parties. 5. When the judgment entered in an action is unauthorized and unsupported by any order or pronouncement of the Court, an appeal will lie from the refusal of the referee to set it aside on motion before him, although such motion also included an application to him to rescind his own order previously made not ex parte in the same action.

Walker v. Robinson, 15 Man. R. 445 (Perdue, J.).

—Recusation — Recorder of Ste. Cunegonde —Jurisdiction since annexation to Montreal.] — (1) A recorder has no right to himself adjudge and dismiss a petition setting forth grounds of recusation against him. (2) Plaintiff's action in this case having been instituted after the annexation of the City of Ste. Cunégonde to the City of Montreal, the Recorder's Court of the former city had ceased to exist and had no jurisdiction over property within the previous limits of the same.

Leclair v. Goyette, 8 Que. P.R. 22.

—Want of jurisdiction — Appeal — Jurisdiction to dismiss action on appeal.] — In an action to recover a small sum in the Magistrates' Court the defendant appeared and contended that the justice had no jurisdiction, inasmuch as the cause of action arose and defendant resided and was served in another county than that in which the justice was sitting. Judgment having been given in plaintiff's favour, defendant appealed to the County Court, the Judge of which dismissed the appeal on the ground that as the justice had no jurisdiction to try the case, the Judge of the County Court had none to hear the appeal, and that the proper remedy was by certiorari: — Held, allowing defendant's appeal with costs, that as the Judge of the County Court had jurisdiction to take evidence to establish the question of jurisdiction he had jurisdiction to determine that the action ought to have been dismissed and should have given judgment accordingly.

Slip v. Morris, 41 N.S.R. 87.

—Police magistrate—Appointment for town —Ex-officio justice of peace for county — Jurisdiction over offences in another town.] —A police magistrate appointed for a town, notwithstanding he has jurisdiction as a justice of the peace for the whole county, has no jurisdiction to act at the trial of an offence committed in another town for which there is a police magistrate, except at the general sessions or in the case of the illness or absence or at the request of such other police magistrate.

Rex v. Holmes, 14 O.L.R.. 124 (D.C.).

—Real action — Art. 48 C.C.P.] — One who claims damages for injury by use of a mill dam and asks for its demolition in case of non-payment brings a real action within the exclusive jurisdiction of the Superior Court.

Houle v. Duchaime, 8 Que. P.R. 326.

—Personal action — Amount — Art. 55 C. C.P.] — When the action is purely personal and the amount in dispute is under $100 the Circuit Court has exclusive jurisdiction. If it is submitted to the Superior Court which is absolutely void of jurisdiction it is bound to remit it, even suo motû to the Circuit Court.

Coupal v. Beaudoin, 8 Que. P.R. 327 (Fortin, J.).

—Alimentary allowance — Interim payment — Grandmother and grandchild.] — The Court is without authority to compel the payment of an interim alimentary allowance by a grandchild to his grandmother.

Hénault v. Fauteux, 8 Que. P.R. 363 (Davidson, J.).

—Cause of action—Goods ordered.]—When goods are ordered, whether verbally to an agent or by letter mailed from the district of Ottawa, and delivery of the goods is made there, then the whole cause of action arises in said district, and no action will lie in the district of Quebec where the seller of the goods is residing and doing business.

Amyot v. Bélanger, 9 Que. P.R. 6.

—Nomination of an executor to a succession.] — Held, the petition for the nomination of an executor to a succession must be presented in the district where the succession devolved.

Ex parte Mignault, 9 Que. P.R. 15.

—Place of instituting actions — Real or mixed actions — Revendication.] — (1) In a real or mixed action, the defendant can only be summoned before the Court of his domicile, or before that of the place where the thing in dispute is situated. (2) A Court that has no jurisdiction ratione personæ on the face of the action over a defendant who fails to appear, can neither entertain the suit, nor make the order of reference to the competent Court mentioned in Article 170, C.C.P.

Canadian General Electric Co. v. Canada

Wood Manufacturing Co., 29 Que. S.C. 148 (C.R.)

—Provincial and Federal Courts — Exchequer Court — Reference.] — (1) The Superior Court of Quebec does not possess any superintending, revisory or appellate jurisdiction in respect of the decisions and decrees of the Exchequer Court in matters arising in Quebec Province. (2) It has no power to refer a record to the Exchequer Court of Canada, which is a Federal Court.

Hodge v. Beique, 8 Que. P.R. 142.

—Solicitor-Master — Acceptance by local Master of retainer from one of the parties —Disqualification.] — The firm of solicitors in which a local Master was a partner had accepted, pending a reference before the latter, a retainer from the defendant for some non-contentious business in the Surogate Court: — Held, that the reference and proceedings thereon must be set aside, for, without suggesting that there had been or would be any bias, the Master, as the solicitor even in a small matter for the defendant, a man of large business interests, might reasonably be suspected of bias.

Livingston v. Livingston, 13 O.L.R. 604 (D.C.).

—Order for sale of real estate pendente lite.] — Rule 1 of Order 50, provides, in part "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part should be sold the Court or a Judge may order the same to be sold":—Held, that this is a general power, to be exercised by the Court or a Judge according to the circumstances, and is not meant to apply only where a sale is necessary or expedient for the purposes of the action. In re Robinson (1885), 31 Ch. D. 247, not followed.

Rainey v. Rainey, 12 B.C.R. 494.

—Superior Court—Exchequer Court of Canada—Action to have proceedings and judgments declared void.] — The Exchequer Court of Canada is not a Court subject to the superintending and reforming power of the Superior Court of the Province of Quebec. No action will lie before the latter to have proceedings and judgments had before and rendered by the former declared null and void for want of jurisdiction.

Hodge v. Béique, 33 Que. S.C. 90.

— Declinatory exception — Sale — Cause of action.] — (1) A debtor who has his domicile in the district of Montreal where the contract of sale was signed, cannot be sued in the district of Quebec, where the goods are to be delivered and are payable. (2) A cause of action is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove, in order to obtain judgment.

Joly v. Godbout, 9 Que. P.R. 93.

—Commissioners' Court — Jurisdiction — Territory.] — A commissioners' Court established in a parish has jurisdiction over causes originating in a part of the territory subsequently erected into a town.

Bussieres v. Bussieres, Q.R. 33 S.C. 292 (Sup. Ct.)

—Ex parte order — Setting aside.] — Held, that every application not expressly permitted to be made in chambers by summons, and an order made upon an ex parte application not so authorized is irregular. (2) That a single Judge has power to set aside an ex parte order for irregularity.

Jackson v. Canadian Pacific Ry. Co., 1 Sask. R. 84.

—Contract made ex juris — Place of performance — Joinder.]—In determining whether a cause of action is founded on a breach within the jurisdiction of a contract which ought to be performed within the jurisdiction, the Courts must look at the contract and at the facts which existed at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction. (2) Where in an action on a covenant to pay money there is no place specified in the contract for the payment, the debtor must follow his creditor, and pay where his creditor is; and if the creditor is within the jurisdiction, and the contract was made without, and the parties under obligation and residing without the jurisdiction make default in payment, the cause of action arises within the jurisdiction:—(3) Held, also (hesitante), that where the plaintiff brings an action in respect of a breach arising within the jurisdiction, he may also claim in respect of a breach of the same contract which occurred without the jurisdiction.

Saskatchewan and Battle River Land and Development Co. v. Hunter, 1 Sask. R. 27.

— Small debt procedure — "Debt whether payable in money or otherwise."] — In an action for $60, being the value of twelve loads of straw at $5 a load, the unpaid balance of rent for a farm leased by the plaintiff to the defendant at a rental of a two-thirds share of the whole crop; and also to recover $15 for money had and received:—Held, that the claim for the value of the straw was not properly brought under the Small Debt Procedure. The words "all claims and demands for debt whether payable in money or otherwise" do not extend beyond cases where there is a debt created in the proper sense of the word, clearly recognized as such, and there is an agreement that such debt is to be paid in something other than money. Held, also,

that, although a claim clearly within the Small Debt Procedure was joined with such claim, the process was nevertheless bad and must be set aside.

Paradis v. Horton, 6 Terr. L.R. 319.

— Dismissal of action — Deposit.]—The defendant who objects to the jurisdiction of the Court should apply to have the action transferred to the competent Court if there is one; he can claim dismissal only by depositing the amount claimed; if he claims it without such deposit his declinatory motion will be declared irregular and dismissed with costs.

McKenzie v. Boston & Main Rd. Co., 9 Que. P.R. 389 (Sup. Ct.).

—Succession — Payment of annuities.] — A plaintiff, to recover certain annuities left by a testator who died in Montreal, from a defendant who resides and has been served within the district of Montreal, must sue in said district, where the sucession devolved and is administered, and not in the district of Quebec, where the will was modified by an Act of the Legislature.

Bourdon v. Pratt, 9 Que. P.R. 128.

—Preliminary exception — Delay — Deposit.] — A motion for dismissal of a proceeding on the ground that the Court has no jurisdiction over the subject matter need not be filed within the delays prescribed for preliminary exceptions nor accompanied by a certificate of the deposit with the prothonotary of the amount fixed by the rules of practice in the latter case. Incapacity of a school commissioner to read or write is not a matter of public or common law; the fact that it was not relied on to contest the election of the commissioner at the proper time and in a competent Court is a bar to the parties interested; such want of legal capacity cannot afterwards be taken advantage of by means of a writ of quo warranto.

Bouin v. Pagé, 9 Que. P.R. 177 (Sup. Ct.).

—Goods ordered subject to acceptance in another district.] — If an order for goods given in a district is subject to acceptance by the principal in another district where the goods are delivered the action for price must be taken in the latter district.

Brock Co. v. Forget, 11 Que. P.R. 21.

—County Courts Act, R.S.M. 1902, c. 38—Conferring jurisdiction by agreement.] —It is not competent to the parties to a contract to agree to confer jurisdiction upon the County Court of any judicial division other than the one in which, under s. 73 of the County Courts Act, R.S.M. 1902, c. 38, any action arising out of a breach of the contract may be brought, and, if such an action is brought in any other County Court, the Judge should refuse to try it on the ground of want of jurisdiction.

Manitoba Windmill Co. v. Vigier, 18 Man. R. 427.

—Disputed debt as property — Non-resident creditor.] — A debt claimed by a party who has no domicile in the Province, from a debtor domiciled therein, although the latter disputes it and declines to pay it, is property within the meaning of s. 4, Art. 94 C.P. Hence, the Superior Court, at the place where such a debt is due, has jurisdiction to hear and determine a suit, brought by the debtor against the creditor, to annul the contract under which it is claimed.

Porter v. Canadian Rubber Co., 18 Que. K.B. 534.

—County Court — Jurisdiction — Judge acting outside his county at request of another Judge — Persona designata — Municipal Clauses Act, B.C.]—The Judge of the County Court mentioned in s. 137 of the Municipal Clauses Act is persona designata, and the authority conferred upon him by said section may not be exercised by the Judge of another county acting on his request and in his absence. The remedy of an aggrieved party in such a case is by application for prohibition, and not by way of appeal.

City of Slocan v. Canadian Pacific Railway Co., 14 B.C.R. 112.

—Incompetent Court — Rights of defendant.] — A defendant summoned before a Court other than that of his own domicile can demand that the cause be transferred to the latter Court or the action dismissed on depositing in Court the amount of the debt: Art. 170 C.P.Q. A declinatory exception asking for dismissal of the action with deposit of a part only of the sum claimed is irregular and will be rejected.

Belleau v. Dufault, Q.R. 36 S.C. 306.

— Lessor and lessee — Costs.]—(1) If in an action between lessor and lessee, the plaintiff asks that some repairs be made, or that he may be authorized to make such repairs, and that, at all events, the defendant be condemned to pay him the sum of $75.00 as damages already suffered, the Superior Court has no jurisdiction ratione materiæ, and the Circuit Court is the proper Court to take cognizance of the case. Each party was ordered to pay his own costs in review.

Lapierre v. Marcotte, 10 Que. P.R. 435.

—Foreign defendant having property in the Province of Quebec.] — A foreign defendant can be sued in the Province of Quebec, if he has property in said province which can be taken in execution for his debts. In the present case the action being for the cancellation of a sale, the price whereof has not been entirely paid, and the goods being at Montreal, in the Province of Quebec, these goods or the value thereof,

are to be considered as defendant's property, and the latter who resides at Manchester, England, may be sued in the district of Montreal.

Porter v. Canadian Rubber Company, 10 Que. P.R. 402.

—Disqualification of justice — Bias.] — A justice of the peace is not disqualified from hearing a charge of assault on the ground of bias and prejudice, because (a) the justice had been removed from the position of police magistrate of H. some five months before and the defendant appointed in his stead, and (b) some two months before the justice had been charged with a criminal offence before the defendant acting as such police magistrate, and by him committed for trial.

Ex parte Peck; In re Stuart, 39 N.B.R. 131, 15 Can. Cr. Cas. 133.

JURY.

View—Irregular act.]—On the trial of an action claiming damages for negligence on the part of defendant, in connection with the running of his automobile on a public street, whereby plaintiff's husband, while proceeding along the street on his bicycle, was knocked down and received injuries which caused his death, the foreman and one other member of the jury, without the consent of the parties and without the order of the Court or Judge, viewed the locus and made experiments with an automobile for the purpose of gathering information to be used by them in connection with the trial. The jury having found a verdict for plaintiff, and the facts having been brought to the notice of the Court by affidavit:—Held, that there must be a new trial. Held, also (by a majority of the Court), that costs of the appeal should be defendant's costs in the cause.

Hutchings v. McDonald, 44 N.S.R. 64.

Verdict—Jury refusing to answer questions—New trial.]—Upon the trial of an action for negligently setting fire to plaintiff's timber land the Judge submitted certain questions to the jury under C. S. 1903, c. 111, s. 163. The jury did not answer the questions but brought in a general verdict which the Judge accepted without objection by either party:—Held, this was not a ground for a new trial.

Sullivan v. Crane, 39 N.B.R. 438.

—Notice of trial—Jury sittings.]—The plaintiff alleged that she was a clerk in the service of the defendants in their store, and was injured while serving customers, by reason of the negligence of the defendants or of some one in their service in authority. The plaintiff sought to recover damages from the defendants for her alleged injuries, but did not directly seek them under the Workmen's Compensation for Injuries Act, though she alleged in the statement of claim that she was conforming to the orders of the defendants' manager, etc. Assuming that the action was for the recovery of damages under the Workmen's Compensation for Injuries Act, the plaintiff, relying on the King's Bench Act, s. 59, sub-sec. 1, gave notice of trial for a jury sittings, without obtaining an order for a jury:—Held, that the plaintiff was not to be regarded as a "workman," within the meaning of s. 2 (c) of the Act, not having alleged any facts from which it could be inferred that she was engaged in manual labour at the time the injuries were sustained; and she was not, therefore, entitled as a matter of right to a jury.

Hewitt v. Hudson's Bay Co., 15 W.L.R. 372 (Man.).

—Jury trial—Delays.]—A party, by allowing a delay of more than 30 days to elapse, from the date at which the case stands ready for trial without proceeding to bring on the trial, is, by the sole operation of law, deprived of his right to a jury trial.

Czifurska v. MacDonnell, 12 Que. P.R. 29.

—Jury trial—"Personal tort"—Municipal corporation and employee.]—1. The words "personal tort" or "wrong" used in the sense intended by Art. 421 C.P. mean a personal tort or wrong independent of any contract. 2. The hire of his services by an employee to a municipal corporation is a civil contract; an action for damages based on failure of the corporation to perform its obligations upon this contract is not triable by a jury.

The City of Montreal v. De Montigny, 11 Que. P.R. 273.

—Jury trial—Delays.]—The death of one of the defendants does not interrupt the delays as regards proceeding to trial, or interfere with the right of the plaintiff to take the necessary proceedings for trial in the absence of any suggestion or notice of such death.

Chartrand v. Paquette, 11 Que. P.R. 351.

—Motion to reject option for a jury trial.]—1. A motion to define the facts for a jury trial duly served, but which was never presented, cannot be considered a proceeding to bring on the trial. 2. The filing of a reply to an answer, which reply contains no affirmative allegation of a new fact does not interrupt the delays within which a motion to define the facts for a jury trial must be presented; the issues were joined by the filing of the answer.

Simard v. Taschereau, 11 Que. P.R. 200.

—Mixed question of fact and law—Charge to jury.]—In an action (tried with a jury) by a carter against the persons to whom he had delivered a load claiming damages

for injury by an accident occurring at the time of such delivery, the question whether or not at such time delivery had been made in such manner that the defendants and their employees had been put in charge of the thing delivered is a mixed question of law and fact which should be submitted to the jury. Moreover, the expression by the Judge in the course of his charge of his opinion on the matter of law is an irregularity only in so far as such opinion is erroneous. There is no irregularity in the citation by the Judge in his charge of a judicial opinion given in a case analogous to, though not identical with, that before him when the point of such case applies. Hence, an opinion on the duty of masters to their employees may be cited to show what precautions should be taken by persons taking delivery of things the manipulation of which is dangerous to those taking part in it.

Canada Car Co. v. Poirier, Q.R. 19 K.B. 140.

—Verdict—Weight of evidence.]—A verdict is clearly contrary to the weight of evidence only if it is such that a jury "on examining all the evidence could not reasonably render it." Arts. 498, pp. 4 and 501 C.P.Q. This provision of the Code means "a verdict of such a nature that twelve reasonable men should not render it."

Montreal Street Railway Co. v. Henderson, Q.R. 19 K.B. 135.

—New panel—Notice.]—The Judge cannot order a new jury to be impanelled without the consent of both parties to the action and such an order made on application of one party without notice to the other will be set aside.

Archibald v. Cullen, 11 Que. P.R. 363 (K.B.).

—Trial by jury—Life insurance policy.]—Where a mutual insurance company issues policies insuring the life of the applicant for a specified period at a stated premium, it is a commercial transaction and an action for the amount insured is susceptible of trial by a jury.

Huot v. Provincial Life Assurance Co., 11 Que. P. R. 222.

—Discretion of Judge—Jury trial.]—The Court of Appeal will not interfere with the discretion of the Judge in granting or refusing an application for the trial of an action by a jury unless that discretion has been exercised on a wrong principle.

McCormick v. C.P.R. 19 Man. R. 159.

—Trial by jury—Damages for wrongful dismissal.]—An action to recover damages for an act which amounts to a breach of a hire of services, and which could not be maintained in the absence of such a contract, is not an action "resulting from a personal wrong," within the meaning of Article 421 C.P., and is therefore not triable by jury.

City of Montreal v. De Montigny, 20 Que. K.B. 49.

—Jury trial—Delays—Consent.] — Held, (confirming Davidson, J.):—The consent of the parties to the filing of the plea long after the usual delays has the result of prolonging for thirty days from the date it was fyled the delay within which the defendant could proceed upon his option for a trial by jury.

St. Paul Electric Light and Power Co. v. Quesnel, 12 Que. P.R. 158.

—Verdict—Answers to questions—New trial where meaning of verdict in doubt.]—See ELECTRIC RAILWAY.

Rayfield v. B. C. Electric Ry., 15 B.C. R. 361.

—Joinder of issue—Jury trial—Option.]—When the defence to an action sets up new matter, issue is joined by the plaintiff's replication which is limited to admitting or denying the same without suggesting other facts. A general rejoinder by the defendant is then useless and the plaintiff can have it rejected. The option of a trial by jury by special application made within three days from the filing of such rejoinder but eight days after issue was joined by the replication comes too late and will be refused.

Parke v. Laurie, Q.R. 19 K.B. 478.

—Jury trial.]—To avoid being deprived of his right to a trial by jury the party who has obtained it must, within thirty days from the time issue was joined must take not only some but all of the proceedings necessary to bring his case to trial.

Huard v. Landrieux, Q.R. 37 S.C. 478 (Sup. Ct.).

—Appeals from verdict in civil matters.]—See APPEAL.

—Appeals from verdict in criminal matters.]—See CRIMINAL LAW.

Summons for jury — Delivery of defence.] — An application for change of venue and trial by jury after an order made giving leave to amend defence, but before delivery thereof, is premature.

Bank of B.C. v. Oppenheimer, 7 B.C.R. 446.

—Summoning of — Procedure on — Whether directory or imperative.] — If on the trial of an action in the Supreme Court twenty persons do not appear from which a jury may be selected, the panel may be quashed. The provisions of the Jurors Act relating to the procedure to be followed by the sheriff in summoning a jury are not imperative but directory, and an irregularity in respect thereto is not ipso facto a ground for setting aside the panel.

Ross v. British Columbia Electric Ry. Co., Ltd., 7 B.C.R. 394.

—Property in name of another party advancing purchase money — Resulting trusts —Case withdrawn from jury.] — Plaintiffs as assignees of M. sought to obtain a declaration that certain lands held in the name of the defendant were, at the time of the assignment, the property of M., and, by reason of the assignment, became vested in the plaintiffs. The evidence showed that the money required by defendant for the purchase of the properties in question was obtained from M., but that M. had nothing to do with any of the purchases except to advance the money to defendant by whom the negotiations were conducted, and in whose name the deeds were taken and recorded, and who, in all cases, acted independently of M. in negotiating for and acquiring properties from the respective owners:—Held, that the doctrine of resulting trusts was not applicable, and, there being no issue of fact for the jury on this phase of the case, that the learned trial Judge was justified in withdrawing it from them. Held, also, the trial Judge having at the close of the trial announced his intention of withdrawing the case from the jury, that counsel for plaintiffs should at that time have indicated the facts or issues that they wished the jury to pass upon, and having neglected to do so, that it was now too late for them to object. Held, also, that the objection was without merit as the jury was applied for by defendant and not by plaintiffs. Semble, that where a cause of an equitable nature has been ordered to be tried with a jury, under the provisions of O. 34, r. 2, the trial Judge can not, without the consent of both parties, withdraw the case from the jury, and himself try the issues of fact.

McKenzie v. Ross, 33 N.S.R. 252.

—Demand for jury trial — Certificate of default — Art. 442 C.P.Q.] — A certificate by the prothonotary showing that the party who asked for a jury trial has not proceeded with his demand therefor will be struck out of the record if it was filed before the expiration of thirty days from the joinder of issue.

Mathers v. City of Montreal, 3 Que. P.R. 382 (S.C.).

—Jury trial — Delay — Extension.]—The delay granted by Art. 442 C.P.Q. for proceeding by a trial by jury is not extended by the fact that the party who elects to have a jury has obtained the issue of a commission of inquiry returned within less than 30 days, or has been authorized to amend a portion of his proceedings after the expiration of the delay of 30 days after the cause is ripe for hearing, that is to say, after the contestation is at issue.

Foley v. Foley, 17 Que. S.C. 480 (S.C.).

—Findings of.] — See VERDICT.

—Grand jury.]—See GRAND JURY.

—Special jury — Striking — Parties — Challenge.] — Defendants, in the original action, counter-claimed against the plaintiff and one R. On defendants' application an order for a special jury was made, the plaintiff and R. acquiescing. On the striking of the jury the sheriff refused to allow R. to take any part and plaintiff then applied under R. 157 to strike out the counter-claim because of the impossibility of properly striking a special jury where there are more than two parties. Held, dismissing the summons, that plaintiff had no right to make the application. As R. acquiesced in the order for a special jury when it was made and had not appealed, a challenge to the array by his counsel at the trial was overruled.

Bank of British North America v. Robert Ward & Co., 9 B.C.R. 49 (Irving, J.).

— Practice — Counterclaim.] — Where the claim is such that it cannot by reason of R. 170 of the Judicature Ordinance (C.O. 1898, c. 21), be tried by a jury, and there is a counterclaim which, if the defendant had sued in a separate action, he would have been entitled to have tried by a jury. If the counterclaim arises out of the same transactions as the claim, they must be tried together; and in that event the defendant, having accepted the forum chosen by plaintiff, a jury cannot be allowed.

Friel v. Stinton, 5 Terr. L.R. 252.

—Malpractice of surgeon.] — The better practice is to dispense with the jury in trials of malpractice suits against surgeons.

Town v. Archer, 4 O.L.R. 383 (Falconbridge, C.J.K.B.).

—Jury notice — Order striking out.] — In an action of covenant upon two mortgages the defence was that the defendant had been induced to execute them by false and fraudulent representations. The defendant filed and served a jury notice, which was struck out by a Judge in Chambers, whose order was affirmed by a Divisional Court. A motion by the defendant for leave to appeal to the Court of Appeal was refused:—Held, that the order sought to be appealed against involved no question of law or practice on which there had been conflicting decisions or opinions by the High Court, or by Judges thereof: R.S.O. 1897, c. 51, s. 77, sub-s. (4), cl. (c). The power of a Judge in Chambers to strike out a jury notice has never been doubted.

People's Building and Loan Association v. Stanley, 4 O.L.R. 90 (Maclennan, J.A.).

—Trial by jury — Debt of a commercial nature — Articles 177, 421, C.C.P.] — A claim arising from a loan of money by an advocate to a broker is not a debt of a

commercial nature, and consequently is not susceptible, under Art. 421 of the Code of Procedure, of trial by jury. And where such claim is joined to a demand of a commercial nature the defendant is entitled, under Art. 177 C.C.P., to stay the suit by dilatory exception.

Gilman v. Fenwick, 20 Que. S.C. 513 (Tait, A.C.J.).

— Jury notice — Libel action.] — In actions of libel it is not necessary to file and serve a jury notice.

Puterbaugh v. The Gold Medal Manufacturing Company, 3 O.L.R. 259.

—Jury trial — Illegal mandate — Art. 421 C.C.P.]—In order that there may be a jury trial it is necessary that all the causes of action in which it is demanded are susceptible of that exceptional mode of proceeding. An action claiming damages from defendant for having executed a mandate for illegal search by wrongfully entering plaintiff's residence and threatened him with a criminal process, can be tried by a jury; but if in addition damages are claimed for deprivation of the use of certain movable effects this cause of action does not involve a right to jury process.

Roy v. Dickson, 4 Que. P.R. 357 (Sup. Ct.).

—Special jury — Fees of jurors in B.C.]— A special juror is entitled to $2.00 for each day's attendance at Court whether he serves or not, and whether in order to attend Court he travels from his place of residence or not; if he so travels he is in addition entitled to mileage.

Taylor v. Drake, 9 B.C.R. 54.

—Jury trial — Settling facts — Art. 421 C.C.P.] — Trial by a jury can be had only in the cases enumerated in Art. 421 C.C.P. An action for damages founded on fraud and false representations does not come within any of the classes of action mentioned in this article. There is little time, on motion to settle the facts, to plead that the cause is not susceptible of trial by jury.

Bell v. Royal Bank of Canada, 21 Que. S.C. 321.

—Jury notice — Striking out — Judge in Chambers — Common law action — Action to restrain nuisance — O.J.A., s. 103.] — An action to restrain a nuisance and for damages not being one which prior to the Administration of Justice Act, 1873, was cognizable by the Court of Chancery, a jury notice therein is not irregular, under s. 103 of the Ontario Judicature Act, R.S. O. 1897, c. 51. While no doubt a Judge sitting in Chambers has discretionary power to strike out a jury notice in such a case, the practice is to leave it to be dealt with by the trial Judge.

Shantz v. Town of Berlin, 4 O.L.R. 730 (Meredith, C.J.).

—Option for jury trial—Time limit—Art. 423 C.P.C.] — The special application to the Judge for acte of declaration of option for a trial by jury—when this option has not been declared by the declaration or pleadings—must be presented to the Judge within the three days granted for this purpose by Art. 423 C.P.C., and it is not sufficient to give to the opposite party notice of such application within the time so limited, even although one of the three days should be a non-juridical day.

Canadian Pacific Railway Co. v. Foster, 12 Que. K.B. 139.

—Criminal law — Crown case reserved — Application for — Misapprehension of jurors —Statements by.] — It is no ground for stating a reserved case, after a trial and conviction, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; it is contrary to principle to allow the statements of jurors, even under oath, to be used for the purpose of an application for a reserved case.

Rex v. Mullen, 5 O.L.R. 373 (Street, J.), 6 Can. Cr. Cas. 363.

—Trial by jury — Action on mutual insurance policy.] — The nature of an action to recover the amount of a policy of insurance issued by a mutual insurance company, is not such as requires trial by jury. 2. Want of jurisdiction for the trial by jury of such a case may be urged at any stage of the proceedings; but, if the question be raised for the first time only in answer to a motion to settle the assignment of facts, such motion will be rejected without costs.

Montreal Coal and Towing Co. v. Empire Mutual Assurance Co., 5 Que. P.R. 283.

—Jury notice — Leave to deliver reply — Discretion.] — Where an order was made by the Master in Chambers allowing the plaintiff to deliver a reply after the regular time for replying had expired, a Judge refused to interfere with the discretion exercised, although the reply was open to the objection that all that it sought to put in issue was already in issue by the statement of defence, the purpose being to enable the plaintiff to file a jury notice, and the case being one in which the plaintiff should be allowed to file a jury notice, and thus leave it to the discretion of the Judge at the trial to say whether it should be tried with or without a jury. The pleadings were not closed until the lapse of four days (excluding the Christmas vacation) after the delivery of the reply, or until the defendants had joined issue, and a notice of trial given before the lapse of that time, and without a joinder of issue having been delivered, was irregular; and the Judge had no power to allow the notice of trial thus irregularly given to stand.

Qua v. Woodmen of the World, 5 O.L.R. 51 (Meredith, J.).

—Trial by jury — Declaration of option—Non-juridical days.] — If the third and fourth days after joinder of issue are non-juridical days, the motion of acte of declaration of option for a trial by jury may be presented on the next following juridical day. (See also Forget v. Wallach, 1 Que. P.R. at p. 29).

Morlock v. Webster, 5 Que. P.R. 484.

— Question for — Street railways — Conductor's authority.] — Plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down, but did not stop, and as it was passing the conductor seized plaintiff's hand and while attempting to help her on board signalled to car to go on again which it did and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently:—Held, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it was slowing up; that there was evidence to go to the jury, and that the effect of it was for them to consider, and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority. Per Meredith, J.:—The jury might draw reasonable inferences against the defendants from the fact that they did not call the conductor, or any other of their servants or officers, to prove what actually took place, or what the conductor's duties were.

Dawdy v. Hamilton, Grimsby and Beamsville Electric R.W. Co., 5 O.L.R. 92 (D.C.).

—Jury trial — Time to declare option.] — A plaintiff in default to answer a plea may obtain permission to file his answer, but such filing cannot have the effect of enlarging the time for declaring an option for a jury trial which expires on the fourth day from joinder of issue.

Deniger v. Grand Trunk Ry. Co., 5 Que. P.R. 136.

—Alleged misconduct of jurymen — Contradictory affidavits — Viva voce examination of deponents.] — Where one of the grounds in support of a motion for a new trial was that some of the jury had been tampered with, and the charge included the defendant's attorney, an officer of the Court, and a number of affidavits very contradictory and of an entirely irreconcilable nature were read, under the special circumstances of the case an order was made that the deponents should appear before the Court to be examined viva voce touching the matters in question. Where each party is seeking to make a title for himself by possession the Court will not interfere with the findings of the jury unless the verdict was one which, the whole of the evidence being reasonably viewed, could not properly have been found.

Wood v. LeBlanc, 36 N.B.R. 47.

— Jurors Act, B.C.—Special direction.] — Where an action is to be tried at the Victoria or Vancouver Civil Sittings held pursuant to the S.C. Act Amendment Act, 1901, s. 5, a special direction to the sheriff is necessary under s. 69 of the Jurors Act to summon a jury.

Tanaka v. Russell, 9 B.C.R. 336 (Martin, J.).

—Special jury — Challenge — Same juror sitting on former trials.] — See VERDICT.

(Harris v. Dunsmuir, 9 B.C.R. 303.)

—Action to set aside will.]—See WILLS.

—Jury trial — Option — Inscription.]—(1) The delay of thirty days, within which a party must proceed to bring on a trial by jury, runs from the day of the granting of a motion praying acte of his option for jury trial. (2) A motion for fixing the facts for the jury is a proceeding to bring on the trial, and an inscription for proof and hearing filed by the adverse party, notwithstanding such motion will be rejected.

Morlock v. Webster, 6 Que. P.R. 49 (Doherty, J.).

—Jury notice — Striking out — Non-repair of highway.] — An action for damages caused by runaway horses, which were frightened by a steam roller placed and left standing on a highway by the defendants is an action based on an act of misfeasance by them, and not on the non-repair of the highway, and the plaintiff is entitled to have it tried by a jury.

Clemens v. Town of Berlin, 7 O.L.R. 33 (Teetzel, J.).

—Jury notice — Injury by steam roller.]—Injuries caused by the negligent use of a steam roller belonging to a municipal corporation and operated for them under the direction of a contracting company on a street of the former are not caused through non-repair of the street, and a motion to strike out a jury notice under s. 104 of the Judicature Act was refused.

Kirk v. City of Toronto, 7 O.L.R. 36.

—Trial before justice — Demand of jury—Time for making.] — An application for a jury under Consolidated Statutes, c. 60, s. 31, must be made one clear day previous to the trial; and a demand made after a trial had been commenced, and adjourned at the request of the defendant before any substantial progress had been made, is too late.

Temperance and General v. Ingraham (No. 2), 35 N.B.R. 558.

—Findings as to negligence — Questions as to special grounds — Judge's charge — Non-direction — Misdirection.] — Upon a trial by jury, the Judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, the extent to which he should do so depending on the circumstances of the case he is trying, and, where the form of the charge was defective in this respect and, consequently, left the jury in a confused state of mind as to the questions in issue, there should be a new trial. Judgment appealed from (Alaska Packers v. Spencer, 10 B.C.R. 473) affirmed, Davies, J., dissenting:—Held, per Nesbitt, J.—That in an action founded on negligence it is advisable that specific questions should be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence.

Spencer v. Alaska Packers' Association, 35 Can. S.C.R. 362.

—Severing issues.] — In an action containing several causes of action some of which are triable by jury under Rule 170, the others being non-jury matters, the trial of the issues may be severed and an order was made setting down the action for trial with a direction that the issues respecting the alleged fraudulent conveyance and for a conveyance of certain lands should be tried without a jury and that the other claims founded upon contract exceeding $1,000 should be tried by a jury.

Turner v. Van Meter, 2 W.L.R. 345 (Scott, J.).

—Jury trial — Option — Delay.] —If a plea is filed during the holidays, the plaintiff may answer it on the 7th day of September, from which date the delay for making option for trial by jury will run if the plea is not answered.

Bélanger v. Montreal Street Ry. Co., 7 Que. P.R. 272.

—Damage claim under $500—Yukon practice.] — The right to the trial of an action by jury in the Yukon Territory is regulated by s. 88 of the North-West Territories Act, as amended by 60 & 61 V. c. 32, and the defendants were entitled to file a jury notice, though the amount of damages claimed did not exceed $500.

Ledieu v. Roediger, 1 W.L.R. 515 (Macaulay, J.).

—Order for special jury — New trial — Whether order is exhausted after first trial.] — Pursuant to an order therefor a trial was had with a special jury; on appeal a new trial was ordered:—Held, that the order for a special jury was not exhausted and a summons for a special jury on the new trial was unnecessary.

Alaska Packers' Association v. Spencer, 11 B.C.R. 138 (Martin, J.).

—New trial — Order for special jury.] — Pursuant to an order therefor a trial was had with a special jury; on appeal a new trial was ordered:—Held, per Irving and Morrison, JJ. (Hunter, C.J., dissenting), that the order for a special jury was not exhausted by the abortive trial and that as there had been no amendment of the pleadings or change in the circumstances the order was not provisional in its nature.

Alaska Packers' Association v. Spencer, 11 B.C.R. 290.

—Grand jury — Constitution of — Motion to quash — Juror prejudiced.] — An objection to the qualification of an individual member of a grand jury is not an objection to the "constitution" of the grand jury within the meaning of s. 656 of the Criminal Code, and so cannot be raised by motion to quash. Per Martin, J.:—The question as to whether or not a grand juror is prejudiced is for the Judge of Assize to decide and his decision cannot be reviewed on appeal.

Rex v. Hayes, 11 B.C.R. 4.

—Inspection of panel.] — The restriction imposed by s. 94 of the Jurors' Act, R.S.O. 1897, c. 61, upon the disclosure of the names of the jurors and inspection of the panel, applies in criminal proceedings. Judgment of Street, J., affirmed, Osler, J.A., dissenting.

In re Chantler, 9 O.L.R. 529, C.A.

—Jury notice—Effect of.]—A jury notice is not a notice of trial but one changing the mode of trial. If given in sufficient time it assigns the case to the jury list of trials, and when once given makes the case a jury case when the trial comes on, unless the case be an equitable one or the parties agree to a trial without a jury.

Hackett v. Rorke, 37 N.S.R. 435.

—Jury notice — Non-repair of highway.]—In an action for damages for injuries sustained by the plaintiff from a fall upon a highway under the control of the defendant municipality, the statement of claim alleged that the accident to the plaintiff was caused by the faulty, improper and negligent construction of the pavement, which, being built upon an incline and having a smooth surface, "would call for the ordinary rough finish which it is customary and prudent to build under said conditions":—Held, that the action was for "injuries sustained through non-repair" of the highway, within the meaning of s. 104 of the Judicature Act, R.S.O. 1897, c. 51, and that a jury notice was therefore irregular.

Armour v. Town of Peterborough, 10 O.L.R. 306, M.C.

—Jury trial — Delay to proceed — Forfeiture—442 C.P.]—1. When, after making the option for a jury trial in his declaration the plaintiff allows more than 30 days to elapse from the date on which he should have filed his answer to plea, without proceeding to bring on the trial, he is deprived of his right to a jury trial, and subsequent production of an answer, whether by consent or otherwise, has not the effect of reviving the lapsed right to a jury trial. 2. A motion praying act of an option already made is not a proceeding to bring on the trial.

Asselin v. Montreal Light, Heat & Power Co., 7 Que. P.R. 218 (Davidson, J.).

—Demand for jury trial — Motion.] — A demand for a jury trial will be received if presented within the three days following the joinder of issue notwithstanding one clear day's notice of the motion therefor was not given.

Richer v. Shawinigan Water & Power Co., 7 Que. P.R. 71 (Sup. Ct.).

—Joinder of different causes of action — Jury trial — Separate trials of different causes of action.] — Under Rule 257 of the King's Bench Act, R.S.M. 1902, c. 40, a plaintiff may sue in the same action both for malicious prosecution and trespass, although, by s. 59 of the Act, the former must be tried by a jury unless the parties waive it, whilst the latter must be tried without a jury unless a Judge otherwise orders, and a statement of claim including both such causes of action is not thereby embarrassing or inconsistent with the rules of practice of the Court. After the pleadings are closed, a plaintiff suing for both such causes of action may either waive his right to a jury or apply to have the trespass claim also tried by a jury, and, if such application fails, then an application might be made, under Rule 263, to exclude one of the causes of action or for separate trials, but no application under the last mentioned rule should be made before the cause is at issue.

Coates v. Pearson, 16 Man. R. 3 (Mathers, J.).

— New trial — No substantial difference in evidence — Withdrawal of case from jury.] —The judgment of the Supreme Court of Nova Scotia, in an action by plaintiff as executrix of M. to recover an amount claimed to be due under a contract of hiring with defendant, was reversed on appeal to the Supreme Court of Canada, on the ground that the illness of deceased, by which he was permanently incapacitated, would of itself terminate the contract, and a finding of the jury that deceased did not continue in his employment after notice of a rule that an employee was only to be paid for time that he was actually on duty was held to be against evidence and was set aside. A new trial having been ordered and had, the presiding Judge, on the conclusion of plaintiff's case, stated that, in his opinion, the additional evidence made no material change in the case from what it was before, and withdrew the case from the jury:—Held, that the facts being substantially the same as before no useful purpose could be served in submitting the case to a jury, and that the judge was right in withdrawing the case from the jury and in dismissing the action.

Marks v. Dartmouth Ferry Commission, 38 N.S.R. 386.

—Trial by jury — Panel of jurors—Postponement of trial.] — Where there is a postponement of a jury trial after the completion of the panel of jurors, the Court may order that the panel struck should serve for the date of the postponement, unless there are serious reasons against doing so.

Milonas v. The Grand Trunk Ry. Co., 7 Que. P.R. 427 (Lavergne, J.).

—Failure of jury to answer material question — Power of Court to supply omission.] —Where the jury, in answering questions submitted to them, fail to answer a material question, upon which their answers to other questions depend, their findings will be set aside and a new trial ordered. Assuming that the Court has power to supply a finding, on a point not answered by the jury, it will not do so in a case where the evidence is not clear or where it is conflicting. A deposition tendered in evidence for the purpose of contradicting a witness held to be improperly received where the attention of the witness was not called to the writing before it was tendered.

Blois v. The Midland Railway Co., 39 N. S.R. 242.

—Questions submitted — Duty of jury to answer.] — T. & Co., under an arrangement made with B. in 1900, agreed to supply S. with materials to be used in building and repairing houses owned or managed by B. The materials were charged direct to B., and supplied upon his credit. This arrangement continued down to November 8th, 1902, without any dispute between the parties. T. & Co. claim that about that time B. requested them for his convenience to change the account and charge all materials got under the arrangement between them to S. to prevent the account from getting mixed up with his private account with T. & Co. with which S. had nothing to do, and the account was changed in the books accordingly, but without any intention on the part of T. & Co. to alter the liability of B. This arrangement and request is denied by B., and he says on the other hand that about the 8th of November, 1902, he gave T. & Co. a written notice that he would be no longer liable for goods supplied to S., and that the arrange-

ment between them to that effect was terminated. On the trial of an action by T. & Co. against B. for the goods sold and delivered after November 8th, 1902, the jury was asked "after the 8th of November, 1902, to whom was credit given by T. & Co., to B. or S.," and they found to B. They were also asked whether the goods were sold upon the credit of B. or S., and they found upon the credit of B. They also found, in answer to a question, that B. agreed to become liable for the goods supplied subsequent to the 8th of November, 1902, and charged in T. & Co.'s books to S. On these findings a verdict was entered for the plaintiffs for the amount claimed:—Held, per Tuck, C.J., Hanington and Landry, JJ., that these findings were in effect findings that the change in the account was made under the circumstances alleged by T. & Co. at the request of B., and that the notice alleged to have been given by B. terminating his liability was not given, and it is no ground for a new trial, that no distinct questions were left, or findings asked on these issues. Held, per Barker, McLeod, and Gregory, JJ., that as the questions submitted did not necessarily involve findings upon the issues between the parties, and, upon which the defendant's liability must depend, there should be a new trial. That under section 163 of c. 111 of the Consolidated Statutes, 1903, counsel have the right to require the Judge to submit questions to the jury, and if they are pertinent to the issue it is the duty of the Judge to instruct the jury that they must answer them if they can.

Thorne v. Bustin, 37 N.B.R. 163.

—Jury trial — Facts assigned.] — After the facts to be submitted to the jury have been assigned, a party cannot, even if thirty days elapse after such assignment, inscribe the case on the ordinary roll.

Kermode v. Queen's College, 7 Que. P.R. 368.

—Jury trial — Lapse of time to demand.]— The production, with or without consent, of a reply after default had inured, will not revive a lapsed right to trial by jury.

Leclair v. Montreal Street Ry. Co., 7 Que. P.R. 453.

—Jury trial — Time for proceeding — Deprivation of right to trial by jury — Motion to settle assignment of facts.] —Where a party has, within the proper time, served a motion to settle the assignment of facts to be submitted to the jury he cannot be deprived of his right to a jury trial except by peremption in the usual course.

Furness Withy & Co. v. Great Northern Railway of Canada, 7 Que. P.R. 361 (Cimon, J.).

—Jury trial — Option — Delay.] — Option for trial by jury by special application must be made within three days after issue joined; the subsequent acquiescence or the filing of necessary pleadings does not reopen the right to ask for a jury trial.

La Banque Nationale v. Atlantic & Lake Superior Ry. Co., 8 Que. P.R. 309.

—Exhausting panel — Talesmen — Treating juror.] — Where the jury panel has been exhausted by reason of some of the jurors being out in another case the presiding Judge may direct talesmen to be summoned. Treating one of the jurors during the progress of the trial by the attorney of one of the parties is ground for a new trial.

Nadeau v. Theriault, 37 N.B.R. 498.

—Trial by jury — Demand for particulars —Questions for jury — Forfeiture of right to jury trial.] — The demand by motion for assignment of the facts to be submitted to the jury provided by article 424 C. P.Q., even when followed by adjudication, is a proceeding within the meaning of Article 442 C.P.Q., which, if made within the prescribed time, may avail against the forfeiture of the right to trial by jury provided by that article.

Furness Withy & Co. v. Great Northern Ry. Co., Q.R. 29 S.C. 11.

—Personal torts — Injury to property.] — The damages caused to an industry by the closing of streets adjoining the premises and giving access thereto, though the work and carrying on of the industry may be affected, and a cause of action has arisen, are not damages resulting from personal torts or of délits or quasi-délits against movable property as provided by Article 421 C.C.P. Therefore the party sued for recovery of such damages has no right to a jury trial.

Montreal Brewing Co. v. City of Montreal, Q.R. 15 K.B. 297.

—Hire of machine.] — The hire of machines to a manufacturer for the purposes of his industry is an act of commerce and the lessee sued by the lessor for damages resulting from violation of the terms of the lease has a right to a trial by jury under Articles 421 et seq. C.C.P.

Brunet v. United Shoe Machinery Co., Q. R. 15 K.B. 295.

— Jurors — Disqualification of — Ground of challenge.] — The fact that a juror was related to the plaintiff's wife, which was not known to either party or their attorney at the time of the trial; and that two other jurymen were open to challenge on the ground that they had not the necessary property qualification are not grounds for a new trial. Telling the jury in an action of replevin that if there is any question about the defendant's possession of the property replevied it was settled by the record of the return at the time of replevying is misdirection and a ground for a new trial,

though there is other evidence amply justifying the finding of possession.

Lloyd v. Adams, 37 N.B.R. 590.

—Jury trial — Action for damages for negligence.] — The plaintiff's claim was for damages for the loss of an arm in consequence of being run over by a car of the defendants which he claimed was going at excessive speed, without a fender and without the gong being rung to warn him. On his application, under s. 59 of the King's Bench Act, R.S.M. 1902, c. 40, a Judge ordered that the action should be tried by a jury on the grounds that the principal issues to be tried were issues of fact and that a jury would be more likely to assess the proper damages in case of a verdict for the plaintiff than a Judge:—Held, that the judicial discretion exercised by the Judge in this case should not be interfered with.

Griffiths v. Winnipeg Electric Ry. Co., 16 Man. R. 512.

— Verdict — Right of jury to return a general verdict.] — If either party asks that the jury return a general verdict, then the jury must do so unless they are unable to agree.

Macleod v. McLaughlin, 13 B.C.R. 16.

—Venire — Challenge to array — Disqualification — Interest.] — It is no ground for a challenge to the array that the jury was summoned by a coroner who was the deputy of the sheriff of the county who was disqualified by reason of being a ratepayer in the town that was the defendant in the action, or that the coroner summoned the jury under a notice by the clerk of the circuits, pursuant to s. 18, of c. 126, C.S. 1903, and no venire was issued.

Milmore v. The Town of Woodstock, 38 N.B.R. 133.

—Trial in Toronto — Investigation of accounts — Striking out jury notice.] — The practice where the venue in an action is laid out of Toronto is, except in rare cases, to leave the matter to be dealt with by the trial Judge; but in Toronto, where there are separate sittings for jury and non-jury cases, the latter being practically a continuous sitting throughout the year, the practice has been adopted, in order to prevent the jury list from being unduly encumbered, to strike out the jury notice in cases which properly ought to be tried without a jury. In an action on a promissory note, which involved an investigation of accounts, and therefore properly triable without a jury, an order was made in Chambers directing such notice to be struck out.

Montgomery v. Ryan, 13 O.L.R. 297.

—Answer by majority to question submitted — Failure to take objection at time.] —In an action claiming damages for placing a car laden with lumber on plaintiff's track, whereby a collision occurred and plaintiff suffered injury, questions were submitted to the jury who, without having remained out for four hours, returned the answer of a majority to certain of the questions. The prothonotary read over the answers to the jury, without making any reference to whether the answers were unanimous or not, and asked the question, "as you say one so say you all," and, no one objecting, entered the verdict accordingly:—Held, that this had the effect of making the verdict a unanimous one. Per Longley, J., that if counsel for defendant wished to object to the validity of the finding, he should have done so on the spot, when the jury could have been sent back, and having been silent and allowed the verdict to be recorded, he could not afterwards raise the objection.

Midland Railway Co. v. McDougall, 39 N.S.R. 280.

— Jury trial — Illegal seizure — Trespass.] —Under s. 59 of the King's Bench Act, a party complaining of an illegal seizure of his goods has a right to have his action tried by a jury unless he expressly waives such right. That the act complained of might have been properly characterized as a trespass, will not affect the right to a trial by jury, for every illegal seizure is a trespass although there may be a trespass without a seizure.

Bartlett v. House Furnishing Co., 16 Man. R. 350.

—Judge's charge — Practical withdrawal of case.] — On trial of an action against a surety, the defence was that he had been discharged by the plaintiff's dealings with his principal. The trial Judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability they could find for defendant he knew of no such evidence and it was not to be found in the case:—Held, that the disputed facts were practically withdrawn from the jury, and as there was evidence proper to be submitted and on which they might reasonably find for defendant there should be a new trial.

Wood v. Rockwell, 38 Can. S.C.R. 165.

—Motion for jury trial — Que. P.C. Art. 442.] — The delay given by Article 442 C. P. is for the presentation of the motion for a jury and the mere service of a notice of motion within the time is not sufficient.

Bray v. Montreal Street Ry. Co., 8 Que. P.R. 122.

—Neglect of municipality.] — An action against a municipality claiming damages for personal injuries received by plaintiff by being beaten in a police patrol waggon by another occupant thereof is properly triable by a jury.

Larrasey v. City of Montreal, 8 Que. P. R. 429.

—Jury notice — Motion to strike out — Discretion exercised before trial.] — The discretion of a Judge in Chambers in striking out a jury notice, in an action to be tried outside of Toronto, was held to have been properly exercised where the action was brought by the executors of a deceased mortgagee upon the covenant contained in the mortgage deed, and the defence was that the written documents, the mortgage deed and the deed of conveyance to the mortgagors, did not express the true agreement between the parties: — Semble, per Meredith, C.J.C.P., that the rule laid down in Montgomery v. Ryan (1906), 13 O.L.R. 207, might well be extended to all cases, whether to be tried in Toronto or elsewhere. Semble, also, that the facts alleged in the defence would not have been admissible under the plea of non est factum; that the defence was really an equitable one, involving rectification of the instrument sued upon; and in that case the jury notice would be irregular.

Bryans v. Moffatt, 15 O.L.R. 220 (D.C.).

—Motion for jury trial — Delay.] — Issue is joined by failure of the plaintiff to reply to a plea within six days from the time it is filed. A motion for a jury trial made more than three days after joinder of issue will be refused as too late.

Cox v. Phœnix Assur. Co., 9 Que. P.R. 117 (Sup. Ct.).

—Jury trial — Formation of the jury — Jury de medietate linguae.] — A jury composed exclusively of persons speaking the French or English language can only be had upon the application of either party and if the opposite party does not object; otherwise it will be refused even if both parties speak the same language and are of the same origin.

Martin v. St. Vincent de Paul, 9 Que. P. R. 381.

—Jury trial — Joinder of issue — Delays.] —The delay of thirty days fixed by C.P. 442, to have the facts fixed for the jury does not run until an inscription in law filed with the plea has been determined.

Clough v. Fabre, 9 Que. P.R. 231.

—Amendment of pleading — Trial by jury.] —A plea amended by leave of the Court on terms imposed on defendant may restore the latter to the position in which he was when his original plea was filed. Therefore, in a case susceptible to trial by a jury where the defendant who has lost his right to demand such a trial obtains the leave of the Court to file a new plea he can then demand a jury trial as he could have done originally.

Huard v. Landrieux, Q.R. 33 S.C. 391 (Sup. Ct.).

—Qualification — Age limit.] — The age limit provided by s. 1 of the Jury Act of N.B., 1903, c. 126, operates as a disqualification.

Moran v. O'Regan, 38 N.B.R. 399.

—Jury notice — Striking out in chambers —Equitable issue.] — Since the rules providing for the holding of separate jury and non-jury sitting it is desirable, even where the venue in an action is laid out of Toronto, to have it settled at as early a stage of the action as possible, whether the case is to be tried with a jury or without a jury. Montgomery v. Ryan (1906), 13 O.L.R. 297, approved of. In this action the plaintiff sought to set aside a certain agreement as fraudulent and void as against the plaintiffs and to have the plaintiffs declared entitled to a one-eighth share in the property in question; and in the alternative, a declaration that the plaintiffs were entitled to a one-eighth share in certain stock; or damages and other relief:—Held, that this was an action which it was proper to try without a jury. Sawyer v. Robinson (1900), 19 P.R. 172, distinguished.

Clisdell v. Lovell, 15 O.L.R. 379 (D.C.).

—Findings of jury — Grounds for setting aside.] — The main defence to an action on a bond was that it was materially and fraudulently altered after it was signed. Questions were submitted to the jury the answers to which were in plaintiff's favour, and were in accordance with the weight of evidence: — Held, that the findings would not be disturbed except upon clear and necessary grounds, and that in the absence of such grounds defendant's appeal must be dismissed with costs.

Kennedy v. McDonald, 42 N.S.R. 22.

— Jury trial — Jurisdiction of referee to order trial by jury.] — Under Rules 27 and 29 of the King's Bench Act, R.S.M. 1902, c. 40, the referee in Chambers may exercise the power of ordering the trial of an action by a jury to a Judge by sub-s. (b) of s. 59 of the Act.

Cameron v. Winnipeg Electric Railway Co., 17 Man. R. 475.

—Damages — Personal injuries.] — The effect of c. 44 of 6 Edw. VII. (Ca.), was to annul the repeal of the North-West Territories Act, so far as Alberta and Saskatchewan were concerned and the Ordinance respecting juries is in consequence not in force:—Held, also, that the increase of damages on the second trial of an action for damages for the loss of a foot from $3,500 to $6,500, was not perverse or wrong, and that the latter amount was not under the circumstances excessive.

Hansen v. Canadian Pacific Railway Co., 6 Terr. L.R. 420.

—Trial by jury — Misdirection by trial Judge on matters of fact — General ver-

dict — Additions to verdict.]—(1) Misdirection by the trial Judge on matters of fact affords no ground for a new trial, more particularly when the Judge expressly instructs the jury that they are not bound by his view of the facts. (2) When, in a trial by jury, the assignment of facts is dispensed with by consent of the parties, and the jury bring in a general verdict to which they append a recommendation and an expression of opinion, the Court will not infer that the verdict rests exclusively on these additions and will therefore not disturb it, if it is one which in view of all the evidence, could reasonably have been found. (3) In the absence of an assignment of facts, the Court cannot apply special rules of law (v.g. respecting employer's liability) to any one or more of the facts proved, to say that a general verdict is wrong. In such a case, the verdict must stand, if there is enough in the whole evidence to support it. (4) When it does not appear that the jury was actuated by improper motives, or was misled, a verdict of $2,000 damages to a father for the death of his son is not excessive.

City of Montreal v. Enright, 16 Que. K. B. 353.

— Finding of jury — Questions of fact — Duty of Appellate Court.] — Where the question was one of fact, and the jury, on evidence properly submitted to them, accepted the evidence on one side and rejected that adduced upon the other, the Supreme Court of Canada refused to disturb their findings.

The Windsor Hotel Company v. Odell, 39 Can. S.C.R. 336.

—Jury trial — Delays.] — When a party within 30 days after issue joined has formulated the facts which the jury should consider, he is not barred by taking no further step in the cause for 30 days more and after that time he is entitled to an order for trial by jury.

Brosseau v. Montreal Light, Heat and Power Co., 9 Que. P.R. 227 (Sup. Ct.).

—Jury trial — Sums claimed as accessory to a commercial contract.] — An action claiming a certain amount for salary due, for monies advanced and for salary until the completion of a management contract, is triable by a jury, if these monies have been so advanced incidentally and as accessory to the execution of the management contract as alleged by the plaintiff's declaration.

Clark v. Clark Automatic Nut-lock Company, 10 Que. P.R. 386.

— Jury trial — Expiry of the delays — Amended pleading.] — When a party is permitted to produce an amended pleading, he does not thereby acquire again the right to have the cause tried by a jury, if that right has already been forfeited by the expiry of thirty days since issue joined.

Montreal Light, Heat and Power Company and Dupras, 10 Que. P.R. 114.

—Jury trial — Right to — Action in warranty.] — When the city of Montreal being sued in damages for a defective sidewalk, takes an action in warranty against a third party, its demand is based on a special right conferred by its charter, and it does not sue for personal wrongs. Art. 421 C.P. being a restrictive one, there can be no jury trial in such an action in warranty.

Ste. Agnes v. Montreal, 10 Que. P.R. 157.

— Trial by jury — Option forfeited by lapse of delay.] — Leave granted to a plaintiff to amend his answer to the defendant's plea does not revive his right of option to a trial by jury, which he had declared, but had forfeited by allowing a delay of thirty days to elapse from the date at which the case stood ready for trial. Cf. Anderson and Norwich Union Ins. Co., 17 Que. K.B. 361.

Montreal Light, Heat and Power Company v. Dupras, 18 Que. K.B. 174.

— Jury trial — Contract based on a municipal by-law.] — Held, a case is not triable by a jury when it is taken on an infringement of a contract based on a municipal by-law. A municipal by-law is purely an act of administration, excluding all idea of commerce, and the signing of a contract based on said municipal by-law in no way changes the nature of the Municipal Act.

Montreal Terminal Railway Co. v. City of Montreal, 11 Que. P.R. 1.

— Jury trial — Delays — Inscription in law.] — If an inscription in law and a plea to the merits have been filed concurrently, the delay of thirty days allowed by C.P. 442 to have the facts fixed for the jury does not run until the inscription in law has been determined.

O'Brien v. Montreal Light, Heat and Power Co., 10 Que. P.R. 348.

—Jury notice — Motion to strike out.]—Held, reversing an order of Riddell, J., in Chambers, striking out a jury notice, that in an action of merely common law character the determination as to the method of trial should not be taken out of the hands of the trial Judge; and that, if he determines that an action on the jury list should be tried without a jury, he should himself try it, because the litigants are entitled to have their cause tried in its order upon the list. The reasons for letting the determination rest with the trial Judge prevail over those of convenience and expedience applied peculiarly to actions tried at Toronto.

Stavert v. McNaught, 18 O.L.R. 370.

— Jury trial — Amount in dispute — Interest.] — In an action claiming damages to the amount of $1,000 with interest from the time it was instituted a jury trial will not be granted. Interest is only an accessory demand and cannot be considered in determining the amount necessary for such trial.

Bélair v. Dominion Textile Co., 10 Que. P.R. 237.

—Jury trial — Companies Winding-up Act.] —A trial by jury cannot be granted in proceedings under the Winding-up Act.

In re Tetrault Shoe Co., 10 Que. P.R. 244.

— Jury trial — Mixed jury.] — The French-speaking plaintiff who sues a corporation and whose action calls for a trial by jury cannot demand that the jury be composed of an equal number of French-speaking and English-speaking persons; the corporation alone is entitled to make this demand.

Brothers of Charity v. Martin, Q.R. 18 K.B. 268.

—Informal verdict.] — In a case tried with a jury if they return an informal, inconsistent and illogical verdict the Judge may, and should, point out to them where it is defective, give the necessary explanations and direct them to reconsider and rectify it.

Jolicœur v. Grand Trunk Railway Co., Q.R. 34 S.C. 457.

--Special jury.] — A certificate for a special jury will not be granted unless it is shown that a common jury cannot adequately pass upon the facts in issue.

Cross v. Esquimault & N. Ry., 14 B.C.R. 329.

See CRIMINAL LAW.

JUSTICE OF THE PEACE.

Order for arrest — Want of cause — Liability.] — A justice of the peace who issues a warrant of arrest without inquiry into the informant's grounds of suspicion against the accused is liable to the latter if the complaint is not justified on any serious ground, reasonable or plausible.

Murfina v. Sauvé, 19 Que. S.C. 51 (S.C.).

— Territorial jurisdiction — Act for protection of sheep — Offence against — Locality of.] — Upon a motion to quash an order of a justice of the peace for the county of Waterloo, under ss. 11-13 of R.S. O. 1897, c. 271, an Act for the Protection of Sheep and to impose a Tax on Dogs, finding that the defendant, at the town of Waterloo, did unlawfully have in his possession two dogs, which dogs worried and injured two sheep, the property of the complainant, at the township of Wellesley, and ordering the defendant to kill the dogs:—Held, that the offence under s. 11 was the having in possession a dog which, wherever the act was done, had worried, injured or destroyed sheep, and therefore the offence was committed at the town of Waterloo, where the defendant lived, and a magistrate for the county had no jurisdiction, there being a police magistrate for the town, and it not appearing that the convicting magistrate was acting for or at the request of such police magistrate. Upon the same information the same magistrate also made an order, under s. 15 of the Act, for payment by the defendant to the complainant of $10 (said to be the value of the sheep) and costs:—Held, that a proceeding under s. 15 is independent of one under ss. 11-13, and the magistrate had no power to award damages for the injury to the sheep without a separate complaint. The first order was quashed without costs, because the question of the magistrate's jurisdiction was not raised before him, and the assuming jurisdiction was his mistake. The second order was quashed with costs to be paid by the complainant, because he insisted on going on with the claim for damages before the magistrate.

Rex v. Duering, 2 O.L.R. 593.

—Jurisdiction — Warrant executed by a constable not qualified.] — The fact that the defendant was arrested and brought before the magistrate, who made the conviction, by a constable who was not qualified as required by Con. Stat. c. 99, s. 69, is no ground for a certiorari under the Liquor License Act, 1896. The improper arrest does not go to the jurisdiction of the convicting magistrate. R. v. Hughes, 4 Q.B.D. 614 applied.

Ex parte Giberson, 34 N.B.R. 538.
16 Can. Cr. Cas. 70.

—Action against for false imprisonment—Protection of justices — Plaintiff's innocence of the charge.] — By Con. Stat., c. 90, s. 11, it is enacted that, "where the plaintiff shall be entitled to recover in any action against a justice, he shall not have a verdict for any damages beyond two cents, or any costs of suit, if it shall be proved that he was guilty of the offence of which he was convicted, etc." In an action of false imprisonment brought against a magistrate, who without jurisdiction had committed to prison the plaintiff for making default in the payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge:—Held, that the evidence was properly received and that the plaintiff, in order to prove his innocence, was not confined to such evidence as had been given before the magistrate on the trial of the information.

Labelle v. McMillan, 34 N.B.R. 488.

—Recusation — Arts. 5551 R.S.Q.] — When in proceedings before a justice of the peace

under Arts. 5551 et seq. R.S.O., respecting damage to property, the justice has been challenged (récusé) by the defendants the latter must prove the facts stated in their challenge before the justice himself, with subsequent recourse to appeal or prohibition if he persists in sitting, the provisions of the Code of Civil Procedure respecting a challenge (récusation) not applying to a case of the kind.

Guertin v. Beauchemin, 18 Que. S.C. 316 (C.C.).

—In criminal matters.]—

See CRIMINAL LAW; SUMMARY CONVICTION; SUMMARY TRIAL.

—Qualifications — Art. 1003 C.C.P.] — The grounds relied on for demanding a writ of prohibition for want of jurisdiction in the inferior Court should have been taken in the latter. A justice of the peace who, in good faith, exercises his function is, de facto, competent to act though he has not complied with all the formalities relative to his qualification.

Hogle v. Rockwell, 20 Que. S.C. 309 (Sup. Ct.).

—Removal of conviction.]—

See CERTIORARI.

—Collection of fine and costs — Presumption of proper disposition.]—Held, in an action against a justice of the peace to recover the sum of $15 paid to him as fine and costs, upon a conviction under a Territorial Ordinance, which was afterwards quashed, that it must be presumed in the absence of evidence that the moneys were properly applied, i.e., the fine transmitted to the Attorney-General, and the costs paid over to the complainant for whom they were received as agent. There is no duty imposed on the justice in such case to obtain a refund. The justice's personal fees when retained by him are in effect paid to him by the complainant against whom he had the right to retain them.

Kaulitzki v. Telford, 5 Terr. L.R. 488 (Scott, J.).

—Disqualification of justice — Relationship —Want of knowledge of — Cr. Code, ss. 839, 842.] — A summary conviction made by two justices of the peace will not be quashed on the ground that one of them was related to the defendant, within the be satisfied by making a merely nominal ninth degree of consanguinity, if the justice was not aware of the relationship, and no objection was taken at the hearing.

The King v. Biggar; Ex parte McEwen, 37 N.B.R. 372.

—Disqualification — Bias.]—

See LIQUOR LICENSE.

(The King v. Charest; Ex parte Daigle, 37 N.B.R. 492.)

KIDNAPPING.

Extradition for.]—See EXTRADITION.

LABOUR UNION.

See TRADE UNION.

LACHES.

Municipal lighting contract — Forfeiture clause.] — See MUNICIPAL LAW.

City of Toronto v. Toronto Electric Light Co., 10 O.L.R. 621.

LAND.

—Sale of.]—See SALE OF LAND.

—Registration of title.]—See REGISTRATION.

LAND AGENT.

See BROKER.

LANDLORD AND TENANT.

I. COVENANTS AND CONDITIONS.
II. RECOVERY OF RENT.
III. FORFEITURE; TERMINATION AND HOLDING.

I. COVENANTS AND CONDITIONS.

Liability for taxes—Property occupied in part for charitable purposes—Exemption.]—Plaintiffs were owners of a building, part of which was occupied exclusively for the purposes of the Society and part of which was let from time to time for public entertainments and purposes other than those of the Society. The portion of the building occupied exclusively by the Society was exempted from taxation, but in respect of that portion used for public purposes the Society was assessed on a valuation of $1,000. The latter portion was leased to the defendants for a term of years and it was provided in the lease that defendants should pay "any and all license fees, taxes or other rates or regular and ordinary assessments which may be payable to the city of Halifax or chargeable against said premises by reason of the manner in which the same are used or occupied by the lessees hereafter . . . the said lessor, however, agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises." After the making of the lease the valuation, for assess-

ment purposes of the portion of the premises occupied by defendants was increased from $1,000 to $10,000:—Held, per Townshend, C.J., Graham, E.J., and Drysdale, J., that the increased assessment came under the class of regular and ordinary taxes and assessments, and that defendants were not liable therefor. Also, that the rule ejusdem generis applied in full force, and the kind or class of taxes which defendants bound themselves to pay being "all license fees or other rates or assessments chargeable by reason of the manner in which the premises are used or occupied by defendants," the "regular and ordinary taxes, etc." which plaintiff bound itself to pay could not be placed in that category. Also, that there was no ambiguity in the language used and parol evidence should not have been admitted.

St. Mary's Society v. Albee, 44 N.S.R. 1.

—Lease—Breach of conditions—Particulars.]—An action to recover damages for non-observance of the conditions in a lease is summary. An exception to the form demanding the particulars required to enable the defendant to plead to the action should indicate the nature of such particulars. Insufficiency of stamps on papers filed in an action does not warrant an exception to the form if the opposite party has not been prejudiced and the stamps have since been affixed by leave of the Court.

Weinstein v. Millman, 11 Que. P.R. 294.

—Lease—Promise of sale.]—A contract by which the owner of an immovable agrees to lease it for a sum payable by instalments the last of which would mark the expiration of the term and then to sell the premises to the lessee the total consideration being the rent during the term and the price of sale afterwards establishes between the parties the relation of lessor and lessee as provided in Art. 1150 C.P.Q. Therefore, the owner has all the remedies, summary and by way of saisie gagerie of a lessor to recover the instalments and damages which fall due and to resiliate the contract and retake possession of the premises.

Crevier v. Lamoureux, Q.R. 38 S.C. 172 (Ct. Rev.).

—Lease of furnished house—Unsanitary condition.]—Upon the letting of a furnished house, there is an implied undertaking that the house is reasonably fit for habitation; and if from any cause this is not the case, the tenant is justified in repudiating the tenancy. This is quite irrespective of any representation by the lessor; if the lessor makes a representation that the house is fit for habitation, he is not relieved from the effect of that representation by the fact that he honestly believed in the truth of it. The house must be so reasonably fit for habitation at the time of the beginning of the term; and the lessor has no right to be allowed after that time to put the house in the condition it should have been in. A Divisional Court disagreed with the findings of fact of Clute, J., at the trial, as to the condition of a house let furnished by the plaintiff to the defendant, and, being of opinion that the house when let was in such an unsanitary condition as to justify the defendant in leaving it, allowed an appeal from the judgment at the trial in favour of the plaintiff, and dismissed an action for damages for breach of the covenants in the lease. In showing the unsanitary condition of a house, it is not necessary to prove that the condition was such that it caused illness. Beal v. Michigan Central R.R. Co. (1900), 19 O.L.R. 502, and Ryan v. McIntosh (1909), 20 O.L.R. 31, referred to as to the principles to be adopted upon an appeal from the findings of fact made by a trial Judge.

Gordon v. Goodwin, 20 O.L.R. 327.

—Injury to property by overflow of water—Flats in building tenanted by different persons.]—The defendants were held liable in damages for injury to the plaintiffs' premises by water overflowing from a tap negligently left running in the lavatory in the defendants' premises upon the floor above the plaintiffs' in the same building, both plaintiffs and defendants being tenants of the owner of the building. Per Clute, J.:—The fair inference from the evidence was that the defendants, by themselves or their servants, who were allowed to use the lavatory, negligently left the tap running, and caused the injury complained of. Per Middleton, J.:—Where the claim is made against a tenant occupying an upper flat, prima facie he is liable for the escape of water from a tap left open; the onus is upon him to establish facts freeing him from liability. The action was originally brought by the assignees of the persons who were tenants of the lower premises when the damage was done, but the assignors were added as plaintiffs:—Held, that, both parties being before the Court, a right of action was vested in either one or the other, and the effect of the assignment was immaterial.

Powley v. Mickleborough, 21 O.L.R. 556.

—Non-tenantable building—Inherent defect.]—The owner of a building which falls owing to a defect in construction, is liable on two grounds, for the damages suffered by his tenant; first, for failure of his obligation, under the contract of lease, to provide the tenant with a habitable building, and secondly, on account of the quasi-delit mentioned in Art. 1055 C.C. For the first he is liable for the damages foreseen or which might have been foreseen at the time the lease was given (Art. 1074 C.C.) and for the second, all those which are the immediate and direct result of the falling of the building provided the same are

claimed within two years after which there is prescription. The tenant may, at his option, base his action on either of these causes or on both at once.

Granger v. Muir, Q.R. 38 S.C. 68.

—Hay cut by the lessee of a farm.]—Hay cut on a farm by the lessee is movable property and belongs to him; it is not a "substance intended for manure," and in no wise immovable by destination.

Massé v. Chartier, 38 Que. S.C. 258.

—Preventing tenant from removing his building—Damages recoverable from the lessor.]—A lessee who has a right under a covenant in his lease, to remove, at the expiration thereof, a structure added by him to the leased premises, and fails to protect his right by an opposition to withdraw, or otherwise, when the latter are sold by licitation during his tenancy, is entitled to recover from the lessor, or his representatives, not the full value of the structure as attached to the premises, but only what would be the value of it after severance and removal.

Gaudet v. Marsan, 36 Que. S.C. 53.

—Permit to cut hay—Profit à prendre — Provision for termination on lease of land being made—Lease of part of land covered by permit.]—

Decock v. Barrager, 10 W.L.R. 709 (Man.).

—Duration of tenancy—Agreement—Construction.]—

Methodist Church v. Roach, 9 W.L.R. 23 (B.C.).

—Lease of part of building—Damage to roof—Injury to tenant's goods—No implied liability on landlord to repair roof.]—

Betcher v. Hagell, 1 E.L.R. 20 (N.S.).

—Termination of lease by death of the usufructuary lessor—Crop standing—Right of lessee to the crop.]—The lease of a farm made by an usufructuary for a term of years expires at his death, but if it occurs after a year of the term has begun, the lessee has the right to continue his enjoyment to the end of that year. Hence, when the death of the usufructuary lessor takes place in May, when the crop is standing, the lessee having the enjoyment of the farm till the first of November following, has the right to cut the crop in the interval, and thus make it his own.

Peckham v. Parizeau, 39 Que. S.C. 9.

—Construction of covenant—Taxes—Partial exemption.]—A society owned a building worth about $20,000 which, by the statute law of the province, was exempt from municipal taxation so long as it was used exclusively for the purposes of the society. A portion of the building having been used at intervals for other purposes, it was assessed at a valuation of $1,000 and the society paid the taxes thereon for some years. Such portion was eventually leased for a term of years to be used for other purposes than those of the society, and the valuation for assessment was increased to $10,000. The lease contained this covenant:—"The said lessees * * * shall and will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor)." The society was obliged to pay the taxes on such increased valuation and brought action to recover the amount so paid from the lessees:—Held, that the taxes so paid were "regular and ordinary taxes" which the lessors had agreed to pay as theretofore and the lessees were not liable therefor on their covenant.

Saint Mary's Young Men's Society v. Albee, 43 Can. S.C.R. 288.

—Covenant to renew—Severance of term—Consent of lessor—Expropriation.] — The covenant for renewal of a lease for a term of years is indivisible and if the lessee assigns a part of the demised premises neither he nor his assignee can enforce the covenant for renewal as to his portion. The assignment of part of the leasehold premises included an assignment of the right to renewal of the lease for such part and the lessor executed a consent thereto:—Held, that he did not thereby agree that his covenant for renewal would be exercised in respect to a part only of the demised premises. In the case mentioned the lessee who has severed his term cannot, when the land demised is expropriated by a railway company, obtain compensation on the basis of his right to a renewal of his lease. Judgment of the Court of Appeal (18 Ont. L. R. 85) affirmed.

Brown Milling and Elevator Co. v. Canadian Pacific Railway Co., 42 Can. S.C.R. 600.

—Lease—Improvident contract—Misrepresentation.]—R. was the owner of certain premises situated in Saint John, which she leased to E. and M. by a written Indenture of Lease made February 4th, 1908. The defendant M. offered to draw the lease for her, and did so, and it was executed by all the parties at the same time, in the presence of the father of the defendant E. The

lease was read over to R. by M. on two separate occasions, and was given to R. to read for herself. R. is a middle-aged woman of property. She has been accustomed to transact all her own business, and manage her own property without assistance from anyone, and it was not contended that she was not fully capable of making an agreement of this nature:—Held, that the lease would not be set aside, as there was no fraud or misrepresentation; that the defendant M. did not stand in any fiduciary relationship to R. by reason of his having drawn the lease, and the rule as to independent advice in such cases was not applicable here. The lease contained the following provision for renewal:—"For a further term of five years or more and containing and subject to precisely the same covenants, provisions and agreements as are herein contained." The defendants consenting the words "or more" in the renewal clause were expunged.

Robinson v. Estabrooks, 4 N.B. Eq. 168.

—Injury to goods on demised premises—Alteration of premises above—Breach of covenant for quiet enjoyment—Premises leased for particular purpose.]—The defendant, the landlord of premises, was held liable to the plaintiff, the tenant, for damage done to goods of the plaintiff upon the demised premises by water and lime dust from the upper storeys of the defendant's building coming down upon the demised premises, it being known to the defendant when he made the lease, that the plaintiff proposed to use the premises for the purposes of a shop for the reception and sale of second-hand furniture, and the premises being, by reason of the dust and water, rendered unfit for carrying on such business. The defendant was liable for a derogation from his grant, and also for breach of his covenant for quiet enjoyment; and he was not relieved by the employment of an independent contractor to make the repairs to the upper storeys which caused the descent of the dust and water. The plaintiff's covenant to repair did not constitute a defence, for, if the ceiling had been repaired, it would not have kept out the water, nor wholly kept out the lime dust. Damages assessed for the goods injured—but not for loss of business. The conversion of the water-closet from a private one to one to be used by other tenants, and the cutting off of the private access thereto, constituted a breach of covenant for which the defendant was liable in damages.

Gregory v. Tunstall, 15 W.L.R. 140 (B.C.).

—Lease—Sublease—Collapse of building—Implied warranty as to fitness.]—The plaintiffs, the owners of land on which they had commenced to construct a building, on the 16th January, 1907, granted a lease of the basement and three flats of the north and the two upper flats of the south half, to the defendant F., for a term of 12 years from the date of the completion of the building. This lease was stated to be made pursuant to the Land Titles Act, and was in the form prescribed by that Act for leases for terms exceeding three years. It was expressed to be made subject to the covenants and powers implied, except as thereinafter modified, and subject to specified covenants, terms, and conditions, one of which gave the lessee the right to continue the lease for a further period of two years at the same rental, upon giving notice. Another term was that if the demised premises should at any time during the term be destroyed by fire or other unavoidable casualty so as to be a total loss, the lessee should be obliged to pay only a proportionate part of the current rent, and the term should become forfeited and void. On the 19th March, 1907, the defendant F. executed a transfer of the lease to the defendants N. and B., and the plaintiffs assented thereto. The defendant F. never occupied the premises individually, but formed a partnership with defendants N. and B., and the firm commenced their occupation on the 22nd April, 1907. On the 18th June, 1908, N. and B. executed a sublease of the north half of all the floors of the building, except the basement, to another mercantile firm, for a term commencing on the 1st July, 1908, and ending on the 22nd April, 1909. This sublease was also expressed to be pursuant to the Land Titles Act, and contained the provisions referred to above. The sublessees occupied the portion of the building sublet to them, and stored therein a a large quantity of goods. On the 26th October, 1908, all three floors occupied by them collapsed, and a large proportion of their goods were precipitated into the basement. The plaintiffs repaired the building, and brought this action against the defendant F. to recover the amount expended in repairs; N. and B. were afterwards added as defendants, and they brought in the sublessees as third parties, claiming indemnity against them. The third parties counterclaimed against N. and B. for the loss of goods resulting from the collapse; and the defendants N. and B. counterclaimed against the plaintiffs for indemnity against the counterclaim of the third parties:—Held, that, where there is no express agreement or warranty, a landlord is not liable in damages for breach of an implied covenant or warranty that the building is fit for the purpose for which it is to be used. And, held, that no express covenant or warranty was ever made or given by any one, either by the plaintiffs or by the defendants N. and B. Held, also, that there was nothing to prevent the parties from contracting themselves into the terms of the Land Titles, where they would not otherwise have been brought within them, and they had so contracted both in

the lease and sublease; and, therefore, the covenant as to repairs, which, by s. 55 of the Act, is declared to be implied in every lease under that Act, was implied in the lease to F. and the sublease to the third parties, and they were bound thereby, and were liable to rebuild the whole building, and therefore liable to the plaintiffs for the amount properly expended by them. Semble, that the lessees, having covenanted to restore the building, or parts of it, demised to them, were bound to do so, even if there were some latent defects in its construction. And held, that the burden of proof was upon the lessees, and it was impossible to say, upon the evidence, that they had not put a greater load upon the piers than they were apparently fit to carry. Held, also, that the collapse of the building did not come within the exception as to "other unavoidable casualty" in the express provision of the leases, or within the exception of "accident or other casualty" in the implied covenant. Held, also, that where the tenant's covenant to repair contains no provision as to notice, the landlord is under no obligation to give the tenant notice to repair before doing the repairs himself and proceeding to recover the cost. Manchester Bonded Warehouse Co. v. Carr, 5 C.P.D. 510, followed. Held, also, that judgment should be entered for the plaintiffs against F. for the cost of the repairs and the plaintiffs' costs; for F. against N. and B. for this amount and F.'s costs of defence; for the plaintiffs directly against N. and B. for the cost of the repairs and the plaintiffs' costs; for the defendants N. and B. against the third parties for the cost of the repairs, and for N. and B.'s costs applicable to the enforcement of their claim against the third parties, but not for the amount of the plaintiffs' costs.

Telfer v. Fisher, 15 W.L.R. 400 (Alta.).

—Lease of unfurnished house—Warranty as to habitable condition.]—The plaintiff alleged an oral warranty of the habitable condition of an unfurnished house leased to him by the defendant:—Held, upon the evidence, that the plaintiff relied upon his own inspection, and was not given any assurance as to the condition of the house; and, therefore, the case was not brought within De Lassalle v. Guildford, [1901] 2 K.B. 215.

Evans v. Templin, 13 W.L.R. 714.

—Jurisdiction—Damages and specific performance.]—The Superior Court has no jurisdiction to try and determine an action arising from the relation of lessor and lessee in which the amount of damages claimed is under $100, even though, in addition thereto, the conclusions are for the specific performance of work alleged in the declaration to cost $100.

Marcotte v. Lapierre, 37 Que. S.C. 251.

—Contract by correspondence—Acceptance of conditions—Telegram.]—Where negotiations have been carried on by correspondence, for the lease of premises, between the owner and the agents of a company, without a final understanding, and the last letter is from the owner, containing new conditions and proposals, a telegram from the agent in these words: "Will meet you at store, Saturday 2 p.m. Authority to sign lease," is not an acceptance of such conditions and proposals and does not amount to a closing of the contract.

Robichon v. Charlton Co., 39 Que. S.C. 22.

—Covenant for renewal—Construction.]—A lease for 21 years of mill-races and lands on the old Welland Canal contained the covenant that: "After the end of 21 years, as aforesaid, if the said (lessors) do not continue the lease of the said water and works" they would compensate the lessees for their improvements:—Held, Girouard and Duff, JJ., dissenting, that at the end of the 21 years the lessees were entitled to a renewal of the term but not to a new lease containing a similar covenant for renewal or compensation. They had a right to renewal or compensation but not to both. After the original term expired the lessees remained in possession, paying the same rental as before, for a further term of 21 years, no formal lease therefore having been executed and none demanded or tendered for execution. Ten years after the expiration of this second term they were dispossessed and claimed compensation for improvements by petition of right. Held, that the rights of the lessees were the same as if the original term of 21 years had been formally continued, or renewed, for a further like term. Held, per Idington, J., Girouard, J., contra, that the lessees having obtained a renewal their right to compensation was gone. Per Davies and Anglin, JJ.:—The lease was probably not renewed within the meaning or the lessor's covenant, but there having been no proof of a demand for renewal and the lessees having remained in possession for the entire period for which they could have claimed a renewal, they can have no right to compensation for improvements. If they ever had such a right in default of obtaining a renewal it is barred by the Statute of Limitations.

The King v. St. Catharines Hydraulic Co., 43 Can. S.C.R. 595, reversing Exchequer Court.

—Lease of ground floor of building for one year—Covenant for renewal—Covenant to heat upper floor.]—The plaintiff leased to L. et al. for one year the ground floor of a building. The lease provided for a monthly rent of $275, payable in advance monthly. The lessees covenanted that they

would satisfactorily heat, at their own expense, during the term of the lease, the rooms of the upper flat of the building; and also that they would, at their own expense, keep the basement of the premises and all plumbing work in proper sanitary condition. The plaintiff, the lessor, by a clause in the lease, guaranteed that the heating apparatus and the plumbing of the building was in a good working and proper condition, and competent for the purposes for which they were intended. The lease also contained a clause giving the lessees the right to renewal of the lease for a further term of one year, "provided always, and these presents are upon this express condition, that, if the said yearly rent hereby reserved . . . . shall at any time remain unpaid for a space of 10 days . . . . or if a breach or default shall be made in any of the covenants herein contained, by the said lessees, then the covenants herein which relate to a renewal lease for a period of one year on the expiration of this lease shall become null and void and of no effect;" and it gave the lessor a right to re-enter after a breach of these covenants. The defendants were the assignees of the lease from L. et al. There was no express demise of the basement of the building, but the defendants took possession of it and used the furnaces there for the purpose of heating the building, with the consent of the lessor. The plaintiff, alleging that the covenant properly to heat the rooms in the upper flat was not complied with, and therefore the defendants had lost their right to a renewal of the lease, and were overholding after the end of the year, brought this action to recover possession of the demised premises:—Held, that the covenant to heat the upper rooms was not a covenant which ran with the land, but the defendants took the assignment with the notice of that covenant, and in equity it was binding upon them; but it was a condition precedent to its binding effect that the heating apparatus should be in good working and proper condition and competent for the purposes for which it was intended. And held, upon the evidence, that the upper rooms were not satisfactorily heated by the defendants, within the meaning of the covenant; that the heating apparatus was in good working and proper condition so far as it could be, considering the system adopted, which was to some extent defective; that the defendants did not make the best use they could reasonably have expected to make of the system, such as it was; that there had been a breach of the covenant; that there had been nothing to constitute a waiver of the breach; and, therefore, the right to a renewal was gone. Held, therefore, that the plaintiff was entitled to possession, but not to double damages, the holding over not being wilful and contumacious, and not to special damage, none having been proven.

Nankin v. Starland, 15 W.L.R. 520 (Alta.).

—House infested with vermin—Damages.]—

Middleton v. Allard, 3 E.L.R. 144 (Que.).

Fire in leased premises — Responsibility of lessee — Seizure in recaption — Sale of stock in trade "en bloc."] — Held (affirming the judgment of the Superior Court, Doherty, J., 14 Que. S.C. 396, 1899 C.A. Dig. 232, except as to the amount of damages, which was increased):—1. Where a lease contains stipulations to the effect that the lessee shall deliver the premises at the expiration of the lease in as good order as they were at the commencement of the lease, reasonable wear and tear and accidents by fire excepted, and shall pay extra premium of insurance exacted by insurance company in consequence of the work carried on by the lessee, the effect is to do away with the presumption, which would otherwise exist by law in favour of the lessor, that the fire which occurred in the leased premises was due to the fault of the lessee, or of persons for whom he was responsible, and it is for the lessor to prove fault before he can recover damages. Evans v. Skelton, 15 Can. S.C.R., p. 637, followed. 2. Damage by fire so inconsiderable in extent that repairs may be made in three or four days does not justify the lessee in abandoning the premises. His remedy is to put the lessor in default to make the necessary repairs, and then, if the repairs be not made, to ask for the cancellation of the lease. 3. The application of Article 1623 of the Civil Code,—which says that in the exercise of the privileged right the lessor may seize the things which are subject to it, upon the premises, or within eight days after they are taken away; but, "if the things consist of merchandise they can be seized only while they continue to be the property of the lessee"—is not restricted to daily sales of merchandise in detail. The article applies to any sale which a merchant may make in the ordinary course of business: and the sale en bloc of a stock which has been damaged by fire on the premises, is an ordinary and usual transaction; and therefore the lessor is not entitled to seize in recaption, in the possession of the purchaser, a damaged or partially damaged stock bought from the lessee in good faith, even when such merchandise has been sold en bloc.

Ligget v. Viau, 18 Que. S.C. 201.

—Ejectment — Form of deed — Lessor and lessee — Art. 1150 C.P.Q.] — A deed by which the owner of an immovable lets it for

five years to a person who will become owner on payment of certain sums, and who undertakes to pay all taxes, assessments and insurance with a stipulation that should he make default for 60 days in paying each annual instalment he should lose every advantage, is only, in spite of its title of "agreement for sale and lease" a sale of the immovable revocable on certain conditions, and a saisie-gagerie in ejectment, taken by the vendor who claims rent and an indemnity, will be dismissed on exception to the form, the proceeding not being one between landlord and tenant.

Irving v. Mouchamps, 3 Que. P.R. 430 (S. C.).

—Chattels left on premises by tenant — Abandonment—Fixtures.]—

Dundas v. Osment, 4 W.L.R. 116 (Terr.).

—Chattels left on premises by tenant — Abandonment—Fixtures.]—

Dundas v. Osment, 6 W.L.R. 86 (N.W. T.).

—Damage to goods of tenant on demised premises—Escape of steam—Work done by order of agent of landlord—Employment of independent contractors.]—

Malcolm v. McNichol, 2 W.L.R. 515 (Man.).

—Defect in building—Neglect of landlord to repair—Tenant leaving building.]—

McDougall v. Kerr, 8 W.L.R. 528 (Alta.).

—Overholding tenant—Summary proceeding to recover possession — Originating summons—Jurisdiction of local Judge.]—

Porter v. Rooney, 8 W.L.R. 289 (Alta.).

—Implied obligation of tenant to use premises in tenantlike manner—Injury to heating plant.]—

Warren v. Winterburn, 6 W.L.R. 498 (B.C.).

—Lease of land for quarry—Covenant by lessees not to employ more than 10 men in quarry.]—

Nimmons v. Gilbert, 6 W.L.R. 531 (N. W.T.).

—Agreement for farming land—Covenant to plough—Covenant of owner of land to furnish granary — Independent covenants.]—

See v. Branchflower, 10 W.L.R. 37 (Sask.).

—Agreement for lease—Possession—Subsequent agreement under seal—Surrender of previous tenancy.]—

Boyd v. Naismith, 12 W.L.R. 233 (Sask.).

—Duty of landlord to repair—Covenant in lease—Stranger injured by reason of non-repair.]—The plaintiff was injured, when a guest in a hotel owned by the defendant, owing to the floor of a verandah being out of repair and in a dangerous condition. The hotel was occupied by W. under a lease from the defendant, which contained a covenant on the part of the lessee to repair, "except outside repairs," and that the lessee will repair according to notice:—Held, that the exception in the lease as to outside repairs had not the effect of a covenant on the part of the defendant to make outside repairs; but, even if the lease had contained an express covenant on the part of the defendant to make outside repairs, and he was in default in making them, after notice of the want of repair, before the plaintiff was injured, the plaintiff was not entitled to recover, he being a stranger to the covenant, and the covenant not having the effect of putting the defendant in constructive possession of the premises. Cavalier v. Pope, [1906] A.C. 428, followed.

Marcille v. Donnelly, 1 O.W.N. 195.

—Lease of land—Representations as to value and condition of land.]—

Booth v. Beechey, 5 W.L.R. 71 (N.W. T.).

— Lessor boarding with lessee — Contract.]—

Finley v. Miller, 7 E.L.R. 103 (N.S.).

—Vendor becoming tenant to purchaser—Overholding.]—

Girroir v. Ronan, 7 E.L.R. 153 (N.S.).

—Breach of condition—Notice—Waiver.]—

Dominion Coal Co. v. Taylor, 7 E.L.R. 199 (N.S.).

—Lease—Renewal—Subsequent attempt to cancel—Sub-tenant—Payment of rent direct to landlord—Surrender.]—

Yukon Trust Co. v. Murphy, 2 W.L.R. 298 (Y.T.).

—Lease — Privileges not specified therein conceded — Injunction.] — Before the construction of a building by the defendant, the plaintiff agreed to rent a shop in the proposed building. The lease, in the short form, made in pursuance of the Leaseholds Act, described the premises by metes and bounds, without specifying any privileges. Plaintiff, after entering demanded use of water closet and a place for storing coal, and defendant conceded the right:—Held, that the plaintiff was entitled to an injunction restraining defendant from interfering with the right of access to the closet and his right to store coal in rear of the premises.

Ross v. Henderson, 8 B.C.R. 5 (McCall, J.).

—Covenant — Use of hay on the premises —Execution — Rights of execution creditor.] — Plaintiff leased a farm as a dairy farm and a number of cows, the lease containing the following clause: "All the hay, straw and corn stalks raised on the . . farm to be fed to the said cows on the said . . . farm":—Held, that while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle and consumed on the premises, and that he could not have the beneficial use of it or take it off the farm, and an execution creditor of his had no higher right than he had.

Snetzinger v. Leitch, 32 O.R. 440.

—Covenant as to payment for improvements and renewal of lease — Independent covenants.] — A lease contained a covenant to the effect that the lessee might make improvements upon the demised premises, that at the expiration of the lease or any renewal thereof the same should be valued and paid for by the lessor and then concluded as follows: "And upon such payment upon such valuation not being duly made the party of the first part, his heirs or assigns, shall, if so required, give or renew a lease including the covenants of the present lease to the parties of the second part for a further period of five years, with the like agreement of valuation and payment for improvements as in this lease expressed and at the same yearly rent." On the expiration of the term a dispute having arisen between the lessor and lessee as to the effect of the covenant — the former claiming that it was optional with him either to renew the lease or pay for the improvements after valuation. The latter that he was entitled to have the improvements valued and paid for by the lessor — a special case was stated in Equity for the opinion of the Court. Each party was ready and willing to perform the covenant as interpreted by him:—Held (per Landry, Barker and McLeod, JJ.): (1) That the covenant was single and therefore that the lessor was discharged upon his showing that he was ready and willing to renew the lease; (2) That even if there were two separate and independent covenants, one to pay the appraised value of the improvements and the other to renew, only one was to be performed and the option lay with the lessor, he being the first person called upon to act. Per Tuck, C.J.: That the lessee was entitled to have a valuation of the improvements made, that until the making of such valuation it was optional with the lessor to pay for the improvements or renew the lease. Quære, per Tuck, C.J.: Whether a special case stated under the provisions of 53 Vict. c. 4, s. 139, should not be first heard by the Judge in Equity.

Ward v. Hall, 34 N.B.R. 600.

— Construction of renewal clause — Increased rent.] — A renewable lease provided that renewals should be at such "increased rent" as should be determined by arbitrators "payable in like manner and under and subject to the like covenants, provisions and agreements as are contained in these presents." The lease further provided for the payment of the yearly rent as follows: "For the first ten years of the said term $80 per annum; for the remaining eleven years $100 per annum":—Held, that the proper method of increasing the rent on renewal was by adding to the rent of $80 per annum for the first ten years, and to the rent of $100 per annum for the remaining eleven years of the renewal term. Held, also, that the condition as to the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises.

Re Geddes and Garde, 32 O.R. 262.

—Transfer of lease — Title to land — Alienation for rent — Possessory action.] — An instrument by which lands were leased for sixteen years at an annual rental, subject to renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. The leased premises were transferred by the lessee by deed of sale, and on disturbance an action, with both petitory and possessory conclusions, was brought by the transferee against an alleged trespasser, who pleaded title and possession in himself without taking objection to its cumulative form:—Held affirming the judgment appealed from, that under the circumstances the action should be treated as petitory only; that the contract under the instrument described was neither emphyteusis nor a bail á rente (lease in perpetuity), but merely an ordinary contract of lease which did not convey a title to the land nor real rights sufficient to confer upon the transferee the right of instituting a petitory action in his own name. Held, also, that the transfer by the deed of sale of such leased premises would not support the petitory action, as the lessee could not convey proprietary rights which he did not himself possess.

Price v. LeBlond, 30 Can. S.C.R. 539.

—Maintaining unsafe building — Snow and ice — Resulting damages.] — Held, by the Court of Review (affirming the judgment of Archibald, J.):—The proprietor of a building is responsible for injuries caused by snow or ice falling from the roof thereof, where the fall of the snow or ice re-

sults from a want of proper care in keeping the premises in a safe condition; and the proprietor is not relieved from this responsibility as regards the public by the fact that the building is wholly occupied by tenants, or by the fact that the municipal by-laws impose upon tenants the obligation of keeping the roof free from snow.

Jackson v. Vanier, 18 Que. S.C. 244.

—Negligence — Defective platform — Liability of lessee — Covenant by lessor to repair — License from lessee — Invitation.] —One of the plaintiffs purchased from an exhibition association, upon the terms mentioned in the agreement set out in the report, the privilege of selling refreshments under a certain building during the holding of the exhibition in grounds leased by the association from the corporation of a city for two months in the year for the purpose of holding an exhibition, the city by the lease covenanting to repair. During the period of her occupation, and while walking across a platform which was constructed between the building and the sidewalk to give access to people requiring refreshments, the female plaintiff put her foot into a hole in the platform which was out of repair and was injured:—Held, that under the agreement mentioned, she was not a lessee of the premises but a mere licensee, who was lawfully there upon the invitation of the association, and that the association owed a duty to the persons whom they induced to go there to keep the place in proper repair; that there was no liability on the corporation of the city as they were not the occupiers of the grounds and did not invite the plaintiff to go where she was hurt, and there was no highway to be kept in repair by them, but that the association, who had by their negligence caused the accident, were liable.

Marshall v. Industrial Exhibition Association, 1 O.L.R. 319.

—Lease — Option to purchase — Revocation of by death — Consideration, inadequacy of.] — A provision in a lease, whereby the lessor grants to the lessee an option to purchase the leased property within a limited time, is not a nudum pactum. Such an option is, within the time limited, binding on a deceased lessor's personal representatives, though not so expressed. Statements, whether written or verbally made, by the lessor as to the terms of the lease are not, after the death of the lessor, admissible as evidence in favour of his successor in title as being declarations against the deceased's interest. Per McGuire, C.J.—Such statements merely amount to statements of an agreement which must be supposed to be made on fair terms, and, consequently, as much in favour of the maker's interest as against it. Where a tender is made in current bank bills, and objection is made only to the amount tendered, the objection cannot subsequently be taken that the tender was not made in "legal tender." Judgment of Rouleau, J., affirmed.

Yuill v. White, 5 Terr. L.R. 275.

—Lease made by deceased husband — Dower —Priorities.] — A doweress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but, as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her, in priority to persons claiming under leases created by her husband, without her assent, during the coverture. Stoughton v. Leigh (1808), 1 Taunt, 402, followed. Where a testator, dying in August, 1901, devised land to his son, and probate of the will was granted to the executor named therein, and the son in April, 1902, executed a conveyance of a part of the land to the testator's widow for her life, as and for her dower, the executor not assenting thereto:—Held, that the conveyance was of no avail; for the only person who could assign dower was the executor, in whom, under s. 4 of the Devolution of Estates Act, R.S.O. 1897, c. 127, the whole inheritance of the testator vested.

Allan v. Rever, 4 O.L.R. 309 (Street, J.).

—Specific performance — Right of lessor to compel lessee to sign notarial lease or have judgment serve for lease — Art. 1065, C.C.] —Held (reversing the judgment of the Superior Court, Archibald, J.):—Where the lessee refuses to sign a notarial lease in the terms of the agreement between him and the lessor in respect of the premises leased, the lessor has a right to bring suit, and have the lessee condemned to sign the lease, and, in default of his so doing, to have it ordered that the judgment of the Court shall serve as such lease.

Walsh v. Broke, 21 Que. S.C. 394 (C.R.).

— Lessee — Covenant to repair grosses reparations.] — A lessee, bound by his lease to make grosses réparations is not responsible for an accident to the leased premises when there has been no abuse of his enjoyment thereof and the accident was the result of defect in construction.

Allan v. Fortier, 20 Que. S.C. 50 (Sup. Ct.).

—Lessor and lessee — Anticipated rent — Repairs — Evidence.] — A sum of $300 paid by the lessee to the lessor as a bonus for improvements made to the immovable is equivalent to an additional rent paid by anticipation. If the lease, therefore, is resiliated by a judgment in an action by the lessee for failure by the lessor to make the repairs the latter is bound to repay the bonus as any other rent paid in advance. The lease of an immovable for a commercial establishment is a purely civil contract. A plaintiff who has voluntarily destroyed a written sons seing privé expressing a contract with the defendant cannot be allowed to give oral evidence of the contents of such writing.

Coté v. Cantin, 21 Que. S.C. 432 (Sup. Ct.).

— Lease — Description — Falsa Demonstratio.] — By an indenture of lease lessees were given the right to "a sufficient supply of water for the purpose of propelling a wheel not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises." The "present wheel" was forty inches in diameter:—Held, that the governing words were "not exceeding forty-four inches in diameter" and that the subsequent words "being the size of the present wheel upon the premises" should be rejected as falsa demonstratio. Judgment of Ferguson, J., reversed, Maclennan, J.A., dissenting.

Brantford Electric and Operating Company v. Brantford Starch Works, 3 O.L.R. 118 (C.A.).

—Agreement for lease — Waiver — Distress for rent.] — Defendant contracted to let to plaintiff a house, then under construction, for the term of one year from the 1st June, 1900, at the rental of $20 per month, payable monthly in advance. It was agreed that in the event of the house not being completed by June 1st, there should be a proportionate reduction in the rent. The house was not completed by the time agreed, but plaintiff moved in on the 24th June, when the work was still unfinished. No rent was charged for the month of June, but plaintiff paid rent in advance for the months of July, August, September, and October, and continued in occupation of the premises until the 1st May, 1901, when he moved out. In an action by plaintiff, claiming damages for goods distrained by defendant for rent in arrear:—Held, dismissing plaintiff's appeal, with costs, that the trial Judge was right in construing the agreement as a letting for a year from the 1st June, 1900, with a condition that if the occupancy was prevented by reason of the house not being ready for occupation at that time, there should be a deduction from the rent in respect to the period of time during which the house was not occupied. Held, also, that the payments made by plaintiff showed a waiver of the provision made in respect to the house being finished by a fixed date, or rather, in respect to the reduction which was to be made in consequence of its not being finished.

Acorn v. Hill, 34 N.S.R. 508.

— Lease — Covenant — Forfeiture — Waiver.] — A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors six months rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment, which was afterwards done, the lessors executing the assignment as creditors assenting thereto. Held, reversing the judgment of the Court of Appeal, 1 Ont. L.R. 172, that the lessors and the company were distinct legal persons, and the individual interests of the former were not affected by the above action. Salomon v. Salomon & Co. (1897), A.C. 22, followed. The assignee of the company held possession of the leased premises for three months and the lessees accepted rent from him for that time and from sub-lessees for the month following. Held, also reversing the judgment appealed from, that as the lessors had claimed the six months accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; as the assignee had a statutory right to remain in possession for the three months and collect the rents; as the evidence showed that the receipt by the lessors of the three months rent was in pursuance of a compromise with the assignee in respect to the acceleration; and as the month's rent from the sub-tenants was only for compensation by the latter for being permitted to use and occupy the premises and for their accommodation; the lessors could not be said to have waived their right to claim a forfeiture of the lease. Mortgagees of the premises having notified the sub-tenants to pay rent to them the assignee paid them a sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged. Held, that this also was no waiver of the lessors' right to claim a forfeiture. Quære, was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company or would it, on surrender of the original lease have bound the lessor and a purchaser from him of the fee?

Soper v. Littlejohn, 31 Can. S.C.R. 572.

— Specific performance — Undertaking to build — Non-performance.] — By an instrument dated 29th January, 1901, a father leased a farm to his son for five years from the 1st March, 1901, at a yearly rental of $200 payable in October of each year, and undertook to build on the farm, during the first year of the term, a house of certain expressed dimensions. There was a provision in the instrument for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on the 19th June, 1902 (after the expiry of the first year of the term), but had not built nor done anything towards building the house. By his will, dated the 7th February, 1901, he devised the farm to his son, but made no reference to the lease:—Held, that (the father having died after the breach of the undertaking) the son was not entitled to have the house built at the

expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build. Cooper v. Jarman (1866), L.R. 3 Eq. 98, and In re Day, [1898] 2 Ch. 510, distinguished. Re Murray, 4 O.L.R. 418.

— Responsibility for an accident caused by weakness of construction.] — The lessee is not obliged to notify the lessor of the need of repairs to the leased premises, which the lessor is obliged to make. It is the duty of the proprietor to inspect his own property from time to time, and ascertain what repairs are necessary. He is, therefore, although not notified of any defects, responsible in damages for an accident which happened to the tenant in consefrom the landlord, damages resulting to the tenant from non-repair of the premises. Troude v. Meldrum, 21 Que. S.C. 75.

— Lease — Tacit reconduction — Verbal lease — Mise en demeure — Damages suffered by tenant through bad state of premises — Verbal mise en demeure — Responsibility of lessor.] — (1) Lease by tacit reconduction is not a verbal lease. (2) Under such a lease, a verbal mise en demeure to make repairs is insufficient. (3) A mise en demeure is necessary in order to claim from the landlord, damages resulting to the tenant from non-repair of the premises. Pelletier v. Boyce, 21 Que. S.C. 513 (Andrews, J.).

—Arrears of ground rent — Movable or immovable — Personal promise of purchaser to pay rent to vendor — Arts. 338-391 C. C.] — (1) A ground rent established before the coming into force of the Civil Code, even if it were immovable under the law as it existed at the time the rent was constituted, has become movable by the operation of the Code, under the provisions of which it is convertible into money, and redeemable, and consequently movable (Arts. 388, 389, 390, and 391 C.C.). (2) Where there is a personal promise by the purchaser to pay the rent to the vendor at a given date each year, there is a personal liability to pay the amounts as soon as the time has elapsed and the arrears are movable. (3) Acceptance of such promise, by the person by whom the rent was created, is sufficiently established by the fact that he received payments and gave receipts to the purchasers in their own name, and entered them in his books as debtors of the amount. Laviolette v. Toupin, 21 Que. S.C. 538 (Archibald, J.).

— Covenant by lessee to assign liquor license.]—

See LIQUOR LICENSE.

Walsh v. Walper, 3 O.L.R. 158.

— Lease — Renewal — Increased rent — Arbitration.] — In a lease for twenty-one years the rent fixed was, for the first year $106.88, for the next four years $130 a year, for the next five years $145 a year, and for the remaining eleven years $178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants . . . as are contained in these presents." The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease:—Held, that the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase was to be based upon the rent reserved for the whole term, and not for any particular year or years of it; and might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past. In re Geddes and Garde (1900), 32 O.R. 262, approved. In re Geddes and Cochrane, 3 O.L.R. 75.

— Action negatoire — Servitude — Damage by water.] — L'action négatoire taken by reason of work done by the lessee of land having caused the waters thereof to be directed on to the soil of the plaintiff which had not previously received them should be directed against the owner and not the lessee. Plaintiff may ask that the owner be condemned to take the necessary steps to prevent the overflow of the water, but he cannot claim from him damages caused by the act of the lessee if the latter, in doing the injurious work, was not acting for the owner. Seminary of Foreign Missions v. Kieffer, 11 Que. K.B. 173, reversing 14 S.C. 325.

—Damage suffered by tenant of part of building caused by defective condition of another part.] — The plaintiff was tenant of a store on the ground floor of a building owned by the defendant and sued for damages to her goods caused by rain water entering by an unglazed fanlight over a door at the end of a hall extending from the head of a stairway leading to the second floor of the building. The water, flowing over the floor above the plaintiff's store, came through the ceiling, and caused plaster to fall which damaged the plaintiff's goods. The defect complained of existed at the time of the demise to the plaintiff:—Held, that the defendant was not liable. Miller v. Hancock, [1893] 2 Q.B. 177, distinguished. A tenant taking part of a building in other parts of which are defects likely to result in damage to him should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the

landlord for damages caused by such defects.

Rogers v. Sorell, 14 Man. R. 450 (Killam, C.J., Dubuc and Richards, JJ.).

— Contract by which the lessee undertook to furnish the leased premises — Basis for estimation of value.] — Where, by the lease, the lessee undertook to furnish the leased premises with "a sufficient quantity of household furniture or goods to secure the payment of one year's rent," the effects upon the leased premises should be valued in accordance with their ordinary merchantable value, and not in accordance with what they might bring at a forced sale.

Rousseau v. Archibald, 12 Que. K.B. 14.

—Sheriff's sale of land — Lease for one year.] — A lease for one year, whether registered or not, does not constitute a charge on the immovable leased, and gives no right to the lessee to make an opposition a fin de charge when the immovable is advertised for sale by the sheriff.

Lantaigne v. Skelling, Q.R. 22 S.C. 304 (Sup. Ct.).

— Patent defects in premises — Damages.] —The landlord is not liable in damages to his tenant for injury resulting from patent defects in the leased premises in which defects had existed when the tenancy began. Cartir v. Durocher, Q.R. 22 S.C. 255 (Sup. Ct.), affirmed on review.

— Claims for repairs at lessor's request — Parol evidence.] — On a claim for repairs done by the lessee at the request of the lessor, and board of men, exceeding $50, the request cannot be proved by parol evidence.

Caron v. Gaudet, 6 Que. P.R. 23 (Doherty, J.).

— Trespass by third party.] — A landlord is liable to his tenant if thieves gain entrance into the house adjoining and overturn a cistern whereby the water penetrates into the house leased to the tenant, such action not being a mere trespass by a third party within the meaning of Art. 1616 C.C., but a substantial act which affects the enjoyment of the premises in a manner prejudicial to the tenant.

Brisker v. Larue, Q.R. 23 S.C. 447 (Sup. Ct.).

— Improvements — Materials furnished to lessee.] — The trader who has furnished to a tenant materials for work to be done on the house occupied by the latter, cannot maintain an action against the owner for the price of the same.

Delisle v. Marier, Q.R. 23 S.C. 521 (Cir. Ct.).

— Privilege of lessor — Insolvency — Retroactivity of statute.] — 1. In interpreting laws which affect public interests, e.g., a law for the equitable distribution of insolvent estates, the Legislature is rather presumed to have intended that they should apply generally from the date of their coming into force, so as to accomplish the object for which they were passed, especially when a delay is given between the passing and coming into force of such laws, within which persons affected thereby could take means to preserve acquired rights. (2) The amendment made by 61 Vict. (Q.) c. 46, replacing Art. 2005 of the Civil Code, by which, in the case of the liquidation of property abandoned by an insolvent trader, the lessor's privilege is restricted to twelve months' rent due and to rent to become due during the current year, etc., applies to and includes claims for rent which have arisen under authentic leases made prior to the coming into force of the amending Act.

Re Bulmer, 22 Que. S.C. 46 (Archibald, J.).

— Stipulation in lease that "accidents by fire" are excepted — Proof — Article 1629, C.C.] — One of the covenants of the lease from plaintiff to defendant provided that the tenant should deliver up the premises, at the expiration of the lease, "in as good order, state and condition as the same may be found in at the commencement of the same, reasonable wear and tear, and accidents by fire, excepted." The building was destroyed by a fire, the origin or cause of which was not definitely determined. In an action by the lessor to recover from the lessee the value of the building destroyed less the amount of the insurance money received:—Held (affirming the dispositif of the judgment of the Superior Court, Davidson, J., 21 Que. S.C. p. 1):—(1) A fire in the leased premises, the cause of which is unknown, or not legally proved, is an accident within the meaning of the abovementioned clause in the lease excepting "accidents by fire." (2) In such case there is no presumption of fault against the lessee, where a fire occurs the origin of which is unknown, but rather a presumption of absence of fault, and the burden of proving fault is on the lessor. (3) (Per Mathieu and Lavergne, JJ.): Even assuming that the burden of proving absence of fault was on the lessee, he had succeeded in doing so in the present case.

Ford v. Phillips, 22 Que. S.C. 296, C.R.

— Sale by auction — Opposition to secure charges — Security.] — An hypothecary creditor causing the sale of an immovable in execution may, by motion, demand that a tenant making an opposition a fin de charge based upon his lease, should furnish security that the immovable shall be sold for a sum sufficient to make complete payment of his debt. (See Desaulniers v. Payette, 5 Que. P.R. 344.)

Trust and Loan Co. v. Charlebois, 5 Que. P.R. 365.

— Sale by auction — Opposition to secure charges — Motion for security.] — Held (affirming Langelier, J.), that an hypothecary creditor has the right to ask that the tenant making an opposition a fin de charge founded upon a registered lease should furnish good and sufficient security that the property shall sell for a price sufficient to make the amount of his debt, and this before the advertisements for the sale have been given. Semble, that the tenant, under registered lease, has the right in case of sale by auction, to protect himself by opposition a fin de charge.
(See also Q.R. 12 K.B. 445.)

Desaulniers v. Payette, 5 Que. P.R. 344. (See also Q.R. 12 K.B. 445.)

Motion for leave to appeal to the Supreme Court of Canada was refused (33 Can. S.C.R. 340).

— Ground rent — Valuation of buildings — Extension of time for making award — Interest.] — By a lease made on the 1st November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuators or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid by the lessors, with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the valuators or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the lands and buildings was given up by the lessees to the lessors on the 31st October, 1900:—Held, Osler, J.A., dubitante, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent., and for the remainder of the time at the legal rate of five per cent. Judgment of a Divisional Court, 3 O.L.R. 519, varied.

Toronto General Trusts Corporation v. White, 5 O.L.R. 21 (C.A.).

— Renewal of lease — Appointment of arbitrators — Injunction to restrain proceedings before sole arbitrator.] — The renewal clause in a lease provided that at the expiration of the term the lessors might at their election either take the lessees' improvements at a valuation to be fixed by arbitrators prior to such election being made, or grant a new lease for a further term. No time limit was fixed within which the arbitration should take place, and either party might require the other to appoint an arbitrator within seven days, and on default might appoint a sole arbitrator. The lease terminated November 1st, 1900, and on April 30th, 1900, the lessees wrote saying they had no desire to renew and would be glad to give up possession. The lessors, however, did nothing to relieve the lessees of possession; but, on the contrary, in June and July, 1901, they endeavoured unsuccessfully to have the assessment roll altered by preserving the tenants' names thereon as still tenants. On February 15th, 1902, they gave notice to arbitrate requiring the lessees to appoint an arbitrator:—Held, that the lessees were precluded by delay from enforcing renewal of the lease. The lessees, disputing their obligation to take a renewal lease, and desiring to have that point first decided, appointed their arbitrator under protest, but the lessors refused to accept such nomination, and appointed a sole arbitrator. Held, that the Court had jurisdiction to restrain proceeding before a sole arbitrator, and injunction granted accordingly.

Farley v. Sanson, 5 O.L.R. 105 (Boyd, C.).

—Liability of lessee to adjoining proprietor in respect of works on his land.] — Where a lessee of defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatory of the defendants, the lower part of the leased land with the effect of diverting to the plaintiff's adjoining land, and thereby causing him damage, the water which would otherwise have been discharged over the defendants' land:—Held, that the plaintiff's remedy was against the lessee, and that an action negatoire against the defendants, who claimed no servitude over the plaintiff's land, was unnecessary.

Kieffer v. Le Seminaire de Quebec, [1903] A.C. 85.

—Rent payable in kind — Implied covenants in lease—Liability for failure to crop.] —In April, 1898, the plaintiff leased by deed to defendant's husband a half section of land for five years at a rental of one-third of the crop grown on the premises yearly. The lease was on a printed form of a farm lease and contained covenants by the lessee that he would during the term cultivate such part of the land as was then or should thereafter be brought under cultivation in a good, husbandlike and proper manner, and would plough said land in each year four inches deep and crop the same during the term in a proper farmer-like manner. Afterwards a new lease of the same land was made by deed, ante-

dated so as to bear the same date as the first one, substituting the defendant as lessee instead of her husband. This was done, as found by the trial Judge, at the request of the defendant's husband who had reason to fear the action of a creditor in case the lease remained in his name, and it was intended that the new lease should be a duplicate of the other in all respects except as to the name of the lessee. The new lease, by mistake of the solicitor who prepared it, was written on a printed form of "statutory lease," not containing the special clauses applicable to farm land. It provided for the same rental as the other lease, payable in the same way and at the same times, and contained the same covenant to plough four inches deep in each year written into it, but no express covenants to cultivate or crop the land. By the end of 1901 the cultivated portion of the farm was 117 acres, but in 1902, the defendant only ploughed and cultivated four acres out of the 117, and weeds grew up all over the rest. The plaintiff's claim was for damages for breach of covenants to cultivate, crop and plough in 1902, which he contended should be implied in the lease to defendant under the circumstances. In his statement of claim he had asked for a reformation of the lease by including the covenants to cultivate and crop that were in the first lease, but abandoned that claim on the argument:—Held, following McIntyre v. Belcher (1863), 14 C.B.N.S. 654; The Moorcock (1889), 14 P.D. 68, and Hamlyn v. Wood, [1891] 2 Q.B. 491, that such covenants should, under the circumstances, be implied in the lease to defendant, and that she was liable for the estimated value of one-third of the crop that would probably have been produced on the 117 acres if it had been cropped in that year, and for the deterioration in value of the land on account of defendant having allowed it to grow up with weeds.

Dunsford v. Webster, 14 Man. R. 529 (Richards, J.).

—Covenant not to cut down timber —Statutory covenant — Common law rights.]— Under a covenant in a lease made in pursuance of the Short Forms Act, the lessee was not to cut down timber for any purpose whatever, except for fire wood, but he was to have the privilege of using for any purpose all the lying down hard wood timber, cedar only excepted:—Held, that the covenant was a restriction of the statutory covenant, under which the lessee could cut down timber, or timber trees for necessary repairs, or for fire wood, but was an extension of the common law right, which was limited to lying down dead timber, and that the covenant allowed the lessee to use all the lying down hard wood timber, sound or unsound, except in so far as restricted by the exception as to cedar.

Smellie v. Watson, 7 O.L.R. 635 (C.A.).

—Condition against sub-letting whole or in part—Letting furnished rooms to lodgers.] —A condition in a lease, prohibiting subletting of the premises in whole or in part, is not violated by a tenant who lets furnished rooms to lodgers, the tenant retaining the entire care and control of such rooms, and the lodgers not even being in possession of keys thereto.

Collerette v. Bassinet, 24 Que. S.C. 372 (Archibald, J.).

— Hire of immovable — Service.] — A contract when a person grants to another the use of an engine and boiler affixed to the soil, with a place underneath for depositing fuel, constitutes a lease of an immovable although a fixed price is stipulated for by the contract as well for the use of the engine and boiler as for the wages of the lessee's son whose services were, by the contract, hired to the lessee.

Landie v. Sylvestre, Q.R. 24 S.C. 233 (Ct. Rev.).

— Purchase clause — Advance rent — Purchase money.] — S. leased land from F. for a term of three years at a rent of $150, payable in advance, with a right to extend the term for a further period of six years—that is, two terms of three years each—on paying a further sum of $150, in advance, at the beginning of each term of three years. The lease also contained a purchase clause whereby F. agreed to convey to S. the leased premises at any time within the nine years for the sum of $600, and further agreed that any payment which might have been made on account of the lease rent in advance at the time at which such conveyance might occur should be allowed as part payment:—Held, affirming the judgment of the Judge in equity, that in case of a purchase all the advance rent should go on account of the purchase money.

Freeman v. Stewart, 36 N.B.R. 465.

— Defective gallery — Responsibility for damages resulting from non-apparent defect.] — Where the tenant suffers personal injuries resulting from the giving way of a portion of the structure leased, the fault is not contractual but delictual, and the lessor is responsible therefor without having been put in default, even where the defect was not apparent, and was unknown to either proprietor or tenant.

Vineberg v. Foster, 24 Que. S.C. 258 (Archibald, J.).

— Additional insurance premium — Contract.] — An action lies in favour of a tenant against his landlord, for the recovery of the excess of an insurance premium paid by the tenant to the latter under contract when, in the course of the year for which such insurance was effected, the classification of the building was changed and the landlord got a refund of such excess from the insurance company.

Benard et al. v. Prefontaine, 6 Que. P.R. 327 (Lynch, J.).

—Lease of premises for hotel — Premises not fulfilling requirements of by-law — Illegal lease.] — Premises in Vancouver leased for use as a hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and the lessee were aware at the time the lease was entered into. The lessee was stopped using the premises as a hotel by the authorities: — Held, in an action by the lessor on covenants for rent and repair, that the lease was void ab initio and the maxim In pari delicto portior est conditio defendentis applied. Even if the lease were not void ab initio it became void by the action of the authorities in stopping the further use of the premises as a hotel.

Hickey v. Sciutto, 10 B.C.R. 187 (Hunter, C.J.).

— Failure of lessor to give the lessee possession—Holding over of previous tenant.] —The fact that the previous tenant refused to vacate the premises at the expiration of his lease, and that legal proceedings were necessary to effect his ejection, does not relieve the lessor from a claim for damages by the lessee who was prevented from getting possession at the date stipulated in the lease.

Lariviére v. Vinet, 25 Que. S.C. 338 (Curran, J.).

—Renewal — Arbitration — Appointment of arbitrators — Procedure.] — A lease contained an agreement for renewal upon the following terms: the lessors were at liberty to elect either to take the improvements made by the lessees at a valuation or to grant a new lease for a further term at a rent to be fixed by arbitrators, one to be chosen by the lessors, one by lessees, and a third by the two, provided that if either party refused or neglected to appoint an arbitrator within seven days after being required in writing by the other to do so, the other might appoint a sole arbitrator, whose award should be final. After the original term had expired, the lessors served upon the lessees a notice requiring them to appoint an arbitrator. The lessees answered by stating that they contended that the lessors had no longer any right to insist upon a renewal, and protesting against any arbitration, but at the same time naming an arbitrator. The lessors did not accept this as an appointment of the arbitrator, and assumed to appoint a sole arbitrator as upon default for seven days after notice:—Held, affirming the judgment of Boyd, C., 5 O.L.R. 105, that the lessees had made a valid appointment of an arbitrator, and the lessors had no right to appoint a sole arbitrator; and that the lessees were entitled to resort to the Court to have the lessors restrained from proceeding before a sole arbitrator and to have a determination of their contention that the lessors had no right to insist upon a renewal. North London R.W. Co. v. Great Northern R.W. Co. (1883), 11 Q.B.D. 30, and London and Blackwall R.W. Co. v. Cross (1886), 31 Ch. D. 354, distinguished. Direct United States Cable Co. v. Dominion Telegraph Co. (1881-3), 28 Gr. 648, 8 A.R. 416, followed. Semble, per Osler, J.A., that the lessors could not require the lessees to appoint an arbitrator without having first or at the same time appointed one on their own behalf.

Farley v. Sanson, 7 O.L.R. 639 (C.A.),

—Action between tenants — Warranty.] — When a tenant has brought an action against another tenant of his landlord, in consequence of an act of violence committed to his injury and the defendant pleads that the plaintiff has not the right in the land which he claims under his lease, but that he (defendant) has the sole right of enjoyment thereof, the plaintiff may bring in his landlord in warranty to defend him against the defendant's claim.

Hamilton v. Royal Land Co., Q.R. 24 S.C. 411 (Ct. Rev.).

—Lease — Short Forms Act — Covenant — Covenant to repair — Variation from statutory form.] — An indenture of lease, bearing date the 29th of June, 1891, expressed to be made in pursuance of the Act then in force respecting Short Forms of Leases (R.S.O. 1887, c. 106) contained a covenant by the lessees that they would "leave the premises in good repair, ordinary wear and tear only excepted," the words "ordinary wear and tear only excepted," not being in the statutory short form and the extended statutory equivalent of the short form having in it the exception "reasonable wear and tear and damage by fire only excepted": Held, (Magee, J., dissenting), that the added words were not an exception to or qualification of the short form within the meaning of the Act; that the covenant had to be construed as it stood without the aid of the extended form; and therefore that the exception as to damage by fire did not apply. Judgment of Boyd, C., affirmed.

Delamatter v. Brown Brothers Company, 9 O.L.R. 351, D.C.

— Injunction — Improvements.] — The owner of property who, while it is under lease, has considerable improvements made thereto which disturbs the lessee's quiet enjoyment may be compelled by interlocutory injunction to desist.

Haycock v. Pacaud, 7 Que. P.R. 249 (Sup. Ct.).

—Repairs — Damages — Nature of occupation.] — A tenant can claim from the owner, who, in making repairs, has exceeded the time fixed for the purpose in the lease, only the damages directly resulting from the non-observance of the conditions

in the lease and which might have been anticipated at the time it was executed. Therefore, if it does not appear that the premises are leased for business purposes, the owner cannot expect to be called upon to pay other damages than those resulting from the lease of a residence and cannot be liable for damages caused by the tenant being prevented from carrying on a tailor's business during the time repairs are being made to the premises leased for a dwelling house only.

Leveille v. Pigeon, Q.R. 26 S.C. 73 (Sup. Ct.).

—Covenant for renewal — Option of lessor — Second term — Possession by lessee after expiration of term.] — A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued, and it should be optional with the lessors either to pay for the same or continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years when a new indenture was executed which recited the provisions of the original lease, and, after a declaration that the lessors had agreed to continue and extend the same for a further term of 14 years from the end of the term granted thereby at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender and, after demand of further rent and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option. Held, affirming the judgment of the Court below (28 N.B. Rep. 1), Ritchie, C.J., and Taschereau, J., dissenting, that the lessees were not entitled to a decree for specific performance. Held, per Gwynne, J., that the provision in the second indenture granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant. Per Gwynne, J. (Patterson, J., hesitante) that assuming the renewal clause was incorporated in the second indenture, the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could the clause would operate to make the lease perpetual at the will of the lessors. Per Gwynne and Patterson, JJ., that the option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and, if the second indenture was subject to renewal, the clause had no effect, as there were no buildings erected during the second term. Per Gwynne, J.—The renewal clause was inoperative under the Statute of Frauds, which makes leases for three years and upwards, not in writing, have the effect of estates at will only and, consequently, there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Sears v. City of Saint John (1890), 1 S.C. Cas. 486.

—Lease — Covenant to pay taxes — Usual covenant.] — Where an agreement between the appellant railway and the respondent municipal corporation provided for a renewable lease from the latter to the former of a large tract of land for railway purposes, but was silent as to payment of taxes by the appellant:—Held, that the lease should contain a covenant by the appellant to pay the same, partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corporation and partly because a covenant to that effect was shown to be a usual covenant in the sense that the corporation invariably insisted on it in their leases. Judgment of Court of Appeal (Ont.), 5 O.L.R. 717, varied.

Canadian Pacific Railway v. City of Toronto [1904] A.C. 33.

—Partial destruction of premises — Rent during the time of repairs — Collapse of premises — Bad construction and material —Hidden defects.] — (1) A clause in a lease "that indispensable repairs shall be performed without reduction of rent, damages or compensation" does not apply to the reconstruction of the premises leased, when partially destroyed so as to render them unfit for the purposes of the lease and to compel the lessee to vacate them. In such a case, the latter is relieved from the obligation to pay rent during the period of reconstruction. (2) The lessor is liable for the damages sustained by the lessee by the collapse of the premises leased, caused by bad construction and defective materials, even though such defects were hidden and could not have been ascertained by any ordinary examination of the building.

Central Agency, Ltd., v. Hotel-Dieu of Montreal, Q.R. 27 S.C. 281 (C.R.).

—Building lease — Expiration of term — Work done under prior leases and by subtenant — "Permanent improvements."] — Where, by the terms of a lease, the lessors, in case of their refusal to renew at the ex-

piration of the term, were to pay to the lessee "such reasonable sum" as "the buildings and permanent improvements" on the demised premises might then be worth, evidence was held, in an arbitration to fix their value, to be admissible to explain the meaning of the words "permanent improvements," namely, improvements made and in a sense owned by the lessee:—Held, also, that the meaning of the word "worth" was the value of such buildings and permanent improvements to the lessee in case the lease was renewed, and the principle to be adopted was the fair and reasonable market value thereof as would result, if it were the case of the bringing together of a willing buyer and prudent seller. Where certain of the alleged improvements claimed for consisted of filling in portions of a water lot, which was done by or for lessees under prior leases in performance of agreements entered into therefor. Held, that the claimant was not entitled to be paid for such filling in, for when done it at once became part of the freehold, and was not in any sense a permanent improvement under the claimant's lease. Where other alleged improvments, also consisting of filling in, were done by a sub-tenant, under a sublease from the claimant. Held, that such improvements enured to the benefit of the lessee, and he was entitled to be paid therefor. Where a submission to arbitration is silent as to costs, sub-s. 6 of s. 2 of the Municipal Arbitration Act, 1897, c. 227, applies, and empowers the arbitrator to deal with the costs; and he having awarded costs to the claimant, the Court, under the circumstances, refused to interfere.

Dalton v. City of Toronto, 12 O.L.R. 582 (C.A.).

—Repairs to furnace — Rates of fire insurance — Business carried on in premises.] —(1) Repairs to a furnace, such as substituting a new section for one that is cracked and leaks from long usage, are not tenant's repairs, and the cost must be borne by the lessor. (2) In construing a lease, in which the lessor and lessee are both described as manufacturers of tobacco, and the premises as "a four storey building, etc., now occupied by the lessor as a factory," it is fair to infer that the premises were leased to be used as a tobacco factory. Therefore, a clause in the lease that "the lessee shall pay all extra premiums of insurance of the premises, exacted in consequence of the business or work he carries on therein," does not make him liable for the difference between warehouse and factory rates of insurance.

Fortier v. Youngheart, 28 Que. S.C. 118 (C.R.).

—Injury to roof — Failure to repair.] — Plaintiff was tenant under defendant of the "dwelling portion" of a building, the remainder of which was occupied by defendant as a shop. During a storm a skylight was blown from a neighbouring building and struck the roof of defendant's building and injured it. Plaintiff notified defendant, who gave an order on a builder for the repair of the roof, but, before this could be done the weather conditions became such that the repairs could not be effected, and, later on, water from rain and from the melting of a heavy accumulation of snow on the roof, came through and damaged plaintiff's property:—Held, reversing the judgment of the trial Judge, that defendant was under no obligation to repair the roof which would make him responsible in damages, and that his promise to have the injuries made good was without consideration to support it and was not binding.

Betcher v. Hagell, 38 N.S.R. 517.

— Covenants in lease — Assignment — Sublessee — Forfeiture of rent.] — In an action of replevin by a sub-lessee against the lessor for goods taken by the lessor under a distress for rent, the plaintiff is entitled to prove, on cross-examination of the lessor, that there had been a breach of a covenant in the lease which forfeited the rent claimed. A sub-lessee in such an action is entitled to the benefit of a covenant in the lease which forfeits the rent as a penalty for a breach, though there has been no assignment of the lease in writing.

Ringuette v. Herbert, 37 N.B.R. 68.

—Landlord's claim for damages — Tenant's failure to repair.] — A lessor, in order to obtain judgment must prove that he has suffered damages from his inability to relet the premises leased, that he has paid the taxes claimed, and that the repairs done are "reparations locatives."

Lamarche v. Bessette, 7 Que. P.R. 351.

—Repairs — Apparent defects — Contract against liability.] — The duty of the landlord to maintain leased premises in fit condition for the use for which they were leased is not imposed by law of the essence of the contract of lease and hire, and it may be validly stipulated that he shall be exempt from this obligation. The landlord is not under any obligation in respect of apparent defects, in the premises leased, of which the defendant, at the time of the lease, could have obtained information.

Rivard v. Pelchat, Q.R. 28 S.C. 8 (Sup. Ct.).

— Obligations of lessors and lessees — Covenant not to sub-let without consent of owner.] — (1) A tenant who sub-lets premises in breach of a covenant with the owner not to do so without his consent, is liable for the damages sustained by the sub-tenant who is expelled at the suit of the owner. (2) A demand for improbation can only be made when it is relevant and will be rejected if the "faux" complained of does not affect the issue between the parties.

Hanleyson v. Dozois, 28 Que. S.C. 400.

— Contract of lease — Sub-lease — Rights of lessor and of sub-tenant.] — The voluntary cancellation by the parties, for inability of the tenant to pay the rent, of a lease with a stipulation that failure to pay rent should dissolve it, extinguishes a sub-lease of part of the premises, notwithstanding the fulfilment of his obligations by the sub-tenant; and an action will lie against the latter, in favour of the lessor, to recover possession of the part sub-leased.

Duncan Company v. Bridge, 14 Que. K.B. 133.

— Contract of lease — Rescission — Nuisance — Smoke and bad odours — Liability of lessor for acts of co-lessees.] — The lessee has an action to rescind the lease of a flat which is uninhabitable by reason of smoke and obnoxious odours. Evidence of the existence of smoke and obnoxious odours in it during a stated period, is not sufficiently rebutted by proof that it was free from both immediately before and after the period in question, and that the building of which it forms part was well constructed with all modern improvements. Nor is it an answer to the action to say that the smoke and bad odours complained of came from neighbouring chimneys, while windows were opened, or from two flats underneath, and that the landlord is not responsible for the acts of neighbours or of co-lessees in the building.

Beardmore v. Bellevue Land Co., 15 Que. K.B. 43.

— Lease of farm — Removal of fodder — Privilege of landlord — Forfeiture of term.] The privilege of the landlord, in the lease of a farm, is a security within the meaning of Art. 1092 C.C. Consequently the farmer tenant who removes from the farm the fodder with which it is furnished, by thus diminishing the security of his landlord loses the benefit of the term for the payment of his rent.

Egglefield v. Baben, Q.R. 28 S.C. 382 (Ct. Rev.).

—Disturbance of possession — New constructions by landlord — Injunction.] — A tenant who anticipates disturbance in his enjoyment of leased premises on account of new constructions by the landlord during the term of his lease is entitled to relief by an interim injunction against such works in addition to further recourse by action for damages, if any.

Haycock et al. v. Pacaud, Q.R. 27 S.C. 464 (Sup. Ct.).

— Lease — Disturbance.] — Rectification of boundaries which has the effect of narrowing leased premises, cutting off the light and diminishing the strength of buildings in such a manner as to render them unfit for the purposes for which they were leased is a disturbance for which the landlord is responsible, and gives the tenant a right of action to resiliate the lease, to obtain diminution of the rent during the continuance of the disturbance and for the recovery of damages. (2) Works done by the owner of adjoining lands, beyond those provided for by Art. 520 C.C., are not mere trespass as contemplated by Art 1616 C.C., and the landlord is obliged to warrant the tenant against such disturbance under Arts. 1612, 1614 and 1618 C.C.

Saint-Onge v. Gauthier, Q.R. 27 S.C. 232 (Ct. Rev.).

—Lease for share of produce with agreement by lessee to pay half value of stock, etc.] — (1) A lease of a farm for a share of its produce and an undertaking by the lessee to pay the lessor one-half the value of the stock and agricultural implements on it, partakes of the nature of a partnership and is essentially a contract bonæ fidei. In adjudicating upon a demand by the lessor based upon charges of neglect and of maladministration by the lessee, the Court has a full discretionary power, in its appreciation of the facts, to declare whether the case comes within any of the provisions of Art. 1624 C.C. as to rescission. (2) While the failure of the lessee to carry out the stipulations of the lease entitles the lessor to ask for its rescission when it is of a grievous character, the Civil Code provides another remedy for acts of negligence or omissions which are involuntary rather than the result of incapacity or of a refusal to perform the obligations of the lease.

Meunier v. Laurin, 30 Que. S.C. 68 (Archibald, J.).

— Agreement to renew unproductive stock.] —A covenant in a lease of a farm that the lessor will contribute one-half the expense of feeding the stock and that the latter, as it becomes unproductive, will be renewed by sale and purchase, will, in case of breach by the lessor, give the lessee a right of action to be allowed to carry it out at the cost of the lessor.

Laurin v. Meunier, 30 Que. S.C. 78 (Archibald, J.).

—Essence of contract — Delivery of possession.] — Delivery of possession of the premises leased at the time agreed upon is of the essence of the contract of leasing and on refusal or neglect to give possession a summary action lies to recover damages resulting from the non-performance of the terms of the lease.

Davignon v. Chevalier, 8 Que. P.R. 104 (Ct. Rev.).

—Action against landlord — Defective premises — Action by tenant's wife.] — An action will not be dismissed on exception to the form, because it was brought by the wife of a tenant against his landlord for

injuries received by a fall owing to the defective state of the premises leased, as a summary action and made returnable within two days, such irregularity not being without remedy. Joining the husband as plaintiff with his wife séparée de biens does not avoid the action but is ground for an exception to the form (mis joinder). The cause of the separation de biens need not be stated. An action against a landlord for damages resulting from the defective state of the premises will be dismissed on exception to the form where the declaration is vague, the facts are insufficiently stated and it does not appear that defendant was guilty of negligence or how he was the cause of the injury suffered by the plaintiff.

Raso v. Miller, 8 Que. P.R. 329 (Lafontaine, J.).

— Covenant to leave premises in repair — Insurance by lessee — Application of insurance money.] — A lessee covenanted for himself and assigns that buildings of the lessor on the premises at the date of the lease would be left on the premises in as good repair as they then were; also that machinery of the lessee would not be removed from the premises during the term without the lessor's consent, but the same should be held by the lessor as a lien for the performance of the lessee's covenants and for any damage from their breach. Under a deed of assignment for the benefit of the lessee's creditors the lease became vested in the trustees. A fire subsequently occurring, which destroyed the buildings and machinery, insurance on the latter was paid to the trustees. The lessor demanded of the trustees that the insurance be applied to reinstating the buildings or the machinery. By Act. 14 Geo. III., c. 78, s. 83, insurance companies are authorized and required, upon request of a person interested in or entitled unto a house or other buildings which may be burnt down or damaged by fire . . . to cause the insurance money to be laid out and expended towards rebuilding, reinstating or repairing such house or buildings:—Held, (1) without deciding whether the Act was in force in this province, or not, that the lessor was not entitled to the benefit of it, the Act not applying to machinery belonging to a lessee, and the lessor not having made a request upon the insurance company, as provided by the Act. (2) That even had the insurance been upon the buildings, the lessor would have had no equity to it, there being no covenant by the lessee to insure for the former's benefit. (3) That the lessor was not entitled to prove for damages against the estate with respect to the covenant to leave the premises in repair, the term not having expired.

Randolph v. Randolph, 3 N.B. Eq. 576.

— Premises leased for special business — Abandonment by lessee — Rights of lessor.] — The lessor of premises leased for a special business (v.g. as a barber shop) who brings suit with attachment in recaption for rent due and to rescind the lease, has a further right to recover by the same action the damages arising from the likelihood of the premises remaining unoccupied for a length of time.

Darwent v. Montbriant, 31 Que. S.C. 54.

— Terms of lease — Improvements by lessee.] — An agreement between a lessor and his lessee that the lease will run for several years on condition that the lessee will construct, to the satisfaction of the lessor, an addition to the immovable leased creates mutual rights and obligations which form the consideration on both sides. Therefore, the lessor refusing to continue the lease, claiming that the addition was not made to his satisfaction, cannot at the same time retain it without paying its value. When the addition which is the object of such an agreement is of a value exceeding $50 oral evidence cannot be received to establish that it was constructed to the satisfaction of the lessor.

Le Chu v. Deslauriers, Q.R. 30 S.C. 494 (Ct. Rev.).

— Sub-lease for purposes of prostitution — Legal relation between sub-tenant and owner — Damages.] — (1) Where the tenant has sub-let premises for purposes of prostitution, the sub-tenant stands, in relation to the landlord, in the position of a third person whose effects are upon the premises with his consent (Art. 1622 C.C.), and these effects are subject to the privilege of the landlord for rent and damages for breach of the obligations under the principal lease. (2) The sub-tenant who takes a sub-lease of premises for the purposes of prostitution commits a civil wrong which renders him liable towards the owner for such damages as may result therefrom.

Montmarquette v. Berman, Q.R. 29 S.C. 193.

— Unlawful consideration — Lease of house of prostitution.] — As the lease of a house for purposes of prostitution is a contract for illegal consideration, contrary to good morals and public policy, it can give no right of action to any of the parties thereto. (2) In such a case, the circumstance that the lessee is about to quit the premises and remove the furniture therefrom does not give the lessor the right to have an attachment for rent (saisie-gagerie), more particularly when the lessee is forced to quit by legal process.

Lachance v. Roy, Q.R. 29 S.C. 478.

— Vacation — Arts. 15, 1150 C.C.P.] — When a portion of the rent consists in the furnishing of certain supplies the obligation to furnish them forms part of the consideration for the lease and an action based on enforcement thereof will be heard in the long vacation.

Imperial Ice Cream Co. v. Cunningham, 8 Que. P.R. 391 (Loranger, J.).

— Action for resiliation — Premises not habitable — Art. 191 C.C.P.—Art. 1641 C.C.] —The defendant to an action for resiliation of a lease and for damages may properly plead that the premises leased have become uninhabitable by reason of a fire which occurred before the institution of the action.

Lander v. Hammond, 8 Que. P.R. 408 (Loranger, J.).

— Jurisdiction — Superior Court.] — The Superior Court has jurisdiction to hear a case between landlord and tenant when it is alleged that the latter did not sufficiently furnish the premises leased and had taken away certain movables subject to the landlord's lien.

Devlin v. Robb, 8 Que. P.R. 417 (Loranger, J.).

— Sub-letting — Sale of premises — Notice.] — The provision against sub-letting in a lease to a firm does not avoid the lease when, the partnership being dissolved, one of the partners continues to occupy the leased premises. When the lessor reserves the right to sell the premises and in doing so to terminate the lease on giving three months' notice before the expiration of the year ending on May 1st, a notice by letter to the lessee posted on January 31st and received on February 1st is not sufficient.

Carter v. Urquhart, Q.R. 15 K.B. 509.

— Lease of goods.] —See TRESPASS.

— Parol lease for one year to commence at future day.] — A parol agreement for the lease of a house for the period of one year, to commence at a future day, is void as made in contravention of the Statute of Frauds, R.S. (1900), c. 141, and cannot be enforced. But an immediate letting for the same period is within the exception to s. 3 of the statute, and is good, notwithstanding that it is not to go into effect until a future day. Where in an action for rent claimed to be due under a contract of hiring, made under the circumstances mentioned, defendant having refused to take possession, the Judge of the County Court was of the opinion that plaintiff was entitled to recover only for one month's rent and plaintiff failed to appeal, the Court (Townshend, J., dubitante), although of the opinion that plaintiff was entitled to recover generally, dismissed defendant's appeal, and ordered judgment for plaintiff for the amount awarded in the Court below.

Smith v. Thomas, 41 N.S.R. 216.

— Disturbance in enjoyment of premises— Acts of third party — Reduction of rent.] —A lessor is liable for a disturbance in the enjoyment of his lessee arising from the acts of a neighbour performed in the exercise of his proprietary rights. So, when the owner of property contiguous to the leased premises builds a mitoyen wall and in doing so cuts off means of access to them, shuts off light openings and by sinking foundations puts a strain on the framework of the building, opening cracks and fissures therein through which rain gets in, the lessor who allows the performance of such acts, becomes liable to a reduction of rental proportionate to the loss of enjoyment of the lessee, and further to pay damages for deterioration of his goods.

Gauthier v. Saint-Onge, 15 Que. K.B. 264.

— Covenant by lessee to pay extra insurance premiums — Notice of same — Waiver by lessor.] — (1) A covenant in a lease that the lessee shall pay in addition to rental, any "extra premiums of insurance of the premises exacted in consequence of the business or work he carries on therein," does not impose on the lessor the obligation to notify the lessee when such extra premiums are exacted, even though the premises were occupied for a number of years by the same tenant, carrying on the same business, under a lease containing the same clause, during which no extra premiums had been paid. (2) Dilatoriness on the part of the lessor and his not making the demand of such extra premiums for several years cannot be construed as a waiver of his right to recover them.

McMillan v. Wing Sang Kee, 29 Que. S.C. 440 (C.R.).

— Tenant for years — Liability for permissive waste — Covenants in lease.] — Held, after detailed review of the cases, that Yellowly v. Gower (1855), 11 Exch. 274, which decided that a tenant for years is liable for permissive waste, was rightly decided, and that its authority has not been impugned or affected by any subsequent case or displaced by the provsions of the Judicature Act. Held, also, that the provisions in the lease in question in this case whereby the covenants to repair and to repair according to notice were qualified by the exceptions in the covenant to leave the premises in good repair, namely, "reasonable wear and tear and damage by fire or tempest," had not the effect of relieving the tenant from any liability which but for them he would have been subject to for permissive waste. Such exceptions are to be construed as exempting from damage which is the result of accident, not from damage which is the result of negligence. Taylor v. Taylor (1875), L.R. 20 Eq. 297, specially considered. Semble, a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, is entitled to exercise the power of leasing conferred by s. 42 of R.S.O. 1897, c. 71.

Morris v. Cairncross, 14 O.L.R. 544 (Boyd, C.).

— Negligent act of caretaker —Injury to tenant's property — Alterations to plumbing — Damage by steam, etc. — Responsibility of contractors.] — In the lease of a shop, the landlord agreed to supply steam heating and, in order to improve the system, engaged a firm of plumbers to make alterations. Before this work was completed and during the absence of the tenant, the plumbers' men, who were at work in another part of the same building, with steam cut off for that purpose, at the request of the caretaker employed by the landlord, turned the steam on again which, passing through unfinished pipes connected with the shop, escaped through an open valve in a radiator and injured the tenant's goods:—Held, that the landlord was liable in damages for the negligent act of his caretaker in allowing steam to be turned on without ascertaining that the radiator was in proper condition to receive the pressure, and that the plumbing firm were also responsible for the negligence of their employees in turning on the steam, under such circumstances, as they were acting in the course of their employment in what they did although requested to do so by the caretaker. The judgment appealed from, Malcolm v. McNichol, 16 Man. R. 411, was affirmed with a variation declaring the plumbers jointly liable with the landlord. The action was against the two defendants, jointly, and the plaintiff obtained a verdict, at the trial, against both. The Court of Appeal confirmed the verdict as to McN. and dismissed the action as to the other defendant. McN. appealed to the Supreme Court of Canada, making the other defendants respondents on his appeal. Held, that the plaintiff, respondent, was entitled to cross-appeal against the said defendants, respondents, to have the verdict against them at the trial restored.

McNichol v. Malcolm, 39 Can. S.C.R. 265.

— Bank vault door — Trade fixture — Removal.] — In 1886 the landlord of the defendants constructed a vault in the premises occupied by them, the defendants supplying a steel lining and a bank vault-door. On April 1st, 1890, the defendants leased another portion of the same building from the same landlord for ten years from that date, a vault being built there by the landlord and the defendants bringing to it the same door. The lease was made in pursuance of the then Short Forms of Leases Act, and contained no reference to fixtures, but had the covenants by the tenant to repair and leave in good repair. During the currency of the lease the landlord sold and conveyed the premises. On November 10th, 1899, the defendants obtained a new lease from the owner for five years from April 1st, 1890, made pursuant to the statute, which contained the clause "provided that the lessee may remove its fixtures." On November 10th, 1904, the owner granted the defendants another lease, made in pursuance of the statute, for eighteen months from April 1st, 1905, with the same clause as to fixtures, and during its currency the defendants removed the door: — Held, that under the above provisoes the defendants were not restricted in their right of removal to those fixtures placed subsequent to the dates of the last two demises, and that they were entitled to remove the door.

Cronkhite v. Imperial Bank of Canada, 14 O.L.R. 270 (D.C.).

— Bank safe built into rented property — Agreement as to removal of property after termination of tenancy — Subsequent sale of premises.] — Plaintiff bank rented a building into which it moved a safe for the purposes of its banking business. The landlords at the request of the bank built around the safe a brick vault. After occupying the building about a year the bank moved into premises of its own, and the building and safe were used by succeeding tenants until the sale of the property to defendants, who knew nothing of an alleged agreement between the bank and its landlords as to the right to remove the safe after the bank had left the premises. During the interim between the removal of the bank and the sale, certain improvements were effected in the building, one of which was the pulling down of the vault and the construction of a mezzanine floor which was partly supported by the safe:—Held, on appeal that although the safe when enclosed in the vault, became a fixture, and although it could have been removed with the consent of the original owners of the building, yet the right of removal was lost when the defendants bought the premises.

Canadian Bank of Commerce v. Lewis, 12 B.C.R. 398.

— Defective roof — Demise of part of premises — Implied covenant for repair.] — There is no implied covenant on the part of a landlord to protect a tenant of the ground floor against water percolating through a defective roof. A tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damage caused by such defects. Rogers v. Sorele (1903), 14 Man. R. 450, specially referred to.

Barker v. Ferguson, 16 O.L.R. 252 (D.C.).

— Leave by parol — Notice to quit — Overholding tenant — Defective premises.] — Notice to quit is necessary to terminate a lease by parol even when the term is fixed. When the rent is payable monthly a month's notice should be given. The notice to quit or renewal of the tenancy should be for-

mal and express. When conditional it can only be effective by acceptance. A letter from the landlord informing the tenant that he can remain on the premises at a higher rent, written eight days before the termination of the tenancy, is sufficient notice to prevent a tacit renewal. Continuance in occupation of the premises after the tenancy is terminated does not give the occupant the rights of a tenant and he can not longer exercise the remedies of a tenant. When it is proved that a chimney has no defects in construction there is a presumption that, if it smokes, the cause is to be attributed to the tenant using it.

Canada Newspaper Syndicate v. Gardner, Q.R. 32 S.C. 452.

— Water supply — Resiliation.] — The landlord who lets premises provided with apparatus, pipes, taps, water closets, etc., connected with an aqueduct is deemed to guarantee to his tenant a constant supply of water. The failure of water in these circumstances constitutes on his part a breach of the obligations to procure the enjoyment of the leased premises and gives rise to an action by the tenant for resiliation of the lease.

McKillop v. Tapley, Q.R. 32 S.C. 380 (Ct. Rev.).

— Holding over after expiration of tenancy for a year — Implied tenancy.] — A letter from the landlord posted to the tenant before the expiration of a lease for a year, proposing that after its expiration the tenant should hold from month to month, is not sufficient, if the letter is not received by the tenant, to displace the tenancy from year to year which arises by implication from the tenant's holding over and paying rent after the expiration of his term.

Gass v. McCammon, 6 Terr. L.R. 96.

— Power of attorney to receive and apply revenue only — Lease by one co-owner of his share of the property.] — The creation of a trust by co-owners of property, in a power of attorney to the trustee, to receive the revenues of the property and apply them to certain uses, but without any conveyance of title or ownership, can have no effect on a lease, made subsequently by one of such co-owners of his share of the property, or on the relations between him and his lessee. Hence an attachment of the rent by his judgment creditor cannot be attacked or set aside at the instance of one of his co-owners on the ground of the trust created as stated above.

Nelson v. Resther, 16 Que. K.B. 550.

— Request for favour — Acquiescence — Resulting injury.] — The undertaking to fulfil the obligation of another is a contract of surety and should be express. Therefore, there cannot be found, in a letter written by the tenant of an upper storey in a building to one in the lower in these terms, "Please do not turn the water off except on Saturday afternoons and Sundays and oblige, E. H. T.," an undertaking to pay for losses that sub-tenants of the writer may incur by compliance with such request. The said writing contains only a simple request for a favour with no indication that the writer intended or should incur any obligation to the person to whom it was written. It cannot, then, serve as a commencement of proof in writing of any undertaking whatever. Damages claimed for injury to merchandise should be established by direct and specific proof of deterioration and diminution in value. General proof of its original value, of the fact that it is no longer merchantable and an offer to abandon it to defendant is not sufficient.

Thurston v. Dawson, Q.R. 17 K.B. 148, reversing Dawson v. Thurston, 31 Que. S.C. 225.

— Acquisition of land for camp grounds— Sub-division into lots and streets — Lease of lots — Right of access — Admission fee.] —Under letters patent issued in 1875 incorporating the defendants, power was conferred to acquire a tract of land and to improve, sell or otherwise dispose of same in lots, plots or parcels as the by-laws might provide, which they did, and by plans duly registered sub-divided it into lots with streets or avenues giving access to the lots. By s. 6 of 47 Vict. c. 83 (O.), the company were authorized to impose and collect an admission fee from any person seeking an entrance into "the premises occupied by the company" and those claiming under them; but such payment was not to prevent the company from excluding or ejecting any person from the premises for disorderly conduct. In 1885 by a lease under the Short Forms Act, the company leased two of the lots for 999 years subject to the letters patent and the company's by-laws then or thereafter to be enacted, the lease containing a covenant by the lessee, on behalf of herself and her assigns, to at all times during the term to observe, keep and perform all such by-laws, etc., there being also a covenant by the company for quiet enjoyment. In 1889 the lease was assigned to the plaintiff. In 1902 a gate was placed at the entrance to the grounds, and a by-law passed requiring an admission fee or toll to be paid by all persons seeking admission to the grounds, under which the company claimed the right to demand payment thereof from the plaintiff and each adult member of his family, and by-laws were subsequently passed in 1904, 1906 and 1907 rising the amount of the fee:—Held, that the plaintiff, by virtue of the lease, was entitled to the reasonable use of the roads, streets and avenues leading to his premises for access thereto, and though it was doubtless intended that the lessee personally, if not his lands, should be subject to some control by means of by-laws,

and to charges for certain services, the power to regulate such services did not carry with it the right to impose an admission fee with the corresponding right to exclude for non-payment, etc.; and that s. 6 of the Act was applicable to those, such as casual visitors, who merely sought an entrance to the defendants' premises or through them to the premises of others, and not to a person such as the lessee who sought an entrance to the grounds for the purpose of reaching his own premises.

Irving v. Grimsby Park Co., 16 O.L.R. 386.

(Appeal from this judgment quashed, 41 Can. S.C.R. 35.)

— Lease of movables — Continued possession by lessee after expiration.] — There can be no tacit renewal of a lease of movables. When the lessee remains in possession after the expiration of the period for which they were leased, the owner can at all times demand that such possession cease and that the movables be surrendered to him. Notice to the lessee is required, failing which, he is not held to be in default, nor liable for damages or costs.

Monarch Manufacturing Co. v. Blouin, 34 Que. S.C. 167.

— Lease — Execution by party not understanding its effect — Absence of fraud — Denial of lessor's title.] — A lessee can not deny his lessor's title and set up title in himself in an equitable replication in an action brought by him against the lessor for an illegal distress for rent in arrear under the lease by alleging and proving (no issue of fraud being raised) that he did not understand the effect of the lease, and believed that in executing it he was completing an option of purchase of the demised premises given in a prior lease from the defendant's predecessor in title.

Sivert v. Young, 38 N.B.R. 571.

— Lease for rental exceeding $50 — Commencement of proof in writing.]—(1) Parol evidence is not admissible to prove a contract of lease for a period of five years, at a yearly rental of six hundred dollars, unless there be a commencement of proof in writing of it. (2) Such a commencement of proof in writing may be found in the admissions of a party examined as a witness under oath. (3) The admission by a party cannot be divided except in the special cases stated in Art. 1243 C.C.:—Quære, can the admissions by an agent have the same value as proof in writing, or as a commencement of proof in writing, as if made by the principal?

Sobnisky v. Allard, 16 Que. B. 530.

— Lease of oil rights — Condition — Well to be "commenced."]—An "oil lease," or agreement under which the lessee was to have the right to take oil from the land of the lessors, provided that "if within six months from date a well has not been commenced on said premises, this lease shall be null and void." The well contemplated involved drilling into the ground or through rock several hundred feet. When the six months had expired, it was found that the lessee had done no work on the ground, but had put upon the place where the well was to be drilled some plant suitable for the contemplated operation, at an expense of $200:—Held, that this did not amount to a commencement of the well; the terms of the lease imported that some work was contemplated upon and in the ground — "breaking the ground" in order to the commencement of a well.

Lang v. Provincial Natural Gas and Fuel Co., 17 O.L.R. 262.

— Lease — Assignment — Personal covenant — Breach prior to assignment — Liability of assignee.] — The assignee of a lease of a store and premises and of certain personal property enumerated in a schedule annexed to the lease containing covenants not to assign without the consent of the lessor and at the expiration of the term to yield up the premises and return the articles mentioned in the schedule, who got the lessor to sign an assent to the assignment containing a proviso that it was subject to the payment of the rent and the performance of the covenants in the lease reserved is not liable in an action on the covenant to return the goods for a breach committed by the original lessee.

Goggin v. Whittaker, 38 N.B.R. 415.

— Lease of dwelling previously occupied as a brothel — Peaceable enjoyment of premises leased — Rescission of lease.] — An action by a lessee will lie to rescind the lease of a dwelling previously occupied as a brothel and in close proximity to two other houses the property of the lessor actually leased and occupied for similar purposes, in consequence of which the lessee and his family are molested, insulted and troubled by frequenters of such resorts, in their enjoyment of the premises leased.

Levin v. Lalande, 30 Que. S.C. 481 (Dunlop, J.).

— Sub-tenant — Guarantee.] — The prohibition in a lease against the lessee making alterations in the premises without the consent of the lessor does not apply to work made necessary by a new use to be made of them which is provided for in the lease itself. A sub-tenant is only bound to guarantee the tenant against claims of the landlord arising out of his own acts and cannot be made answerable for those of the tenant himself.

Stevenson v. Macphail, Q.R. 17 K.B. 119.

— Lease — Owner of usufruct — Extinction of usufruct — Re-entry by owner of

land.] — The extinction of a right of usufruct of an immovable leased to the holder of the usufruct, and notice by the owner of the land of his intention to enter into possession does not give the lessee a right to an action for damages under Art 1618 C.C. It is necessary that there should be actual, if not material, disturbance in his enjoyment of the premises, at least by institution of an action for eviction by the owner. A fortiori there will be no ground, when agreement is made with the owner for continuation of the lease, for an action in damages against the lessor.

Baillargeon v. Robillard, Q.R. 17 K.B. 334.

— Repairs by lessee — Agreement for.] — The clause in a lease by which the lessee, in consideration of a reduced rent, undertakes to make the repairs to the inside of the premises should be construed strictly and against the lessor. It does not release the latter from the obligation imposed on him by law to make the greater repairs and to maintain the leased premises in a habitable condition and one suitable for their intended use. The knowledge that the lessee had of the bad state of the premises at the time the lease was executed cannot be relied on as an answer to his claim that the lessor make the repairs incumbent on him.

O'Connor v. Flint, Q.R. 33 S.C. 491 (Ct. Rev.).

— Delay in entry — Refusal to deliver premises — Resiliation.] — The tenant of a house has a right to enter from the first day of the term for which he has rented it but subject to the delay of three days recognized by custom for the occupant to move out. Hence, a trifling quarrel on the first day between the landlord occupying and the brother of the tenant who wished to penetrate to the upper storey of the house is not a refusal to deliver over the premises and does not give to the tenant, without further mise en demeure, a right of action for resiliation of the lease. The landlord who, under these circumstances, vacates the house on the second day and sends the key to the tenant has a right of action for damages against the latter who refuses to take possession and rents other premises and also a right to a saisie-gagerie to seize the movables of the tenant who had furnished part of the house.

Landry v. Lafortune, Q.R. 33 S.C. 126 (Ct. Rev.).

— Building erected by lessee — Privilege of removal.] — A building erected by the lessee of a lot of land under an agreement with the lessor by which he has the right to remove it at the expiration of the lease, does not become a part of the lot. A sale by licitation of the latter, even though described in the proceedings as "a lot, etc., with the building thereon," does not pass the ownership of the one so erected to the purchaser, and the lessee has an action to recover its value from him.

Gaudet v. Marsan, 33 Que. S.C. 37.

— Leasehold — Specific performance.] — Plaintiff purchased leasehold property from defendant for $340.50, and has paid $300 on account. Plaintiff alleged that property was sold free of all unpaid rent and taxes, and refused to pay balance of purchase money unless defendant contributed towards unpaid rent which was due at the time of the sale. Defendant alleged that no such agreement as to unpaid rent and taxes was made, and was willing to execute conveyance on payment of the true balance, but refused to entertain any proposition for settlement unless certain other dealings between the parties were adjusted at the same time:—Held, that the plaintiff was entitled to a decree for specific performance. Held, also, that as the evidence failed to establish the plaintiff's contention as to the agreement for sale and the unpaid balance; and that as the defendant had acted wrongfully in attempting to make the settlement of this matter contingent upon the settlement of other dealings between the parties which are distinctly foreign, there should be no order as to cost.

Edgecombe v. McLellan, 4 N.B. Eq. 1.

—Lease — Description of building as an office — No implied restriction.] — The defendant L. holds certain premises under a lease granted by the plaintiff N. to one W. and assigned by W. to L. The lease contains express covenants, but nothing in reference to its assignment, or to the use of the premises, with the exception of the word "office" used in the description, which is as follows: "All that certain office situate on the ground floor of her brick building on the east side of Main Street in the said town of Woodstock, and the office in the said building fronting on the south side of Regent Street in the said town, also the lower part of the shed in the rear of the said office, etc." W. is an attorney and occupied the premises as an office. L. is a retail meat and fish dealer, and proposes to carry on this business in the premises:—Held, that there was no implied covenant in the lease, restricting the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises included in the demise:—Held, that as no actual damage had been shown, the action was in the nature of a quia timet action; and that as the defendant was carrying on a legitimate business, and there was no probability of any immediate or irreparable damage to the plaintiff arising, the application for an injunction must be dismissed.

Nevers v. Lilley, 4 N.B. Eq. 104.

— Lease for a term of years — Registration by memorial that does not specify term of years.] — The lessee of premises under a written lease for six years, registered more than thirty days after it is made, and only by a memorial in which the term of years is not specified, cannot invoke it against a subsequent purchaser under a deed passed before the registration of the lease, though registered after, but within thirty days of its date.

Trudeau v. Ressler, 36 Que. S.C. 17.

— Commencement of proof in writing — Admission of existence of a lease — Special conditions.] — The admissions, by a party, of a verbal lease of premises and of occupation thereof, are not a commencement of proof in writing of special conditions attached to it. Hence, they will not avail to allow proof by testimony that the tenant, by the terms of the lease, was to permit alterations, etc., without compensation.

Men's Wear v. Arnold, 34 Que. S.C. 224.

— Covenant to insure leased premises — Default of lessee — Difficulty of insuring.] — A covenant in a lease that the lessee will insure the premises and transfer the policies to the lessor, and, in default of doing so, the lessor will have the right to insure them himself and recover the premiums from the lessee, is binding, notwithstanding difficulties in the way of obtaining insurance from regular underwriters, particularly when such difficulties arise from the circumstance that the lessee does not occupy the premises. In such a case, the lessor has the right to insure as best he can and to recover the premiums, even if somewhat in excess of ordinary rates.

Bannerman v. Consumers Cordage Company, 34 Que. S.C. 441.

— Failure of lessor to make repairs — Option of the lessee to obtain a rescission.] — When a lessor after due notification (mise en demeure), fails to make necessary repairs, the lessee may, by action, declare his option to obtain a rescission of the lease and recover judgment accordingly.

Vannat v. Fischel Ship, 34 Que. S.C. 529.

— Possession taken in expectation of lease —Encroachment on adjacent land of lessor by tenant.] — The defendant, in 1882, went into possesion of certain lands situate on Toronto Island, under the expectation of obtaining a lease thereof for twenty-one years, which was shortly afterwards granted to him by the plaintiffs, owners of the freehold, the lease containing a covenant for renewal. The lands leased were three lots, described in the lease by their numbers on a plan. The defendant, in the belief that a piece of land, not so included, formed part of the lands leased, took possession of it with the lands actually leased, and occupied the whole. In 1891 the defendant allowed a person to occupy the encroached upon land as tenant, the latter paying defendant a yearly rental, it being stated by the defendant in a receipt therefor that such land formed part of his leasehold lands. Defendant's tenant continued to pay the yearly rent until 1905, when the plaintiffs, in making a survey of the lands, discovered the mistake made by the defendant, and notified the tenant not to make any further payments. In an action for use and occupation of the part encroached upon:— Held, that the defendant could not claim to have acquired a title by possession, under the Statute of Limitations, of the land so encroached upon, for his possession was in his character of lessee, and would therefore be deemed to be that of his landlords, the claim made by plaintiffs for the use and occupation not constituting a repudiation thereof; nor could he claim to have the encroached upon lands included in the new lease to be given him under the covenant for renewal, for under that covenant he would only be entitled to a lease of the lands actually comprised in the old lease. Held, also, that the city were not entitled to claim for the use and occupation of such encroached upon land prior to the termination of the lease to defendant, but were entitled thereafter to be paid therefor.

City of Toronto v. Ward, 18 O.L.R. 214.

— Reduction of rental.] — (1) The right of the lessee to sue for specific performance, under s. 1 of Art. 1641 CC., applies only, as stated therein, to repairs and ameliorations stipulated in the lease, or which the lessor is bound by law to make; it does not extend to the erection of works (especially outside the premises leased), required to procure a covenanted state of things. Hence, an undertaking in a lease by a lessor to heat the premises convenablement et confortablement, does not give the lessee a right of action to compel the lessor to build a furnace, for that purpose, in a cellar under the leased premises. (2) Failure by the lessor to carry out the above agreement does not give the lessee a right of action to have a different and lesser rental substituted to that agreed upon in the lease.

Lapointe v. Vincent, 35 Que. S.C. 485.

— Lease of mud flats — Covenant to pay for buildings and erections — Piling and filling in — Damages.] — On expropriation under 63 Vict. c. 59 of lands under a lease, containing a covenant to pay at the end of the term for "any buildings or erections for manufacturing purposes" which should or might then be on the demised premises:— Held, that damages should be assessed for the value at the time of expropriation of all piling and filling in intended for and forming a necessary part of the foundation of such buildings.

Sleet v. City of Saint John, 39 N.B.R. 56.

— Covenant to renew — Option of lessor.] —A lease for years provided that on its termination the lessor, at his option, could renew or pay for improvements. When it expired the lessor notified the lessee that he would not renew and that he had appointed a valuator of the improvements requesting her to do the same, which she did. The valuation was made and the amount thereof tendered to the lessee which she refused on the ground that valuable improvements had not been appraised, and refusing to give up possession when demanded the lessor brought ejectment. By her plea to the action the lessee set up the invalid appraisement and claimed that as the lessor's option could not be exercised until a valid appraisement had been made he was not entitled to possession. By a plea on equitable grounds she again set up the invalid appraisement and asked that it be set aside and the lessor ordered to specifically perform the condition in the lease for renewal and for other and further relief:— Held, affirming the judgment appealed against, Purdy v. Porter, 38 N.B. Rep. 465, that though the appraisement was a nullity that fact did not defeat the action of ejectment; that the acts of the lessor in giving notice of intention not to renew, demanding possession and bringing ejectment, constituted a valid exercise of his option under the lease, and that the lessor was entitled to possession. Held, that s. 289 of the Supreme Court Act of New Brunswick did not authorize that Court to grant relief to the lessee under her equitable plea; that such a plea to an action of ejectment must state facts which would entitle the defendant to retain possession, which the plea in this did not do.

Porter v. Purdy, 41 Can. S.C.R. 471.

— Permit to cut hay — Provision for cancellation of permit if land leased — Subsequent lease of part.] — The defendant paid for a permit to cut in 1908, on a parcel of land across which was printed the following: "This permit becomes cancelled by the sale or lease of the land." Subsequently the plaintiff obtained a lease of half the same parcel:—Held, that the defendant's permit gave him an actual interest in the land, that the provision for cancellation should be most strictly construed and that as the land had not been leased but only a part of it, the permit was not cancelled, and the defendant had a right to the hay cut in that year on the whole of the land including some that had been cut by the plaintiff under his lease.

Decock v. Barrager, 19 Man. R. 34.

— Covenant by lessee to insure.] — The obligation of the lessee under a clause in a lease of manufacturing premises to keep them insured is not at an end when the company to which he applied for insurance refused the risk especially when the refusal was based on the ground that the lessee had not occupied nor operated the factory. And where the lessor under authority of the same clause effects the insurance himself he can recover the premium from the lessee though it is higher than the usual rates. The lessee cannot set up as against such action that the insurance effected does not give him proper security. It is sufficient that the lessor is satisfied as it was he who stipulated for the covenant which the lessee entered into.

Consumers Cordage Co. v. Bannerman, Q. R. 18 K.B. 305, affirming 34 S.C. 441.

— Conditions of lease.] — A creditor cannot demand the execution of a contract to perform an act dependent on circumstances foreseen and expected so long as they do not take place. Therefore, a landlord who is to bring the water into the premises leased and instal closets, etc., whenever a proposed main should be placed in the street in front cannot be compelled to do it sooner, the lessee's remedy, if any, being only for damages, diminution of rent or resiliation of the lease.

Lazanis v. Grenier, Q.R. 36 S.C. 171.

— Building lease — Settled estate — Order of Court authorizing lease — Covenant for renewal.] — The lessor, the devisee of land "during his natural life and for him to leave it to any of his children he may please," agreed to lease it; and an order was made by the High Court on the 29th September, 1884, under certain Imperial statutes and R.S.O. 1877, c. 40, s. 85, declaring that it was proper and consistent with a due regard to the interest of the parties entitled or to become entitled under the will containing the devise, that leases of the land should be authorized, but for periods not exceeding, with renewals, 99 years, and directing that a proper lease should be executed, being first approved of by a Judge or the Master in Ordinary, upon notice to the official guardian, and that such lease should be binding on all persons claiming under the will. Thereupon with the approval of the Master in Ordinary, a lease was executed for 21 years from the 1st January, 1886, containing a covenant for renewal, subject to the approval of the Master in Ordinary, for a further term of 21 years, and at a rental to be fixed by the Master. By an order of the High Court of the 20th May, 1907, the powers conferred upon the Master by the former order were transferred to an official referee, and it was declared that it should be lawful for the latter to do all acts and exercise all powers which it would be lawful for the Master to do or exercise in pursuance of the former order. The referee then proceeded, in the presence of all parties and without objection, to determine the rental upon evidence and made an award fixing the amount of the rental for a renewal term:—Held, that the lease, though approved by the officer

of the Court, was a contract between the parties thereto, and the provisions as to renewal as much a contract as any other part; the proper officer to fix the rental was, therefore, the Master, the express contract not being varied by the order of 1907. But there was nothing to prevent the parties waiving the terms of the contract and agreeing that, instead of the Master fixing the rental, the referee should do so; no formal submission, either oral or written, was necessary; what was done amounted to an informal agreement or submission that the referee should act as arbitrator and fix the rental; and therefore an objection to his award, on the ground that he had no jurisdiction, failed. Objections to the award, that the referee should have provided for the reimbursement in whole or in part of the lessee for the buildings, and that he should not have fixed a rental which would imply the expenditure of a considerable sum of money by the lessee, were overruled. It is not improper in fixing a rental to take into consideration the potential value of the property.

Re Denison and Foster, 18 O.L.R. 478.

— Sub-letting — Consent of lessor.] — Where a lessor received in payment for rent the cheque of a third party to whom the premises had been sub-let and indorsed it but almost immediately obliterated his indorsement after consultation with his solicitor; his act was not a commencement of proof in writing of his acceptance of the third party as sub-tenant. The condition against sub-letting without the consent in writing of the lessor is de rigueur and if alleged in an action for resiliation of the lease the Court can neither inquire into the reasons for refusing consent nor otherwise exercise control over the condition.

Brown v. Orkin, Q.R. 35 S.C. 132.

— Condition for reduction of rent — Hotel property.] — A lease to the plaintiff of an hotel business in Orillia contained a proviso that "in the event of any law being enacted . . . which shall prohibit the sale of intoxicating liquors upon the demised premises" the lessor shall make a reasonable reduction in the rent. A local option by-law was passed in Orillia in February, 1908, prohibiting the sale of liquor from and after May 1st, 1908, but was quashed in June, 1908. Meanwhile, in April, 1908, 8 Edw. VII. c. 54 (O.), was passed, which by s. 11, prohibited under such circumstances the issue of the necessary license, without the written consent of the provincial secretary, who refused it:—Held, that until such consent was obtained there was a law prohibiting sale within the meaning of the above proviso, and the plaintiff was entitled to a rebate in his rent.

Hessey v. Quinn, 18 O.L.R. 487.

—Land let "for pasturing purposes"—Hay raised by tenant — Injunction against selling.] — The defendant agreed to rent a farm from the plaintiff "for pasturing purposes," by a memorandum containing no other stipulation as to the use of the place. Instead of using the entire farm for grazing purposes, the defendant raised a crop of hay on part of the land, which he cut and stored in his barn and endeavoured to sell:—Held, that the defendant was rightly enjoined from selling and removing from the farm any part of the hay, but that his raising a crop of hay on the farm was not a breach of his contract to use it for "pasturing purposes," as these words did not require that the grass should be severed only by the teeth of the feeding beasts, but permitted him to cut the hay and remove it to his barn, and either use it in feeding his cattle during the winter or leave it on the premises after the termination of the lease. Westropp v. Elligott (1884), 9 App. Cas. 815, discussed and followed.

Bradley v. McClure, 18 O.L.R. 503.

II. RECOVERY OF RENT.

—Division of premises leased—Action to apportion rent.]—The lessee of a house and vacant lot adjoining paying one rent for both has a right of action against the person who has acquired the property in the house subject to the lease in order to have settled the proportion of rent to be paid therefor.

Brouner v. Lapointe, Q.R. 38 S.C. 309.

—Distress for rent—Sale of goods distrained—Oath of appraisers.]—The right to sell goods distrained for rent did not exist at common law, but was given by the statute 2 W & M. c. 5, s. 2; and it must be exercised, if at all, upon the terms the statute imposes. The tenant is allowed 5 days after distress within which he may replevy; at the expiration of that time, or within a reasonable time thereafter, and before sale, the goods must be appraised by sworn appraisers; the oath can be administered by the officer conducting the proceedings. Where damage has occurred, the tenant is entitled to recover the real value of the goods, i.e., their full value to him, less the rent and expenses:—Held, in the circumstances of this case, that the tenant had a right of action, and was entitled to $250 damages.

Dewar v. Clements, 15 W.L.R. 341 (Man.).

—Piano under mortgage seized for rent—Storage—Right of mortgagee.]—Landlady seized a piano for rent due; later she released possession of the piano, taking a bond providing that she might repossess if the amount claimed for rent, costs, etc., was not paid in a few days. The tenant could not meet the amount when due and arranged to have the bailiff take the piano in storage and hold it until he could pay

it all up. The piano in question was subject to a chattel mortgage to plaintiff, who brought action to recover possession. Defendant contended that he was holding the piano under the distress warrant:—Held, that so soon as the piano, in accordance with the arrangement, was removed from the demised premises, the distress was abandoned and the landlady's lien ceased and the mortgagee was entitled to possession of the piano under his mortgage.

Gosnell v. McTamney, 1 O.W.N. 832, 16 O.W.R. 176.

—Sale of reversion—Equitable assignment of rent—Distress by vendor after sale.]—The sale of the reversion of leased lands with an equitable verbal assignment of the rents but without transfer of the legal estate in the lands, prevents the vendor from distraining for rent, and gives no right to the purchaser to distrain. The landlord is liable for the act of his bailiff in making an excessive distress. There is no action of replevin under the practice in Alberta, proceedings by way of replevin being only collateral to an action for detention or conversion, and therefore if the tenant replevies his goods wrongfully seized by the landlord, he may still maintain action for damages for excessive distress. The English rule by which the tenant in such case is precluded from bringing such an action for damages is not in force in this province.

McCoig v. Griffith, 2 Alta. R. 335.

—Landlord's lien—Goods of third parties.]—The notice provided for by Art. 1622 C.C. to withdraw the movables of third parties from a landlord's lien should be in writing but proof of the "knowledge acquired" by the landlord of the right of the third party, mentioned in the same article, may be made by witness. In either case the notice and the "knowledge acquired" should be of specific movables distinct from the others.

Cf. Ouimet v. The Heirs Greene Willis, Q.R. 37 S.C. 136.

The intervenant who claims ownership of movables seized as security for rent against whom the plaintiff, while acknowledging his right of property therein, sets up the privilege with which they are affected as being on the leased premises; and who proves neither the notice to the plaintiff nor the "knowledge acquired" by him within the terms of Art. 1662 C.C. is not entitled to a declaration of his right of property in the judgment dismissing his intervention. He should also bear all the costs even if the amount for which his movables are subject to the lieu is declared in the judgment to be less than that for which the writ of saisie-gagerie was issued.

Gosselin v. Morin, Q.R. 38 S.C. 385.

—Distress and sale—Landlord debarred from purchasing.]—A landlord who distrains upon the goods of his tenant cannot himself become a purchaser at the sale of the tenant's goods and, should he do so, will be held accountable in damages. Where no order for judgment is taken and the whole matter is left to be disposed of by the trial Judge, the Court may make the order for judgment which the trial Judge should have made. The appeal was allowed with costs, but plaintiff was deprived of costs below because of the extravagance of his claims and untenable contentions set up with respect to the nature of his claim and the measure of damages.

Spain v. McKay, 44 N.S.R. 74.

—Sale of movables by lessee.]—The lessor has a right to make a conservatory seizure of the movables of his lessee who has publicly announced their sale, even though no rent may be due at the time.

Carroll v. Elliott, 11 Que. P.R. 217.

—Lease of hotel—Rent—Proviso for rebate—Distress for rent reserved without making rebate.]—A lease of hotel premises contained a proviso that, in a certain event (which happened), the lessors should make a reasonable rebate in the rent which the lessee convenanted to pay. Notwithstanding that an action was pending for a declaration as to the rebate which should properly be allowed, the defendants (the lessors) distrained the goods of the plaintiff (the lessee) in the hotel, and the plaintiff brought this action, for replevin and other relief, paying into Court the amount of the rent in question:—Held, that the defendants' covenant to make the rebate did not directly affect the reservation of rent; the rebate was to be made by the defendants from time to time, and for their refusal to make it the lessee's remedy was by action for breach of covenant; and, therefore, so far as the action was founded on replevin, it failed, the rent not having been tendered before distress. Bickle v. Beatty (1359), 17 U.C.R. 465, specially referred to. But held, that the plaintiff was entitled to damages for excessive distress, the value of the goods distrained being wholly out of proportion to the rent distrained for. Quære, whether any cause of action had arisen for breach of covenant for not making a reasonable rebate in respect of the rent distrained for, the rent not having been paid or tendered before the distress; but this it was not necessary to determine, as any relief to which the plaintiff might be entitled in respect of the rebate could be administered under Con. Rules 1069 and 1072 in dealing with the money which had been paid into Court. Held, that on their counterclaim, the defendants were entitled to recover the rent accrued due under the lease, subject to the rebate as ascertained in the former action; but their claim for double

the yearly value for holding over certain rooms outside the hotel was disallowed, the agreement being that the plaintiff was to hold them during the term of the lease of the hotel. A reference was directed; and the plaintiff was allowed the costs of the action except as to his claim in replevin; the defendants were allowed no costs of the action or counterclaim, their conduct having been harsh and unreasonable.

Hessey v. Quinn, 20 O.L.R. 442. (See next case.)

—Rent — Excessive distress — Substantial damage not shown.]—The judgment of Osler, J.A., 20 O.L.R. 442, was varied by reducing the damages awarded to the plaintiff for excessive distress from $100 to $5:—Held, that the statute R.S.O. 1897, c. 342, is confined to irregularities or illegalities arising after the distress, and has no application to the taking of an excessive distress. In the case of an excessive distress there is a breach of the statutory duty to make a reasonable distress only, and some damage must be presumed; but nominal or "nearly nominal" damages only are allowed, unless substantial damage is shown. As in this case the bailiff took nominal possession only, and did not interfere with the use and enjoyment of the goods, and replevin was granted upon payment into Court of the rent due, there was nothing upon which to found an award of more than nominal damages. The judgment of Osler, J.A., as to the terms upon which certain rooms were held by the plaintiff, was affirmed.

Hessey v. Quinn, 21 O.L.R. 519.

—Action for rent—Proof of lease—Possession of sub-tenant.]—

Lauder v. Peltier, 11 W.L.R. 333 (Sask.).

—Sale of property—Notification to tenant—Action for rent.]—In an action for rent by the transferee of the original lessor, it is not necessary that service of the assignment and delivery of a copy of it should be made to the debtor before commencing said action (following Bank of Toronto v. The St. Lawrence Fire Ins. Co., 87 L.T.R. 462). But said deed of sale must be set forth in the declaration and a copy thereof filed therewith. Maller v. Levinton, 7 Q.P.R. 17, distinguished.

Désy v. Damant, 12 Que. P.R. 94.

—Tenancy at will—Right to distrain—Excessive distress.]—A tenant at will may by agreement made during the tenancy change the nature of his holding so as to make the rent payable at fixed periods, and upon this being done a right of distress is given to the landlord:—Held, also, that in levying distress for rent a bailiff is justified in seizing sufficient to make the realization of the rent and expenses certain, but must be careful not to take more than what is manifestly sufficient for that purpose.

Stanier v. Fleming, 3 Terr. L.R. 223.

—Rent payable in kind—Damages for non-delivery.]—

Paradis v. Hotton, 3 W.L.R. 317 (Terr.).

—Distress for rent—Purchase by landlord at open auction sale.]—

Tingley v. Sharpe, 3 W.L.R. 159 (B.C.).

—Farm leased in profit-sharing agreement—Crops—Division—Setting apart of landlord's share—Property passing.]—

Saskatchewan Elbow Wheat Land Co. v. Gombar, 11 W.L.R. 520 (Sask.).

—Rent payable in grain—Agreement to pay half grain grown on farm.]—

Richey v. Rear, 5 W.L.R. 420 (Man.).

—Action for rent—Surrender of premises—Operation of law—Acceptance—Delivery of key—Subsequent renting of premises.]—

Yukon Trust Co. v. Popich, 8 W.L.R. 852 (Y.T.).

—Rent payable by delivery of portion of crop—Assignment of rent by lessor.]—Defendant was the owner of a farm, which he leased on terms that he was to receive one-half of the crop, when threshed, by way of rent. Being indebted to one Emerson, he executed a deed by way of security whereby he did "assign and grant . . . all that certain parcel of land . . . together with the residue unexpired of the said term of years and the said lease and all benefit and advantages to be derived therefrom." The sheriff, under writ of execution of the plaintiff, seized the defendant's half of the crop which was claimed by Emerson, and the sheriff interpleaded. Whether the crop was standing or cut, threshed or divided, did not appear by the material before the Court:—Held, rent is a chose in action, and as such is assignable, and the doctrine applies to future rent as well as past due rent. 2. That until the grain was threshed and divided the property therein remained in the lessee, and in the absence of evidence of division and delivery there was no evidence that the debtor had any interest in the crop liable to seizure. 3. That the assignment by the lessor of the benefits of a lease, the rent under which is payable by a portion of a crop, is not an assignment of a growing crop within the meaning of the Bills of Sale Ordinance.

Robinson v. Lott, 2 Sask. R. 276.

—Lessor's privilege—Notification of right of ownership of third parties in movable.]—No particular manner or form of the

"Notification" required by Art. 1622 C.C. (as amended by 61 Vict. c. XIV, Que.), having been prescribed by law, it may be proved, as any other fact, by written or oral evidence or even by presumption.

Ouimet v. Green, 37 Que. S.C. 136.

—Privilege on movables—Sale of premises.] —A lessor who sells the leased premises thereby loses his privilege on the movables therein for rent due at the time of the sale.

Lamb v. Whittingham, 37 Que. S.C. 267.

—Lessor and lessee—Remedy of lessee—Sub-lease.]—The inconvenience caused to a lessee by work done on a party wall by the owner of land adjoining the leased premises is a trouble de droit which gives him a right of action for resiliation of the lease or for reduction of the rent but not to the recovery of damages. When there is a sub-lease it is the original lessee who is entitled to a reduction of rent without regard to that of the sub-tenant.

Lanctot v. Boack, Q.R. 38 S.C. 228.

—Seizure of movables—Sale—Lien of lessor.]—When movables are seized the debtor (saisi) cannot by selling them with the immovable containing them to a third party and taking a lease from such third party of the immovable and the movables seized, confer on the latter the privilege of lessor capable of being opposed to the seizing creditor on the distribution of the proceeds of the sale of the movables on proceedings taken by another creditor.

Dagenais v. Honan, 17 Que. S.C. 478 (S.C.).

—Excessive distress—Fire—Remoteness of damages.]—Where a landlord makes an excessive distress, and the goods, while so distrained, are destroped by fire, the tenant is entitled to damages for such excessive distress to the value of the excess in distress, and that such damages are not too remote.

Ernscliffe L.O.L. v. Lethbridge, 37 C.L J. 123 (Creasor, Co.J.), affirmed on appeal to a Divisional Court.

—Distress remaining unsold—Suspension of action for rent.]—A distress had been made, and the goods distrained remained unsold in the plaintiff's hands:—Held, that the right of action for the rent was suspended.

Smith v. Haight, 4 Terr. L.R. 387 (Wetmore, J.).

—Rent—Seizure under execution—8 Anne c. 14.]—Where goods are seized under execution on leasehold premises and are claimed by a third party, who establishes his title thereto, the statute 8 Anne c. 14, does not entitle the landlord to be paid rent by the sheriff. Where, however, goods seized by the sheriff were claimed by a third party, and under an interpleader order were sold and the proceeds paid into court pending the trial of an issue as to the ownership of the goods, and the trial of a second issue had been directed between the landlord and the execution creditor as to the landlord's right to the rent claimed, and the claimants in the first issue consented to the landlord's claim being satisfied, even if they should be successful in the issue, the landlord was held entitled to be paid out of the fund in Court the arrears of rent not exceeding one year's rent, without awaiting the decision of the issue as to the ownership of the goods. Judgment of Rouleau, J., affirmed.

Robinson v. McIntosh, 4 Terr. L.R. 102.

—Mortgage—Creation of tenancy—Tenancy at will—Right to distrain—Assignment of equity of redemption—Assent of mortgagees—Liability of assignee for rent—Sale of distress—Absence of appraisement.]—A mortgage made by the plaintiff to the defendants secured $36,000 and interest at five per cent., payable by instalments, this rate of interest to be paid both before and after maturity. It had the usual statutory covenants, and this special provision: "Provided that in default of the payment of the interest hereby secured the principal shall become payable. Provided that until default of payment the mortgagor shall have quiet possession of the said lands. Provided that so long as the mortgagor, his heirs, executors, administrators or assigns, shall remain in possession of the said lands then he or they shall hold the same by tenancy at will under the said mortgagees, their successors or assigns, at an annual rent equal to the said yearly interest and payable at the times set forth for the payment of said interest, any such rent collected to be applied towards satisfaction of said interest and that if the tenancy be determined at any time the rent accrued up to that period shall be payable forthwith for the purpose of enforcing remedies for the collection thereof." This formed one sentence in the mortgage, and had no stops throughout:—Held, that it contained no repugnancy or inconsistency. Trust & Loan Co. v. Lawrason (1882), 10 S.C.R. 679, distinguished. The mortgagor, remaining in possession upon the execution of the mortgage, had the right, under the provision for quiet possession, until default, to enjoy the premises, but for no determinate period, and his tenancy thereunder was a tenancy at will, and such provision was, therefore, not inconsistent with an express tenancy at will at a half-yearly rent. There being a tenancy at will

at a fixed rent, there was, as incident to it, the right to distrain, and the covenant for quiet enjoyment must be read as subject to such right. Doe d. Dixie v. Davies (1851), 7 Ex. 89, followed. After the mortgagor had made default, his continuance in possession was still as tenant at will. After default, the mortgagor, at the instance of the mortgagees, assigned his equity of redemption to his wife, and she took possession and agreed to apply the proceeds of the land to the payment of the mortgage:—Held, that this operated as a new tenancy at will with the wife, who became liable for the payment of the rent as the assign of her husband with the assent of the mortgagees, and her goods was therefore distrainable for rent. So the goods of the husband might also be distrained, as it was a case of real tenancy. Held, however, that the defendants were liable for selling the distress without appraisement or valuation; and the measure of damages was the real value of what was sold, minus the rent due.

Pegg v. Independent Order of Foresters, 1 O.L.R. 97 (D.C.).

—Privilege of lessor—Repayment of loan—Contestation of collocation.]—The curator to an insolvent estate has a right to attack a privileged claim by showing that part of what is supposed to be rental price goes to the repayment of a loan, and therefore does not constitute a privileged claim.

In re Mercier, Pauzé v. Lamarche, 3 Que. P.R. 483.

—Effects in possession of tenant—Third party owner—Notice—Intervention.] — A third party, owner of effects in possession of a tenant, who desires to take advantage of the provisions of Art. 1622 C.C. as modified by 61 Vict. c. 45, should give notice to the landlord specifying the effects of which he is owner; it is not sufficient to notify the landlord merely that he owns the greater part of the effects in possession of the tenant. An intervention filed in proceedings against the tenant by the landlord, with saisie-gagerie conservatoire of the movables in the leased premises—no rent then being due—constitutes sufficient notice of the ownership of the third party if it specifies the effects which belong to the intervenant. But the intervenant in this case having caused the landlord's proceedings by removing all the effects without distinction from the leased premises, some of which belonged to the defendant, before sufficient notice of his ownership had been given to the landlord, is liable for the costs incurred by the latter and should have tendered them with his intervention; in the absence of such tender he should be condemned to pay the costs of contesting his intervention.

Mathieu v. Clifford, 19 Que. S.C. 410 (C. R.).

—Exemptions—R.S.O., c. 170, s. 30.]—In this case the tenancy was a monthly one at $12 per month rent. There were nine months' rent in arrears. The landlord seized all the goods on the premises, including goods exempt under R.S.O., c. 170, s. 30. The tenant claimed the goods as being exempt under the said section and an injunction was obtained, and on motion to continue the same, the matter was disposed of summarily:—Held, that the plain import of the words of the above section "In case of a monthly tenancy, the said exemptions shall only apply to two months' arrears of rent" is to give the protection to this monthly tenant as to two months' rent, viz., $24. This amount can be paid to the tenant at the outset, or it may be so paid at the conclusion of the sale of the goods. [Note.—The above case differs from the holdings in Harris v. Canada Permanent Co., 34 C.L.J. 89, and Shannon v. O'Brien, Ib. 421. See also 34 C.L.J. 440].

McGaw v. Trebilcock, 37 C.L.J. 703 (Elliott, Co.J.).

—Action for rent—Quiet enjoyment.]—A leasee sued for rent may plead as a defence that he has had quiet enjoyment of the leased premises or that he has only had a partial enjoyment thereof.

Synod of the Diocese of Montreal v. Kelly, 20 Que. S.C. 19 (Sup. Ct.).

—Distress for rent due under an illegal lease—Replevin.]—Replevin will lie to recover goods distrained for rent in arrear under an illegal lease. The maxim, In pari delicto est conditio possidentis, is applicable only when the possession results from the act of the parties, and not when it results from some incident attached to a legal instrument. Per Tuck, C.J., Barker and McLeod, JJ. (Hanington and VanWart, JJ., dissenting).

Gallagher v. McQueen, 35 N.B.R. 198.

—Landlord's privilege—Costs—Cession de biens—Arts. 1619, 1620 C.C.]—The proceeds of sale of a hotel license (sold under cession de biens) is not subject to the landlord's lien. The only costs of judicial proceedings which take precedence of special privileges are those incurred in the interest of the privileged creditors and for the preservation of their security (gage). Therefore, in a cession de biens the costs made necessary by the assignment and those for the administration of the assets in insolvency and their liquidation are not superior to the landlord's claim, but it is otherwise in respect to the costs of sale of the articles subject to his security, of the inventory thereof

and of the distribution of the proceeds of sale.

Poulin v. St. Germain, 11 Que. K.B. 353.

—Summary procedure—Arts. 1150, 1162, 15, 516 C.P.]—In an action between lessor and lessee, the plaintiff will be allowed upon paying costs of motion, to add the words "summary procedure" to the writ and copy thereof.

Cusson v. Vaillancourt, 5 Que. P.R. 88.

—Obstructing distress—Legality of distress—Crim. Code, s. 144 (2).]—Held, that it devolves on the prosecution under s. 144 of the Crim. Code to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, and therefore to prove that there was rent in arrear.

The King v. Harron, 40 C.L.J. 27, 6 O.L.R. 668, 7 Can. Cr. Cas. 543.

—Jurisdiction—Personal action — Arrears of rent.]—The Circuit Court, sitting au chef lieu of a district has no jurisdiction to hear and decide a personal action for $12 arrears of an annual rent. The Superior Court has such jurisdiction, and the action, therefore, may originate in the latter.

Lebel v. Langlois, Q.R. 22 S.C. 239 (Sup. Ct.).

—Procedure—Evocation.]—The lessor, to whose action his lessee pleads that the renting value of the leased premises was not stated in the declaration, cannot evoke the cause from the Circuit Court to the Superior Court.

Shearer v. Marks, Q.R. 22 S.C. 472 (Sup. Ct.).

—Rent payable under lease to administratrix for benefit of others—Attachment.]—Plaintiffs, claiming as heirs at law of their father and owners of a lot of land, brought an action for specific performance, which was dismissed with costs. After the trial one of the plaintiffs, G. R., died, and probate of his will was granted to a sister and co-plaintiff, and the action was revived in the names of the remaining plaintiffs and the executrix, and an appeal against the judgment was dismissed with costs. It appeared G. R. owned one-half of the lot and the father of the plaintiffs the other half, and that the lot had been leased to a tenant by one of the plaintiffs as administratrix of the father, who died in or before 1896, and by the executrix of G. R. No caution was registered under the Devolution of Estates Act:—Held, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs. Macaulay v. Rumball (1869), 19 U.C.C.P. 284, commented on. Judgment of Street, J., reversed, and judgment of the Master in Chambers restored.

McDonald v. Sullivan, 5 O.L.R. 87 (D. C.).

—Distress of lodger's effects.]—See PLEADINGS.

Gray v. Harris, 35 N.S.R. 519.

—Fraudulent removal of goods to evade distress.]—The offence of fraudulent removal of a tenant's goods to evade distress for rent under R.S.O., c. 342, does not extend to a removal and surrender of possession taking place after the termination of the tenancy by the landlord's notice to quit.

The King v. Davitt, 7 Can. Cr. Cas. 514.

— Privilege — Saisie — Revendication — Deposit.]—A landlord's privilege is gone when he fails to seize movables within eight days from the time at which they were removed from the premises under lease, and this even when the tenant, who was not the owner of the movables, had sent them to the landlord as a pledge, and the real owner may revendicate them from the possession of the landlord. In this case, a merchant, to whom the movables had been entrusted as a deposit, could be deemed the depositary and claim from the owner his charges therefor.

Erumans v. Savage, Q.R. 24 S.C. 104 (Sup Ct.).

—Second distress for rent due at date of first distress — Appraisement—Appraisers not sworn.]—After a distress for a month's rent, it is not illegal to make another distress for the next month's rent, although it was due and in arrear at the time of the first distress. Under 11 Geo. II. c. 19, s. 19, the want of the sworn appraisement required by 2 W. & M. sess. 1, c. 5, is only an irregularity, and the tenant can only recover such special damage as he can show to have resulted from it.

McDonald v. Fraser, 14 Man. R. 582.

—Illegal distress — Abandonment of — Agreement to suspend right.]—Under a distress for rent issued on the 12th of March the defendant took possession of the plaintiff's store and evicted him. On the 13th of March, discovering that the distress was illegal, he induced the plaintiff to go to the store with his attorney and the bailiff, who made the distress, where they informed him that the distress was illegal and a new one would have to be made, and they handed him the key of the store and an inventory of the goods distrained, and tendered him $17 as damages for the eviction. The bailiff immediately informed him that he had a new demand and received back the key and they left the store. It was not left

to the jury to say whether there had been an abandonment of the distress under the first warrant, but they found in answer to a question left that the bailiff at no time prior to the service of the second warrant gave up the possession and control of the goods under the first:—Held, that it should have been specifically left to the jury to say whether what took place and what was done on the discovery of the mistake made on executing the warrant and making the distress after sunset was done with the intention of abandoning the distress. Where an agreement was made between the plaintiff and the defendant that if the plaintiff would pay the rent on the 1st April and give up the premises so that the defendant could have the month for making repairs for a new tenant coming in on the 1st of May he, the plaintiff, would not distrain for the rent until after default on the 1st of April:—Held, the agreement would have the effect of suspending the right to distrain, and if the defendant in violation of it distrained he would render himself a trespasser.

Mooers v. Manzer, 36 N.B.R. 205.

—Distress—Payment of rent, after distress, to mortgagee—Costs of distress.] —Rent, being in arrear, the landlord distrained, and the tenant then paid the rent to the landlord's mortgagees, who had previously given him notice to pay to them (their mortgage money being in arrear), and threatened him with proceedings if he did not do so:—Held, that the tenant having paid the mortgagees under compulsion, was entitled to be relieved from the distress and from further liability to the landlord; but the distress was lawful when made, and the landlord was entitled to retain a sufficient quantity of the goods until the costs of the distress were paid. The tenant sued the landlord and bailiff, claiming an injunction to restrain them from proceeding with the distress, and damages, and the landlord counterclaimed for the rent and costs of the distress:—Held, that the action should be dismissed as against the bailiff with costs; that the landlord should have judgment against the plaintiff for the costs of the distress without costs of the counterclaim, and that there should be no costs of the action between the plaintiff and the landlord.

Puffer v. Ireland, 10 O.L.R. 87 (Street, J.).

—Preferred claim for rent on insolvency of tenant.]—See BANKRUPTCY.

— Rent — Property of third party — Exemption.]—The right of a landlord to seize on a judgment for rent does not extend to the moveables of a third party found on the leased premises if the same are exempt from seizure, or to effects which, by law, the tenant may select and withdraw from seizure. As the law makes no distinction as to persons such choice of selection may be exercised by the third party who has an interest as owner of the movables as well as by the debtor himself.

Battison v. Potvin, Q.R. 27 S.C. 165 (Supt. Ct.).

—Lien—Owner of effects—Notice — Service by bailiff.]—A bailiff has no authority to serve on a landlord the notice that should be given him by the owner of movables in order to exempt them from the landlord's lien; and the return of the bailiff alone is not sufficient proof of service required by law in such a case.

Duprereault v. Pauzé, Q.R. 25 S.C. 401 (Sup. Ct.).

—Recovery of rent—Entry by landlord.] —An entry made by the landlord for the purpose of protecting the demised premises, which had been left vacant by the tenant, does not amount to an eviction if there were no intention to put an end to the tenancy. The fact that the premises became uninhabitable during the term did not afford a defence to an action for rent.

Harrod v. Watt, 1 W.L.R. 216.

—Overholding—Double yearly value.] — A lease for one year, terminable upon a month's notice, creates a tenancy for years within the meaning of 4 Geo. II. c. 2.

Dundas v. Osmont, 1 W.L.R. 363 (Newlands, J.).

—Seignorial Act of 1854—Substitution of constituted rents — Liability of person in possession of part of lands charged.]—The person in possession of part of a parcel of land, inscribed in the land register of the fief made and deposited in virtue of the Seignorial Act of 1854, ss. 7 et seq., is personally liable for the whole constituted rent mentioned in such register as substituted for the cens et rentes charged upon the land under the seignorial tenure previously subsisting.

Letellier de St. Just v. Desjardins, Q.R. 28 S.C. 350 (Sup. Ct.).

—Use and occupation — Lease — Parol proof.]—The lease of real estate for a rental exceeding $50 cannot be proved by parol testimony, but, when the alleged tenant has occupied the premises, the owner may, under Art. 1608 C.C. have all the remedies against him which the law gives to landlords against tenants.

Superior v. Withel, Q.R. 14 K.B. 396.

—Advocate's fees — Recorder's Court — Montreal City Charter, s. 485.]—The costs of suit in cases of landlord and tenant in the Recorder's Court, city of Montreal, do not include advocate's fees.

Blouin v. Parent, 7 Que. P.R. 479 (Dorion, Cir. Ct. J.).

—Distress — Lessor's title.]—A replication which admits the taking of goods under a distress for rent and impeaches the lessor's title to the demised premises pleaded in answer to a plea of non cepit in an action of replevin is bad on demurrer.

McLean v. Green, 37 N.B.R. 204.

—Distress for rent—Irregularities in proceeding—Damages improperly awarded.]—Defendant distrained upon plaintiff's goods for rent, then overdue, but nothing further was done, and no special damage was shown:—Held, that, if there were irregularities in connection with the making of the distress, defendant was protected by the Act (R.S. 1900, c. 172, s. 10). A previous distress of plaintiff's goods was irregular in a number of particulars, among others as including goods which were not distrainable, and omission to give the notice required by the statute, section 2, but none of the articles were removed from the premises, plaintiff continued to use them as before, and the distress was abandoned before anything had been sold. Held, that, to entitle plaintiff to damages on account of the irregularities committed, some substantial hurt or injury must be shown, resulting from the irregular proceeding, and that, in the absence of proof of actual damage, the trial Judge erred in awarding damages to plaintiff, and his decision on this point must be reversed with costs.

Beckman v. Hickey, 38 N.S.R. 55.

—Distress for rent—Share of crops—Tenant's possession.]—See BILL OF SALE.

Meighen v. Armstrong, 16 Man. R. 5.

—Holding over — Increased rent.]—When a tenant holds over after the expiration of the term and nothing is agreed on as to the terms of the new holding, that new holding is not of necessity to be on the same terms as the former, but the landlord may be awarded an increased rent if there are circumstances to show that such was expected by him, and that such expectation was known to and not repudiated by the tenant. In such a case the tenant was notified in writing within a month that the rent would be increased after another month, and paid two months' rent at the increased rate without objection:—Held, that she was liable for rent at such increased rate for the remaining months of her occupancy, without deciding whether a new tenancy from year to year had been created or not.

Winnipeg Land & Mortgage Corporation v. Witcher, 15 Man. R. 423.

—Premises leased for special business — Abandonment by lessee—Rights of lessor.]—The lessor of premises leased for a special business (v.g. as a barber shop) who brings suit with attachment in recaption, for rent due and to rescind the lease, has a further right to recover by the same action the damages arising from the likelihood of the premises remaining unoccupied for a length of time.

Darwent v. Montbriant, 31 Que. S.C. 54.

—Sub-lease for purposes of prostitution—Legal relation between sub-tenant and owner—Damages.]—(1) Where the tenant has sub-let premises for purposes of prostitution, the sub-tenant stands, in relation to the landlord, in the position of a third person whose effects are upon the premises with his consent (Article 1622 C.C.), and these effects are subject to the privilege of the landlord for rent and damages for breach of the obligations under the principal lease. (2) The sub-tenant who takes a sub-lease of premises for the purposes of prostitution commits a civil wrong which renders him liable towards the owner for such damages as may result therefrom.

Montmarquette v. Berman, Q.R. 29 S.C. 193.

— Distress—Goods fraudulently or clandestinely removed.]—Goods fraudulently or clandestinely removed to avoid distress cannot be seized under distress if there is no rent in arrear: Hoyt v. Stockton, 13 N.B.R. 60, considered. In an action for an illegal distress the plaintiffs are entitled to recover the value of the goods sold, although they are subject to a bill of sale by way of mortgage to secure a compromise which the plaintiffs have made with their creditors.

Clark v. Green, 37 N.B.R. 525.

—Action for rent and saisie-gagerie—Removal of goods seized.]—When movables attached by saisie-gagerie in an action for rent by the landlord are removed into premises belonging to a third party, a second action will not lie to bring such party into the suit and to preserve the privilege of the plaintiff as against him. It is useless for such purposes and if brought will be dismissed as such.

Simard v. Champagne, 30 Que. S.C. 505.

—Distress—Reversion.]—The common law right of distress for rent in arrear can only be exercised by the owner of the reversion which must be vested in him at the time of the distress. A tenant,

therefore, who makes a sub-lease of the property for the whole of his term, without reserving to himself any right of distress cannot distrain for rent in arrear due under the sub-lease, as he has parted with the reversion. The payment of rent under the sub-lease does not operate as an estoppel so as to confer a right of distress for subsequent arrears of rent which otherwise does not exist.

O'Connor v. Peltier, 18 Man. R. 94.

—Irregular and excessive distress — Sale without appraisement—Unreasonable delay in selling.]—Plaintiff and one B. carried on business in partnership in premises owned by the wife of B. There was a verbal arrangement between B. and plaintiff by which they were to become the joint owners of such premises, but the wife of B. did not appear to have been a party to such arrangement. It was also a part of such arrangement that the partnership should assume and make the payment due under a mortgage on the property. The partnership was dissolved, plaintiff continuing the business. After the dissolution defendant became the owner of the premises, and served a notice on plaintiff demanding rent at $20 per month, to begin from a date some months previous to the date of the notice. Plaintiff never agreed to pay any rent, and not paying same defendant distrained for 8 1-3 months' rent, locked up the premises, and after a delay of nearly three weeks sold the goods of plaintiff and of other parties which were then on the premises, without appraisement, the defendant himself buying in at a very low price. The plaintiff sued for damages for trespass, conversion and illegal distress:—Held, that to give a right to distress there must be a fixed rent, and there being no such rent fixed by agreement there was no right of distress. 2. That a landlord cannot by notice fix the amount of rent to be paid unless the amount is assented to or fixed by implication.

White v. Cusak, 2 Sask. R. 106.

—Rent payable by delivery of portion of crop—Assignment of lease by lessor — Seizure of crop by sheriff under execution against lessor.]—Defendant was the owner of a farm, which he leased on terms that he was to receive one-half of the crop, when threshed, by way of rent. Being indebted to one Emerson, he executed a deed by way of security whereby he did "assign and grant . . . all that certain parcel of land . . . together with the residue unexpired of the said term of years and the said lease and all benefit and advantages to be derived therefrom." The sheriff, under writ of execution of the plaintiff, seized the defendant's half of the crop which was claimed by Emerson, and the sheriff interpleaded. Whether the crop was standing or cut, threshed or divided, did not appear by the material before the Court:—Held, rent is a chose in action, and as such is assignable, and the doctrine applies to future rent as well as past due rent. 2. That until the grain was threshed and divided the property therein remained in the lessee, and in the absence of evidence of division and delivery there was no evidence that the debtor had any interest in the crop liable to seizure. 3. That the assignment by the lessor of the benefits of a lease, the rent under which is payable by a portion of a crop, is not an assignment of a growing crop within the meaning of the Bills of Sale Ordinance.

Robinson v. Lott, 2 Sask. R. 276, reversing Robinson v. Lott, 2 Sask. R. 150.

—Repair of premises by landlord—Tenant out of possession during repairing.]—Plaintiff leased certain premises from the defendant for a period of three years, and carried on business therein. The premises being out of repair the plaintiff complained to the defendant of the condition of the premises, and the defendant thereupon proposed that the plaintiff vacate the premises for about one month and that he would have the necessary repairs made. To this the defendant agreed and moved out. The repairs were not completed until after about two and one-half months, and the plaintiff ultimately told the defendant he would not continue in the occupancy of the premises, and the defendant thereupon re-let them. When the plaintiff vacated the premises he left a range thereon, and this he demanded from the defendant, who refused to give it up until the rent for the two months during which the repairs were being made was paid. The plaintiff thereupon sued for detention, and the defendant counterclaimed for the rent. The learned trial Judge found for the plaintiff and dismissed the counterclaim. On appeal:—Held, that the plaintiff having vacated the premises at the request of the defendant without any compulsion, and apparently without any objection, the dispossession during the period in which the repairs were being made did not amount to an eviction, and in order to effect a suspension of rent the dispossession must amount to an eviction, and therefore the defendant was entitled to rent during such period. 2. That even if the language used by the defendant were sufficient to constitute a seizure for rent, he had not proved that such seizure was made between sunrise and sunset, and as the onus was upon the defendant to prove that the seizure was lawfully made, which had not been done, the plaintiff was entitled to recover on the claim for detention.

Mah Po v. McCarthy, 2 Sask. R. 119.

—Property of third party—Notice to landlord.]—No special mode is prescribed for notifying a landlord that a movable on the leased premises does not belong to his tenant; if he is notified within a reasonable time it will suffice. The knowledge of the landlord of the right of ownership which is mentioned in Art. 1622 C.C. is a fact to be proved in the ordinary way, not only by obtaining an acknowledgment or notice by letter to the landlord but by oral evidence and even by presumptions.

Ouimet v. The Heirs of Green, 10 Que. P.R. 416.

—Privilege—Sale of effects by tenant — Seizure from purchaser.]—The landlord who has seized goods subject to his lien in the possession of a purchaser thereof from the tenant and who contests the plea of non indebitati on the ground that at the time of such purchase the tenant was insolvent to the knowledge of the purchaser cannot, after failing to establish such fraud, claim that his seizure within eight days from the time the goods were removed, was equivalent to a saisie-gagerie under which the tiers-saisi could be ordered to return them or pay their value, especially when, in exercising the remedy he chose, he acted in the capacity of personal creditor only without invoking the pledge or lien he had upon the goods.

Bastien v. Richardson, Q.R. 35 S.C. 481.

—Fraud on landlord—Disposal of movables.]—A third party who, fraudulently and in collusion with the tenant, carries away the movables subject to the landlord's lien is responsible for the damage caused to the latter by loss of rent. An allegation of fact in the declaration as follows: "On the 15th of November, 1907, during the night, the defendants or their employees surreptitiously carried away the movables in the shop leased by the plaintiff to Picard and converted them to their own use without the knowledge and consent of the plaintiff, and disposed of them for their own benefit," is sufficient and an inscription en droit on the ground that it does not disclose any right of lien between the parties does not justify the dismissal of the action, but, at the most, an order for preuve avant faire droit.

Lallemand v. Larue, Q.R. 35 S.C. 431.

—Goods of third party—Notice of ownership.]—It is not necessary that the notice to a tenant by a third party who owns a movable in the tenant's possession should be delivered to him personally; notice by registered letter left at his house is sufficient. The post office books are official, in charge of public officers, and constitute literal proof within the meaning of Art. 1207 C.C.; they form a commencement of proof by writing which enables the sender of a registered letter to prove its contents by evidence.

Montpetit v. Bellemare, 10 Que. P.R. 340.

—Distress and sale where no rent due—Recovery of double the value of goods sold.]—Where distress and sale are made for rent when no rent is due to the person distraining, the owner of the goods is entitled, under R.S.O. 1897, c. 342, s. 18, subs. 2, to recover double the value of the goods distrained or sold, and full costs of suit. Notwithstanding that the word "may" alone is used in the sub-section, whereas "shall and may" is in the original enactment, 2 W. & M., sess. 1, c. 5, s. 4, there is no difference in the effect; there is no discretion in the trial tribunal to give less than double the value or less than full costs; nor is there power, by virtue of the provision of the Judicature Act, s. 57 (3), enabling the High Court "to relieve against all penalties and forfeitures," to reduce the double value to the single value or otherwise. The costs are fixed by the statute itself; and the discretionary power given by the Rules of Court relating to the imposition of or dispensation from costs is not exercisable in regard to costs given by statute. The right to recover the double value not only exists against the landlord, but extends to his officers and bailiffs engaged in the illegal proceedings. The plaintiff was entitled to judgment for double the value of the goods with costs, and the defendants to judgment on a counterclaim with costs; the amounts recovered by the parties respectively for debt and costs to be set off and payment made according to the result.

Webb v. Box, 19 O.L.R. 540.

—Lien of landlord—Seizure for rent—Sale to landlord.]—The landlord who, exercising his lien, seizes the movables on the leased premises and having purchased them at the judicial sale resells them to a third party who leaves them upon the premises does not retain his lien on these movables for rent accruing due after the sale. He cannot seize them in another action against his tenant and if he does the purchaser may intervene to have such seizure set aside.

Pontbriand Co. v. Feeing, Q.R. 36 S.C. 24.

III.—FORFEITURE, TERMINATION AND OVERHOLDING.

—Lease—Termination—Temporary occupation.]—The plaintiffs, tenants of business premises under a lease for five years from the defendant, sublet to one who occupied for a year, and, the premises becom-

ing vacant, engaged the defendant to procure another subtenant. The defendant, wishing to repair the adjoining premises, made a temporary arrangement with R., the tenant of those premises, under which R. moved into a part of the plaintiffs' premises, for which he agreed to pay a small rent, to allow a "to let" notice to remain up, and to show the premises to prospective subtenants. This was done without consulting the plaintiffs:—Held, in an action for a declaration that the lease was determined by the acts of the defendant, that to succeed the plaintiffs must show an eviction, and that what was done by the defendant did not amount to an eviction, especially because it was plain that the defendant did not intend to terminate the lease, or to do more than permit a temporary occupation in the interest of the plaintiffs.

Mickleborough v. Strathy, 21 O.L.R. 259.

—Notice to quit—Remission of rent.]—If a lessee on being served with the following notice from his lessor "the house having been rented from the first of July next, we take the liberty of notifying you that we wish you to quit the premises at that date," quits the leased premises within three days he is released from liability to pay the rent then due, such notice meeting all the requirements of Art. 1089 C.P.Q.

Pouthriand Co. v. Chateauvert, 11 Que. P.R. 242.

—Jurisdiction of Court—Evocation.]—The provision in Art. 1152 C.P.Q. that the amount of the rent or the damages determines the class of the action and the jurisdiction of the Court in actions between lessors and lessees forms no obstacle to their evocation from the Circuit Court to the Superior Court in the cases provided for by Art. 49 C.P.Q. Per Charbonneau, J.:—The Superior Court, to the exclusion of the Circuit Court has jurisdiction over an action for resiliation of a lease carrying a rent exceeding $100 for non-performance of obligations even without any claim for a money compensation. Hence an action of this kind brought in the Circuit Court can be moved into the Superior Court. It is not material, in such case, that the demand contains conclusions asking judgment for a sum less than $100.

Poiré v. Lavigne, Q.R. 38 S.C. 19.

—Breach of covenant—Forfeiture of lease—Relief from forfeiture on terms.]—The plaintiff's deceased testator in his lifetime leased to the defendant the Royal Hotel Block, consisting of an hotel, barber shop, stores, offices and stable, for a term of years. The lease contained lessee's covenants not to sell, assign, let or otherwise part with the demised premises without leave in writing and not to alter the premises without leave in writing. The lessor roomed in the hotel, and usually took his meals there. During his lifetime certain alterations were made in the premises and other alterations were commenced, without his written consent, but with his knowledge and implied consent and acquiescence, and after his death the alterations were continued, with the knowledge of the plaintiff. One sub-tenant had without leave in writing from the head lessor assigned his lease. In the case of two other sub-leases the rent had been increased without consent, and in respect of another a monthly tenancy on a verbal lease had been changed without consent to a two-years' term, with a lease in writing, at a higher rent. The dining-room of the hotel had been placed under separate management on an agreement that the manager should pay defendant a fixed sum of the income from the dining-room and should be entitled to the balance earned by the dining-room. In an action by the executor of the lessor against the lessee claiming forfeiture of the lease on account of the breach of covenants:—Held, (1) an assignment without consent by a sub-lessee of his lease which has been granted with consent is no breach of the lessee's covenant in the head lease not to assign without leave. (2) The mere increase in the monthly rental payable by a sub-lessee is not a termination of one tenancy and the creation of a new tenancy, and will therefore not be a breach of the covenant in the head lease not to sub-let, etc., if done without consent. (3) The alteration of a monthly tenancy to a two years' term on a written lease without such consent is a breach of the covenant. (4) The agreement with the dining-room manager was not a lease, sale or assignment, and therefore no breach. (5) Under the circumstances the Court should exercise the jurisdiction to relieve against forfeitures on terms. The terms imposed were increased rent to make up the increase obtained from the new tenancy created by the conversion of the monthly tenancy to a two-years' tenancy, and the defendant was required to execute a lease covenanting to pay to the plaintiff such increased amount, and was also required to pay the plaintiff's costs as between solicitor and client within one month. Quære—Whether the plaintiff was estopped from taking advantage of the condition for forfeiture in respect of alterations authorized verbally by the testator in his lifetime but executed after his death.

Royal Trust Co. v. Bell, 2 Alta. R. 425.

—Monthly tenancy — Surrender — Relinquishment and acceptance of possession.]—Rumball v. Hoskins, 11 W.L.R. 250 (B. C.).

—Sub-letting.]—One who acquires title to a building and executes a lease which prohibits the lessee from sub-letting cannot demand its resiliation on account of a sub-

lease to a third party made under a prior lease which contained no such prohibition.

Venner v. Thienel, Q.R. 37 S.C. 80, reversing 36 S.C. 223.

—Contract to lease—Repudiation.]—If B. repudiates his agreement to lease property from A. for a term to commence at a future date, A. may treat the contract as at an end except for the purpose of bringing an action for the breach of contract, and he may remain in possession during the whole of the term agreed on and then bring such action.

Arden Hotel Co. v. Mills, 20 Man, R. 14.

—Overholding tenant—Demand of possession.]—Held, that after a tenancy has been determined, it is necessary that a demand of possession be made to give the County Court Judge jurisdiction under the Overholding Tenants Act, R.S.O. 1897, c. 171. Held, also, that it is within the jurisdiction of the County Court Judge, under that Act, to try and determine a question of fact, where the testimony is conflicting, and his decision will not be interfered with.

Fee v. Adams, 16 O.W.R. 103, 1 O.W.N. 812.

—Lease—Breach of covenants—Forfeiture.]—Land leased by the plaintiff to the defendants the B. Co. for mining purposes, was worked by one or other of the several defendants up to the time this action was brought. Previous to action the plaintiff gave notice of cancellation of the lease, addressed to the defendants the K. Co., and served on the defendant T., who was apparently in actual possession. The claim in the action followed the notice, and claimed possession only on account of alleged breaches of covenants in the lease:—Held, on the evidence, that no breach of the covenants was proved as against the B. Co., who were the only necessary defendants, and the plaintiff could not be allowed to turn his action into one of ejectment against T.

Humberstone v. Belmont Coal Co., 13 W. L.R. 119.

—Refusal of lessee to take premises—Action to rescind.]—(1) An action lies by a lessor against a lessee who refuses to take possession of the premises leased, to rescind the lease and to recover damages for loss of rent during the time necessary for re-letting. Such damages may be awarded by anticipation, subject to the condition that the lessor shall account to the lessee for any rental received during the same time. (2) In an action for rescission of a lease, with a demand for damages, costs are due and should be adjudged according to the amount of damages awarded.

Theoret v. Trudeau, 38 Que. S.C. 520.

—Surrender by operation of law—Abandonment.]—Where a tenant, before the end of the term, abandoned the premises leased without any intention of returning to them and his landlord took possession with intent to put an end to the term:—Held, this was a surrender of the term by operation of law, and in any event the tenant, having abandoned possession, could not maintain an action of trespass. To a count for breaking and entering plaintiff's premises and ejecting plaintiff therefrom, defendant pleaded that the premises were not the plaintiff's and gave evidence that the plaintiff had abandoned the premises, and defendant had taken possession before the alleged trespass. Held, that the evidence was admissible under the plea, there being no special allegation of title in the declaration other than that the premises were the plaintiff's and that the defendant need not plead abandonment specially. In an action of trespass to land the Court will not grant a new trial to enable the plaintiff to recover nominal damages.

Whittaker v. Goggin, 39 N.B.R. 403.

—Cancellation of lease—Action upon covenant after.]—Plaintiff leased certain land to defendant, and with the land supplied 800 bushels of seed wheat and 800 bushels seed oats, which the lessee covenanted to return—the wheat the following fall, the oats at the expiration of the lease. There was also a covenant in the lease that either party might cancel the lease within ten months from the date thereof, giving reasons therefor. There was also a provision for cancellation by the lessor in the event of sale, in which case the lessee was to be compensated for improvements. The lessor subsequently cancelled the lease, and the lessee having neglected to return the wheat and oats the lessor brought action to recover the value thereof. The defendant counterclaimed for summer fallowing done during the term:—Held, that cancellation of a lease by mutual consent of the parties does not destroy the term vested in the lessee, and therefore, notwithstanding such cancellation, the lessor could maintain an action for the recovery of the wheat. 2. That in the absence of an agreement to that effect the lessee is not entitled to compensation for tillage upon cancellation.

Ellis v. Fox, 2 Sask. R. 417.

—Lease—Repudiation by tenant—Reletting—Rent accrued.]—The plaintiffs on the 29th February, 1908, made a lease to the defendant of store property in a city for a term of ten years from the 5th March, 1910, at a yearly rent of $3,000, payable in equal parts, on the 5th day of each month, in advance, during each year of the term. The defendant covenanted to pay rent and taxes, to leave in repair, and to add certain improvements. The defendant

was offered possession, but refused to take it. After some negotiation, he repudiated the lease and refused to act under it. The plaintiffs, after doing their best to make the defendant go in under the lease, advertised the property for rent, and on the 22nd April, 1910, leased it for five years to N., on terms less favourable to them as landlords than those contained in the defendant's lease. On the 7th April, 1910, immediately after the repudiation of the lease, the plaintiffs brought this action to recover two gales of rent and damages for breach of contract:—Held, that the plaintiffs were entitled to the two gales of rent and interest thereon. The act of the plaintiffs in leasing to N. could not be called an eviction; and, even were it an eviction, it would not affect the liability for rent accrued due before the eviction. Nor was this the case of the landlord taking advantage of the proviso in the lease, in the statutory form, for non-payment of rent. It was the case of one contracting party expressly repudiating to the other the contract between them whereupon the other could treat the contract as at an end, excepting and reserving his claim for damages for its breach.

Fitzgerald v. Mandas, 21 O.L.R. 312.

—Notice under Art. 1089 C.P.Q.—Expiry on holiday.]—If the last of the three days following the day on which notice is given by a landlord under Art. 1089 is a Sunday or holiday it is not computed, and the tenant has the whole of the following day to leave the premises.

Beaudry v. Harrigan, 19 Que. S.C. 421 (S.C.).

—Resiliation of lease—Damages—Circuit Court.]—An action claiming the resiliation of a lease and damages estimated at $85 is within the exclusive jurisdiction of the Circuit Court.

Yon v. Vallée, 17 Que. S.C. 446 (S.C.).

—Jurisdiction of Circuit Court—Costs.]—An action by which a tenant asks from his landlord certain repairs or otherwise the resiliation of the lease, and, in any event $12.50 damages, is within the exclusive jurisdiction of the Circuit Court and the incompetence of the Superior Court being ratione materiæ, that Court should remit the cause to the proper tribunal. In this case the plaintiff's action having been declared ill-founded by the Court of first instance he was ordered to bear the costs of the contestation in the Superior Court, and also those in the Court of Review although the incompetence of the Court had not been pleaded.

Lafranchice v. Caty, 19 Que. S.C. 185 (C.R.).

—Overholding Tenants Act—Summary order for possession—Review of High Court —Evidence—Breach of covenant in lease —Notice specifying—Necessity for.] — Under the Overholding Tenants Act, R.S. O. 1897, c. 171, two things must concur to justify the summary interference of the County Court Judge: the tenant must wrongfully refuse to go out of possession, and it must appear to the Judge that the case is clearly one coming under the purview of the Act. It is only the proceedings and evidence before the Judge, set up pursuant to the certiorari, at which the High Court may look for the purpose of determining what is to be decided under s. 6 of the Act. Where there was nothing in the evidence to show that the tenants had violated the provision of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the County Court Judge commanding the sheriff to place the landlord in possession. Per Boyd, C.:—The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, as required by s. 13 of the Landlord and Tenants Act, R.S.O. 1897, c. 170, which is applicable to summary proceedings under the Overholding Tenants Act.

Re Snure and Davis, 4 O.L.R. 82 (Div. Ct.).

—Overholding tenant — Forcible entry—Costs.]—In an action brought by plaintiff against defendant, claiming damages for forcibly and unlawfully entering the premises occupied by plaintiff, as tenant of defendant, and ejecting plaintiff therefrom, the trial Judge found that although defendant had technically violated plaintiff's right of possession, plaintiff was retaining possession in violation of good faith, and that her evidence as to the circumstances and manner of her removal was untrue:—Held, that the trial Judge was justified (following Rice v. Ditmars, 21 N.S.R. 140), in depriving plaintiff of costs.

Russell v. Murray, 34 N.S.R. 548.

—Tenant in possession—Resiliation—Third party.]—The tenant who has had quiet enjoyment of an immovable as lessee cannot demand resiliation of the lease and damages because a third party, who has not disturbed him in his possession, is owner of a part of the immovable.

Charpentier v. Quebec Bank, 21 Que. S. C. 296 (Sup. Ct.).

—Surrender of term by operation of law—Creditors' Trust Deeds Act, 1901.]—Plaintiff let a store to H. A. & Co., who afterwards executed an assignment for the benefit of creditors to defendant, who did not take possession of the premises. Plaintiff on the third day after the assignment, requested and obtained from H. A. & Co.,

the keys of the premises which she proceeded to clean up and put in repair, and she took down a sign board having on it the firm name of H. A. & Co., and painted the name out. Plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against the estate for rent accruing due after the assignment:—Held, affirming Henderson, Co.J., who dismissed plaintiff's action, that there had been a surrender of the premises to the landlord by act and operation of law. Phene v. Popplewell (1862), 12 C.B.N.S. 334, applied.

Gold v. Ross, 10 B.C.R. 80.

—Notice—Arts. 8, 1089, C.P.Q.]—Art. 8 C.P.Q., which provides that if the date for taking any step in an action falls on a non-juridical day such steps may be validly taken on the first juridical day thereafter, does not apply to the delay of three days which the landlord must allow his tenant, under Art. 1089 C.P.Q. for quitting the leased premises—therefore, if the last day of such delay is non-juridical, the tenant cannot delay his removal until the day following.

Beaudry v. Hannigan, Q.R. 23 S.C. 232 (Cir. Ct.). overruling judgment of Langelier, J. (19 S.C. 421), who decided the contrary on an inscription en droit in the same cause.

—Lease—Short Forms Act—Covenant not to assign—Breach—Right of entry.]—The right of re-entry under the Act respecting Short Forms of Lease applies to the breach of a negative as well as of an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sub-let without leave. Toronto General Hospital v. Denham (1880), 31 C.P. 207, followed. The making of an agreement for the assignment of a lease, the settlement of the terms thereof and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant; the fact of the document showing the transfer not having been made until after action brought is immaterial.

McMahon v. Coyle, 5 O.L.R. 618 (Boyd, C.).

— Agent to collect rents — Cancelling lease.]—In an action to recover rent in the St. John City Court defendant set up that plaintiff's husband agreed to cancel the lease and relieve defendant from a date prior to the period for which the rent was claimed. Plaintiff alleged that her husband had no authority to do this, though he was authorized to collect rents and make repairs. The magistrate found for the plaintiff. On review before the St. John County Court Judge the latter reversed the verdict:—Held, on motion to make absolute a rule nisi to quash the review order on certiorari that there was no evidence of authority to the husband to make the agreement alleged; and that, even if there were any evidence, the magistrate must be taken to have found against it, and that the review Judge should not have disturbed the judgment. Rule absolute to quash with directions to the review Judge to dismiss the review with costs.

Ex parte Bramwell, 40 C.L.J. 42 (S.C. N.B.).

—Notice to quit—Waiver—Receiving subsequent rent.]—

Dominion Coal Co. v. McLeod, 7 E.L.R. 201 (N.S.).

—Cancellation of lease—Amount of damages to landlord.]—If a lease is cancelled and the amount of rent for the whole year is asked for, the landlord will be entitled to six months' rent as damages for said cancellation. If a sum of over $200 is asked as damages for the cancellation of a lease, and that a sum of $120 only is awarded, the plaintiff must be granted costs of a fourth class action and not those of a third one.

Theoret v. Trudeau, 12 Que. P.R. 92.

—Lease—Expiry of term—Notice to quit.]—

Von Ferber v. Enright, 12 W.L.R. 216 (Man.).

—Overholding Tenants Act—Termination of tenancy—Demand of possession.] — An order made by a District Court Judge under the Overholding Tenants Act for the issue of a writ for the delivery of possession of demised premises by the tenant to the landlord, was removed into the High Court, and set aside by a Divisional Court, because of the absence of a demand of possession after the tenancy was determined, which was necessary to give jurisdiction under the Act, following Re Grant and Robertson, 8 O.L.R. 297. A County or District Court Judge has jurisdiction under the Act to determine questions of fact, and when the facts are determined by him in favour of the landlord, the case comes under the true intent and meaning of s. 3. Re Graham and Yardley, 14 O.W.R. 30, followed.

Re Fee and Adams, 1 O.W.N. 812 (D.C.).

—Forfeiture of lease—Breach of covenant not to sublet without leave—Acquiescence —Waiver.]—

Minuk v. White, 1 W.L.R. 401 (Man.).

—Lease—Cancellation—Notice — Surrender —Termination of lease.]—

Ellis v. Fox, 11 W.L.R. 87 (Sask.).

—Lease — Agreement of tenant to purchase premises — Merger — Intention.]—

Dayman v. Macdonald, 7 W.L.R. 296 (Sask.).

—Overholding tenant — Acceptance of rent —Creation of tenancy from year to year—Notice to quit—Forfeiture for non-payment of rent.]—

Re Hardisty & Bishopric, 2 W.L.R. 21 (N. W.T.).

—Overholding tenant—Summary procedure for ejectment.]—

Re Fuller & Cuthbert, 6 W.L.R. 717 (Y. T.).

—Lease—Resiliation — Unsanitary conditions.]—

Desormeaux v. Grattan, 5 E.L.R. 384 (Que.).

—Lease — Resiliation — Rent and damages — Abortive contract to sub-let.]—

Dacier v. Marcotte, 3 E.L.R. 418 (Que.).

—Overholding tenant—Writ of possession —Prohibition to county Judge and sheriff —Certiorari.]—After an order had been made on the landlord's application under the Overholding Tenants Act for the issue of a writ of possession, but before the writ had been issued the tenant applied for an order for the removal of the proceedings into the High Court and for prohibition to the Judge of the County Court and the sheriff:—Held, per Street, J., that proceedings under the Overholding Tenants Act can be removed into the High Court only when s. 6 of that Act applies; that that section does not apply until a writ of possession has been issued; and therefore that the applicant was not entitled to relief. Per Britton, J., that whether s. 6 is exclusive or not, it at least amply protects the tenant's rights, and that the applicant was not entitled to relief either under that section or under the general jurisdiction of the Court. Judgment of MacMahon, J., affirmed.

In re Warbrick and Rutherford, 6 O.L.R. 430 (D.C.).

—Expiry of lease—Continuation of possession by tenant—Special agreement—Tenancy at will.]—Although payment of rent in aliquot proportions of a year is the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year, yet such payment does not create the tenancy, but is only evidence from which the Court or jury may find the fact:—Held, therefore, in this case where the landlord, before he accepted any rent after expiry of a lease, told the tenants that he would not consent to any tenancy from year to year, but that they should remain as they were on expiry of the lease, to which they assented, that the parties were not tenants from year to year, but tenants at will, although rent continued to be paid as under the lease. Tenants who, on expiry of lease, are permitted to continue in possession pending a treaty for a further lease, are not tenants from year to year, but tenants at will.

Idington v. Douglas, 6 O.L.R. 266 (Falconbridge, C.J.).

—Termination of lease—Removal of furniture—Non-juridical days.]—Held (affirming Loranger, J.), that the period of three days fixed as the time within which an outgoing tenant shall remove his furniture from leased premises according to Art. 1089 of Civil Procedure is not a time for proceeding subject to the rule laid down by Art. 8 C.C.P., but is a period fixed by law which, if it expires upon a non-juridical day, is not prolonged until the next following day. (But see contra, 5 Que. P.R. 99).

Beaudry v. Harrigan, 5 Que. P.R. 366.

—Attachment for rent—Resiliation of lease—Damages for loss of rent to accrue.]—(1) A declinatory exception which prays simply for the dismissal of the action must be dismissed when there is jurisdiction in the Court. (2) A landlord who asks resiliation of a lease for non-payment of rent, may make allegations outside of the proof, in view of rent to accrue and damages, and he is not obliged to limit his demand to three months' rent to become due.

Belanger v. Dubois, 5 Que. P.R. 342.

—Abandonment by tenant—Damages — Resiliation.]—Where the tenant quits the premises before the expiration of the lease the landlord can maintain an action to recover, as damages, a sum equal to the rent to accrue, only asking for resiliation of the lease. The landlord, under such circumstances, cannot before the expiration of the lease claim damages for deterioration in the value of the premises caused by the occupancy of the tenant.

Amiot v. Bonin, Q.R. 23 S.C. 42 (Cir. Ct.).

—Portion of leased premises used for immoral purposes to the knowledge of the lessor's auteur—Action to resiliate lease.]—The fact that the lessor's auteur, who was also the manager of the company appellant, was aware, during several years, that a portion of the leased premises was being used for immoral purposes, and that he acquiesced therein, does not deprive the purchaser and transferee of such premises of the right to demand the resiliation of the lease on the ground of such immoral use of premises. Such knowledge can only affect the question of costs.

Provident Trust and Investment Co. v. Chapleau, 12 Que. K.B. 451 (Full Court).

—Overholding Tenants Act, R.S.N.S. 1900, c. 174—Statute of Frauds—Oral letting.]—An application was made by the original lessee for a writ of possession against a tenant, the lessee alleging that the tenant continued to occupy under a verbal agreement, sub-letting to him for one year which year had expired. The tenant alleged that the agreement to sub-let covered the whole period of three years granted by the landlord to the original lessee. There being a bona fide dispute as to the duration of the term for which the premises were sub-let, and the parties being equally reputable the Judge held that the applicant had failed to establish that the tenant was wrongfully holding possession and a writ of possession was refused: Re Myers v. Murrans, 40 C.L.J. 317, and also, in addition to the cases there cited, Moore v. Gillies, 28 O.R. 358. It was also contended on behalf of the applicant that even if the version of the tenant were accepted it appeared from such version that the oral agreement for the sub-letting for three years was made in January, 1902, and was for a term to begin in the following May and cover a period of three years from May, 1902, and was therefore void under the Statute of Frauds:—Held, following Hodson v. Heuland, 2 Ch. D. (1896), 428, that the continuance in possession after the parol agreement was a part performance of the contract sufficient to take the case out of the Statute of Frauds.

McColl v. Boreham, 40 C.L.J. 399 (Wallace, Co.J.).

—Summary ejectment—Tenancy at will—Contract of purchase.]—W. went into possession of a lot of land under an instrument in writing whereby it was agreed that the purchase money was to be paid in four equal instalments in six, twelve, eighteen and twenty-four months. It was also agreed that W. was to be tenant at will, and that he should remain in possession until default in the payment of any of the instalments:—Held, that W. was not a tenant at will, or a tenant for a fixed term so as to be subject to the provisions of the Summary Ejectment Act, Consoldated Statutes, c. 83, or amending Acts.

Winslow v. Nugent, 36 N.B.R. 356.

— Overholding Tenants Act—Notice of hearing—Affidavit—Waiver.]—On an application under the Overholding Tenants Act of Ontario by a landlord for possession, a copy of the affidavit filed on the application was not served on the tenant as directed by s. 4 of the Act. Counsel appeared for the tenant on the return of the application and took this objection, and the application was adjourned to enable a copy of the affidavit to be served After such service the application was proceeded with and counsel for the tenant examined and cross-examined witnesses and argued the case, when an order for possession was made:—Held, that the failure to serve a copy of the affidavit was an irregularity, which could be and had been waived, and prohibition against the enforcement of the order for possession was refused.

Re Dewar and Dumas, 8 O.L.R. 141 (Anglin, J.).

—Overholding tenant—Colour of right — Summary proceedings.]—In answer to a summary proceeding under the Landlords and Tenants Act, R.S.M. 1902, c. 93, to recover possession of the premises in question, which were held under a written lease creating a tenancy from week to week, the tenant gave evidence tending to show that agents of the landlords had, prior to and at the time of the execution of the lease, agreed and promised verbally that the tenant would not be required to give up possession until the landlords would build on the land. This was denied by one of the agents and the tenant admitted that said agent had refused to put such a term in the lease, although requested to do so:—Held, that the alleged promise, if proved, was of too indefinite a character to support the contention of the tenant that he was not holding over without colour of right. Price v. Guinane (1889), 16 O.R. 264; Gilbert v. Doyle (1874), 24 U.C.C.P. 71, and Wright v. Mattison (1855), 59 U.S.R. 50, followed.

Canadian Pacific Railway Co. v. Lechtzier, 14 Man. R. 566 (Perdue, J.).

—Summary proceedings to recover possession—Notice to quit—Monthly tenancy.]—(1) Where a lease expressly provides that the tenancy created by it shall be a monthly tenancy, the fact that it also provides what rent shall be paid for each of sixteen future months, and more for some months than for others, will not enlarge the rights of the tenant in any way, and the landlord may terminate the tenancy at the expiration of any month by giving a month's notice. (2) A notice to quit signed by one of two owners of the property with the approval of the other, such approval being known to the tenant, will be sufficient, although not expressed to be on behalf of any one except the person giving it. (3) To put an end to a tenancy at the end of May, a notice served on the 30th April is good, although it be erroneously dated 1st May. (4) A notice to quit on or before the anniversary of the commencement of the tenancy is good; Sidebotham v. Holland, [1895], 1 Q.B. 378; although a notice to quit on the last day of the tenancy would also be good.

Burrows v. Mickleson, 14 Man. R. 739 (Perdue, J.).

—Overholding tenant—Summary proceedings to evict—Forfeiture for breach of covenant.]—This was an application by way of summary proceedings under ss. 11-17 of the Landlords and Tenants Act, R.S.M. 1902, c. 93, as amended by 3 and 4 Edw. VII., c. 29, ss. 1, 2, to recover possession of a hall let to defendants for five years, from 1st November, 1901, at a rental of $15 per month. The lease was in writing under seal, and the lessees by it covenanted that they would not permit the hall to be used for the purpose of dancing, except to lodges renting the hall, and that any breach of that covenant should at once at the option of the lessor operate as a forfeiture of the lease. The lessees having rented the hall to five young men not connected with any lodge, for the holding of a dance, the lessor gave them a notice declaring the lease to be forfeited and demanded possession:—Held, following Moore v. Gillies (1897), 28 O.R. 358, that, under the statute as amended, the Judge can now try the right of the tenant to hold over, and that defendants had forfeited the lease, and that a writ of possession should be issued in the landlord's favour.

Ryan v. Turner, 14 Man. R. 624 (Perdue, J.).

—Overholding Tenants Act—Negotiation for new tenancy—Failure to agree—Tenancy at will—Notice to quit—Demand of possession.]—Upon a review of proceedings taken under the Overholding Tenants Act, R.S.O. 1897, c. 171:—Held, that the evidence sustained the finding of the County Court Judge that no complete agreement for a new lease was ever made, but that the tenant held over expecting that an agreement would be arrived at. The tenant, overholding after the 1st March, did so with the consent of the landlord, pending negotiations. When the negotiations came to an end, the landlord, on the 19th March, served a notice requiring the tenant to give up possession on the 23rd March. Upon the tenant's failure to give up possession on that day, the landlord took proceedings under the Act without any further demand of possession:—Held, that the tenant was, after the 1st March, a tenant at will; the notice had the effect of extending his right of occupation till the 23rd March; and a demand of possession after that date was necessary to give the County Court Judge jurisdiction under s. 3 of the Act.

Re Grant and Robertson, 8 O.L.R. 297 (D.C.).

—Abandonment by lessee—Resiliation.]—When the lessee abandons the premises and the lessor lets them to another person there is an implied resiliation of the lease. This resiliation being caused by the fault of the lessee he must pay the lessor the difference between the former and the present rent.

Jodoin v. Demers, Q.R. 24 S.C. 189 (Sup. Ct.), affirmed by Ct. of Review.

—Lease—Resiliation—Change of intention.]—There is a change from the intention with which premises were leased, justifying the resiliation of the lease, when the lessee of a bakery sub-lets it to be used as a laundry.

Pearson v. Potvin, Q.R. 25 S.C. 54 (Sup. Ct.).

—Disturbance of lessee by trespass of third party.]—(1) The cutting of hay, and hunting, upon leased property, by a third party not pretending to have any right upon the property leased, but merely asserting that the land on which he cut hay and hunted was not part of the property leased, is not a trouble de droit, but a mere trespass, against which, in the terms of Art. 1616 C.C., the lessor is not obliged to warrant the lessee. (2) The pretension of a third party that he had acquired a right by prescription to cut hay on the leased property, which pretension was never brought to the notice of the Crown lessor, by a legal proceeding or otherwise, and which was manifestly untenable as regards property of the Crown, would not constitute a trouble de droit under Art. 1616 C.C.

Fitzpatrick v. Lavallée, 25 Que. S.C. 298 (C.R.).

—Surrender of lease—Forfeiture of lease for breach of covenant—Eviction by notice.]—The plaintiff was a tenant to defendant of a farm under a lease for three years dated in March, 1903. The lease contained a covenant by plaintiff to buy three horses from defendant and to pay for them by breaking and clearing of stone on the farm at a price per acre and in default, to pay in cash at the time of threshing. About the first day of December following, plaintiff and defendant met and discussed terms on which plaintiff would abandon the lease and give up possession of the premises. Plaintiff told defendant that he was embarrassed financially, and that, unless defendant would agree to guarantee the wages of the men for the next year's work and the store bills to be paid, he would be unable to go on with the working of the farm under the lease. The defendant seemed to be anxious to assist the plaintiff in this respect, and offered to guarantee the store bills up to $125, but refused to guarantee the men's wages. Negotiations having failed, defendant then told plaintiff that he would cancel the lease for non-fulfilment of some of the covenants. The plaintiff said he wanted that in writing, and the

next morning defendant gave plaintiff the following written notice: "Take notice that I have this day cancelled lease of my farm to you on the grounds of non-fulfilment of terms of said lease." On the same day the plaintiff vacated the premises, after selling to defendant some oats, barley and feed he had there. Defendant resumed possession at once. A few days afterwards plaintiff came back and sold to defendant his poultry and then left the farm altogether:—Held, that there had been no surrender of the lease and that defendant was liable in damages as for an eviction of the plaintiff. Defendant also claimed that he was entitled to terminate the lease for breach of the covenant referred to. As to this, it appeared that plaintiff had done some of the work stipulated for and that there was a dispute over their accounts, but that at all events there was not more than about $38 due on the horses. Held, that there was not such a clear breach of the covenant as to entitle the defendant to declare the lease forfeited on that ground.

Watson v. Moggey, 15 Man. R. 241 (Dubuc, C.J., and Richards, J.).

—Notice to quit—Waiver.]—A lease at a yearly rent, payable in even portions, in advance, on the first day of each and every month, contained a provision entitling the landlord to give the tenant three months' notice to quit in case the landlord received an offer to purchase which he was willing to accept. On the 22nd August the landlord gave the tenant notice to quit three months thereafter. On the 2nd of November the applicant, the original landlord's successor in title, accepted the rent due in advance the previous day, for the whole of the month of November, though the time limited by the notice to quit would expire on the 22nd November:—Held, that the notice to quit was waived. Held, also, that the acceptance on December 3rd of a cheque for that month's rent, although it was not presented for payment, would also be a waiver. A notice to quit in pursuance of such a special provision may be given for any broken period of the term, and need not expire at the end of a month of the tenancy.

Smith v. MacFarlane (No. 2.), 5 Terr. L.R. 508 (Scott, J.).

—Sub-tenant—Claim for cancellation of lease—Lessor as party in warranty.] —Where the lessee is sued by his sub-tenant in cancellation of lease on the ground that the premises have become uninhabitable through fire, and the lessor is bound to repair and reconstruct the premises, the lessee has the right to call the lessor in warranty.

Imperial Button Works v. Montreal Watch Case Co., 7 Que. P.R. 217.

—Overholding—Double yearly value.] —A lease for one year, terminable upon a month's notice, creates a tenancy for years within the meaning of 4 Geo. II. c. 2.

Dundas v. Osmont, 1 W.L.R. 363 (Newlands, J.).

—Overholding tenant—Originating summons—Amendment.]—On an application by a landlord against his tenant for an order for possession, the applicant was refused leave to amend the allegations of his affidavit upon which the summons issued.

Smith v. Macfarlane (No. 1), 5 Terr. L.R. 491 (Scott, J.).

—Overholding Tenants Act—Alterations in lease—Summary adjudication.]—Under the Overholding Tenants Act, as now amended, R.S.O. 1897, c. 171, it is the duty of the Judge upon an application for possession if he is satisfied that the case made out by the landlord is a clear one upon both the facts and the law, to exercise the summary power conferred upon him; but if his conclusion is that the case is a doubtful one either upon the facts or the law then he should leave the parties to proceed in the ordinary course to determine the matters in dispute between them. In such proceedings the Judge has power to determine summarily such a question as the validity of alterations appearing in the copy of the lease in question produced by the tenant although there is a direct conflict of testimony as to the time when and the person by whom the alterations were made.

In re Lumbers and Howard, 9 O.L.R. 680 (D.C.).

—Damages for loss of future rents—Inscription in law.]—In an action asking for the resiliation of a lease and for future rent, it is not necessary to allege specifically that the causes mentioned in the declaration entitle the plaintiff to the conclusions of his action.

Desautels v. Fortier, 7 Que. P.R. 85 (Davidson, J.).

—Tacit renewal — Notice to quit — Lodgings.]—The tenant occupying lodgings under tacit renewal of a lease whereof the rent is payable at a rate per month, has a right merely to one month's notice to quit from the landlord, desiring to terminate the lease.

Comte v. Gissing, Q.R. 28 S.C. 497 (Sup. Ct.).

—Holding over—Increased rent.] — When a tenant holds over after the expiration of

the term and nothing is agreed on as to the terms of the new holding, that new holding is not of necessity to be on the same terms as the former, but the landlord may be awarded an increased rent if there are circumstances to show that such was expected by him and that such expectation was known to and not repudiated by the tenant. In such a case the tenant was notified in writing within a month that the rent would be increased, after another month, and paid two months' rent at the increased rate without objection:—Held, that she was liable for rent at such increased rate for the remaining months of her occupancy, without deciding whether a new tenancy from year to year had been created or not.

Winnipeg Land and Mortgage Corporation v. Witcher, 15 Man. R. 423.

—Premises leased for special business — Abandonment by lessee—Rights of lessor.] —The lessor of premises leased for a special business (v.g., as a barber shop) who brings suit with attachment in recaption, for rent due and to rescind the lease, has a further right to recover by the same action the damages arising from the likelihood of the premises remaining unoccupied for a length of time.

Darwent v. Montbriant, 31 Que. S.C. 54.

—Action for resiliation — Premises not habitable—Art. 191 C.C.P.—Art. 1641 C.C.] —The defendant to an action for resiliation of a lease and for damages may properly plead that the premises leased have become uninhabitable by reason of a fire which occurred before the institution of the action.

Lander v. Hammond, 8 Que. P.R. 408 (Loranger, J.).

—Tenancy for eleven months at a yearly rate—Monthly payments of rent—Notice to quit.]—Respondents became tenants of the appellant for a period of eleven months for which they were to pay rent "at the rate of $400.00 per year." They paid the rent monthly. After the expiration of the term they continued in possession paying monthly rent. On 9th March, 1896, they gave appellant notice that they would quit the premises on the 30th April following. They paid rent up to that date, when they quit the premises in pursuance of their notice. No arrangement was made as to terms upon which respondents were to continue after the expiry of the term. The action was brought for $66.66 rent for the months of May and June:—Held, affirming the judgment of Rouleau, J., that the tenancy was a tenancy from month to month and was properly terminated by the notice to quit. Held, that the matter in question related "to the taking of an annual or other rent," and that consequently an appeal lay without leave.

Eastman v. Richards, 3 Terr. L.R. 73.

—Forfeiture of lease—Relief against non-payment of rent excused by oral assurance.]—Plaintiff, as lessee, and defendant, as lessor, on the 1st of January, 1906, entered into a lease for a term of five years, at a rental of $70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to the 23rd of January, 1907, inadvertently allowed the rent for January to fall in arrear, but on the latter date, tendered defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced:—Held, following Newbolt v. Bingham (1895), 72 L.T.N.S. 852, that, no third party interests having intervened, plaintiff was entitled to relief against forfeiture, both as to the term and the option, and that, the case coming within Rule 976 of the Supreme Court Rules, 1906, plaintiff should also get the costs of the action.

Huntting v. MacAdam, 13 B.C.R. 426.

—Unregistered assignment of lease—Land Titles Act.]—In an action against the landlord by the assignee of a lease under the Land Titles Act, 1894, duly registered, to recover possession of the premises upon which the landlord had re-entered for default in the payment of rent:—Held, 1. That the fact that the assignment was not registered was no bar to the action. 2. That the original lessee was not a necessary party. 3. That the lessee was entitled to relief without the issue of a writ of ejectment upon payment of the rent due, but that the plaintiff, although he tendered all the rent due before action, should bear the costs of it, except in so far as these were increased by the defendant's resistance to the claim. The plaintiff had sub-let the lands, the sub-lease providing for re-entry in the event of the sub-lessee permitting an execution to be levied against his goods. This event had happened and the plaintiff had distrained through the sheriff, who was in possession under a writ of attachment and writs of execution when the defendant re-entered. Held, that the plaintiff's distress and the bringing of this action showed that the

plaintiff intended to terminate the sub-lease.

Tucker v. Armour, 6 Terr. L.R. 388.

—Covenant by lessees not to sublet without leave—Breach.]—A lease of land for five years, made pursuant to the Act, respecting short forms of leases contained a covenant by the lessees not to assign or sub-let without leave, and a covenant by the lessor for renewal, provided that the lessees should have duly kept and performed all the covenants, etc., and have given six months' notice that they required a further term. While the lease was current it was assigned by the lessees to the two defendants, who were partners, with the written consent of the lessor, and before the expiry of the lease one of the defendants, by deed, without the leave of the lessor assigned all his interest in the lease to his co-defendant, and surrendered to him possession of the demised premises, of which he had since been in exclusive occupation:—Held, that the execution of this deed, followed by the change of possession, constituted a breach of the covenant of the lessees not to assign or sub-let, for which the lessor was entitled to enter, and had the effect of putting an end to the right to a renewal provided for by the lease.

Fitzgerald v. Barbour, 17 O.L.R. 254, affirmed on appeal, Loveless v. Fitzgerald, 42 Can. S.C.R. 254.

—Default in payment of rent—Proviso for re-entry—Forfeiture—Distress.]—A plea in an action of trespass by a tenant against his landlord alleging that it became lawful under a proviso in the lease for the landlord to re-enter for non-payment of rent, without setting out the proviso, is bad on demurrer, as stating a conclusion of law. A landlord can not, during the currency of the lease and before the expiration of the term, re-enter for non-payment of rent for which he has distrained on goods and chattels still held by him under the distress.

Whittaker v. Goggin, 38 N.B.R. 378.

—Prohibition of sub-letting—Effect of violation.]—Where a lease prohibits sub-letting a sub-lease by the lessee does not of itself effect resiliation; it has the effect of a resolutory condition and affords ground for application to the Court for resiliation which, in its discretion the Court may grant or may refuse it if the lessor has no longer the interest on the strength of which he applied, for example, if the sub-lease had ceased to exist before the application was made.

Brunel v. Goldwater, Q.R. 33 S.C. 240 (Sup. Ct.).

— Non-payment of rent—Resiliation.] — Failure to pay one gale of rent is ground for an action by the lessor for resiliation of the lease. The lessor who sues for resiliation may recover from the lessee, as damages, the amount of the rent, which would accrue during the remainder of the term under the resiliated lease subject to the obligation to account for rents received by a new tenancy during such period.

Guardian Assur. Co. v. Humphrey, Q.R. 33 S.C. 393 (Ct. Rev.).

—Conditions of lease—Breach—Resiliation.]—The lessor who has covenanted in his lease not to make any alteration in the premises without the express permission in writing of the lessor affords ground for the latter to demand resiliation. (1) By installing a machine heated and operated by gas through an electric motor which causes vibration. (2) By making an opening in the roof for the insertion of an escape pipe which has the effect (the roof being double) of raising the temperature in winter in the intermediate space and causing ice to form on the outer roof. (3) By increasing the risk of fire and thereby making greater the cost of insurance. The lessee cannot invoke in such case the clause of the lease by which he is obliged to pay this extra insurance; the additional risk of fire alone is a sufficient ground for resiliation.

Valois v. Marceau, Q.R. 17 K.B. 31.

—Resiliation—Tacit renewal.]—There cannot be a tacit renewal of a lease resiliated by a judicial decree. It is of no avail for the lessor claiming it to allege that the judgment was rendered by error and that he abandoned it as soon as he was informed of it. It has caused a modification of the judicial relations between the lessee and the lessor which the latter cannot sweep away by the mere expression of his will.

Wallace v. Honan, Q.R. 17 K.B. 289.

—Prohibition to sub-let — Action to rescind.]—Knowledge by a lessor during several months that the leased premises are sub-let in violation of a prohibitive clause, is no bar to an action brought by him against the lessee to have the lease rescinded for such violation.

Venner v. Thienel, 36 Que. S.C. 223.

—Lease—Use of premises—Resiliation.] — The obligation of a lessee to use the leased premises for the purposes indicated is violated by one who, having leased a building to be used as a lodging and boarding house ceases its use for the latter purpose to carry on that business in another building two hundred feet away. The lessor, in such case, can demand the resiliation of the lease and damages from the lessee.

Caron v. Lamarche, Q.R. 17 K.B. 495.

—**Provision against sub-letting — Written consent of lessor—Verbal authority.**] — A provision in a lease against sub-letting without the written consent of the lessor is not de rigueur so as to prevent the lessor pleading a verbal consent to an action to resiliate the lease for breach of this provision brought by an assignee of the lessor. Oral evidence by the lessor of such consent prior to the sale of the immovable to the plaintiff, coupled with the implied consent of the latter to the sub-lease resulting from the fact that he was aware of it for several months without taking action is sufficient. Cf. Vaillancourt v. Saint Denis, Q.R. 34 S.C. 25.

Jilbert v. Bowen, Q.R. 36 S.C. 309.

LAND TITLES ACT.

See REGISTRY LAWS; SALE OF LAND.

LANES.

—Public lane.]—
See HIGHWAY.

—Private lane.]—
See EASEMENT.

LEASE.

See LANDLORD AND TENANT.

LEAVE TO APPEAL.

See APPEAL.

LEGACY.

See WILL

LEGAL PROFESSION.

Legal Professions Act—Power to make rules—Call to the bar.]—Under section 37 (g) of the Legal Professions Act, the benchers of the Law Society, having been empowered to make rules governing "the fees to be paid to the society upon call to the bar . . . ." passed a rule, 103, directing that "the following fees shall be paid to the Society . . . on examination for call to the bar, $100. In the event of an unsuccessful examination $75 will be returned;" and, Rule 60, "the prescribed fees must accompany the notice." Plaintiff was entitled to apply for call under section 41 of the statute, "upon passing such examination . . . and upon payment of the prescribed fees." He gave notice and presented a petition for call, but declined to pay at that time the fee prescribed. Held, (Irving, J.A., dissenting), that "call to the bar includes all the preliminary proceedings and steps connected therewith, such as payment of the fee, the examination and compliance with other proper requirements of the Act and Rules; that when the Society imposed by Rule 103 a fee of $100 upon call to the bar, they intended to impose the fee authorized by section 37, and were entitled to insist upon payment of that fee before entering upon the expense to be incurred by calling the applicant to the bar. The rider to Rule 103, providing for the return of $75 to an unsuccessful applicant is separable from the part prescribing the fee.

Hovell v. Law Society of British Columbia, 15 B.C.R. 167.

—**Solicitor and client.**]—See SOLICITOR.

LIBEL.

Privilege—Notary—Objections after verdict—New trial.]—H., to qualify as candidate in a municipal election procured from a friend a deed of land giving him a contre-lettre under which he collected the revenues. Having sworn that he was owner of real estate to the value of $2,000 (that described in the deed), B. in his newspaper accused him of perjury and he took action against B. for libel. On the trial the deed to H. was produced, and the existence of the contre-lettre proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on the ground that it was a confidential document. The trial Judge maintained this claim, but oral evidence was admitted proving to some extent what the contre-lettre contained. A verdict having been given in favour of H.:—Held, that the trial Judge erred in ruling that the notary was not obliged to produce the contre-lettre, as it was impossible without its production to determine what, if any, limitations it placed upon the deed, and there should be a new trial. B. in his newspaper article also accused H. of having been drunk during the election, and the Judge, in charging the jury, said:—"You should consider the case as if the charge of drunkenness had been made against yourselves, your brother or your friend." Held, that this was calculated to mislead the jury and was also a reason for granting a new trial. If objection to one or more portions of the Judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such case an appellate Court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion.

Barthe v. Huard, 42 Can. S.C.R. 406.

—Security for costs—Action against newspaper—Criminal charge.]—Motion by defendants for security for costs in a libel action:—Held, that on the face of the publication complained of, there was nothing that would suggest a criminal charge. To allege that a bench warrant was applied for to bring plaintiff before a magistrate, but refused, cannot be said to impute a criminal offence to plaintiff. Order for security granted.

Titchmarsh v. The World, 1 O.W.N. 454, 15 O.W.R. 362.

—Particulars of malice.]—When the defendant has pleaded privilege, in an action for libel, and anticipates that plaintiff will endeavour to prove malice to rebut the privilege he is not entitled to an order requiring the plaintiff to furnish particulars of express malice charged by the plaintiff against the defendant as affecting the publication complained of. When the defendant has not pleaded justification in an action for libel, he is not entitled to administer interrogatories asking the plaintiff if he did certain acts with a view to showing that the statements in the alleged libel were true.

Timmons v. National Life Assurance Co., 19 Man. R. 227.

—Proof of malice to rebut defence of privilege.]—1. At the trial of a libel action where the truth of the libel was not in issue, evidence showing that the statements complained of were false to the knowledge of the defendant was properly admitted for the purpose of showing malice in the defendant and rebutting the defence of privilege. 2. A new trial will not be granted because the trial Judge in his charge to the jury commented strongly upon the facts adduced to show such falsity, on the ground that the jury was thereby misled as to the issue to be tried, if it appears that in the same charge he clearly pointed out for what purpose the evidence was allowed in and that the falsity of the statements was only to be considered as an element in the consideration of the question of malice. 3. Neither should a new trial be ordered because of references in the charge to the plaintiff that were "calculated to secure for him the good-will of the jury" and to the defendant that were "uncomplimentary and calculated to prejudice him in the regard of the jury" when the amount of the verdict was only $400 and the evidence seemed to warrant such references, because it did not clearly appear that any substantial wrong or miscarriage of justice had been occasioned by the use of the expressions complained of.

Schaefer v. Schwab, 19 Man. R. 212.

—Criminal libel—Indictment.]—An indictment for defamatory libel is good which purports to set out only the tenor and effect of the alleged libel, but in fact sets out the exact words. Such an indictment following the statutory form, Criminal Code, form 64 h, need not state that the words were likely to injure the reputations of the persons alleged to be defamed by exposing them to hatred, contempt or ridicule, or that they were designed to insult such persons. The following article published in a newspaper, taken in connection with the character of the paper and surrounding circumstances, was held to be sufficient to support a verdict of circulating obscene printed matter tending to corrupt morals within s. 207 (a) of the Criminal Code: "What married woman lets the young man in through the side window when her husband is attending lodge meeting?" "Who is the married woman who went to Saint John last Saturday with an I. C. R. clerk and stopped at the hotel as clerk's wife?"

The King v. MacDougall, 39 N.B.R. 388. 15 Can. Cr. Cas. 466.

—Libel—Election contest—Withdrawal of candidate—Allegation of improper motives.]—K. was a member of the House of Commons prior to the election in 1908 and in August of that year a letter was published in the Sydney *Post* which contained the following, which referred to him:—"The doctor had a great deal to say of the elections in 1904. Well, I have some recollections of that contest myself, and I ask the Doctor: Why did you at that time withdraw your name from the Liberal convention? The majority of the delegates came there determined to see you nominated? Why did you not accede to their request? Doctor Kendall, what was your price? Did you get it? Take the good Liberals of this country into your confidence and tell them what happened in those two awful hours in a certain room in the Sydney Hotel that day? The proceedings of the convention were held up for no reason that the delegates saw, but for reasons which are very well known to you and three or four others whom I might mention. One speaker after another killed time at the Alexandria Hall while you were in dread conflict with the machine. Finally the consideration was fixed and you took off your coat and shouted for Johnston. What was that consideration?" On the trial of an action by K. against the proprietors of the *Post* the jury gave a verdict for the defendants:—Held, that the publication could only be construed as charging K. with having withdrawn his name from the convention for personal profit, and was libellous. The verdict was therefore properly set aside by the Court below and a new trial ordered.

Sydney Post Publishing Co. v. Kendall, 43 Can. S.C.R. 461.

—Animus—Evidence—Proof of handwriting.]—1. At a trial for criminal libel where the matter complained of was libellous per

se, the prosecution should not be allowed to give evidence of acts of hostility on the part of the accused towards the prosecutor or relatives unconnected with the alleged libel, for the purpose of leading to the inference that the accused cherished feelings of ill-will towards the prosecutor and was therefore likely to have been the person who published the libel; and, if such evidence has been admitted, although without objection, the jury should be told that they should give no weight to it. 2. A comparison of style and common forms of expression in the libellous and admitted writings should be by experts or skilled witnesses and, without such evidence, the trial Judge should not invite the jury to draw any inference from similarity in style or expressions. Scott v. Crerar (1886), 14 A.R. 152, followed. Per Perdue, J.A.:—When the only evidence of the handwriting of the accused is that of experts, and where the experts called by the prosecutor are contradicted by an equal number of experts called by the defence, the accused denying the authorship on oath, the jury should be told that the prosecutor had failed to establish that the letters had been written by her.

Rex v. Law, 19 Man. R. 259, 15 Can. Cr. Cas. 382.

—Articles in newspaper—Joint damages asked by husband and wife.]—1. In an action for libel against a newspaper, it is not sufficient to give the purport of the articles which plaintiff alleges to be libellous; but defendant is entitled to know in which articles of the paper the alleged libel appeared. 2. If husband and wife claim a fixed amount of damages caused by a libel, the defendant is entitled to know how much damage was suffered by the male plaintiff, how much by the female plaintiff and how much is claimed by each of them.

Patron v. "La Vigie," 11 Que. P.R. 268.

—Discovery—Person libelled not named—Examination of defendant.]—In an action for a libel said to be contained in a letter written by the defendant to the husband of the plaintiff, the defendant, on being examined for discovery, admitted the authorship of the letter, but refused to answer questions directed to finding out who the person referred to in the letter as "lady friend" was—the plaintiff not being named in the letter. The defendant in his statement of defence denied all the allegations of the statement of claim, and said that, if the words were written and published of and concerning the plaintiff, as alleged, it was without malice and upon a privileged occasion:—Held, that the defendant should answer the questions; the alleged libel having made a reference that could only be understood having regard to extraneous circumstances, the questions were relevant to show that the plaintiff was the person who would be understood by her associates or persons acquainted with the circumstances, to have been referred to; and the questions were also relevant upon the issue as to malice raised by the defence of privilege.

Morley v. Patrick, 21 O.L.R. 240.

Newspaper article signed by defendant—Identity of plaintiff with person mentioned in article.]—

Levallee v. Lannic, 7 W.L.R. 281 (Alta.).

— Innuendo—Defamatory meaning ascribable to words not libellous in themselves—Privileged occasion—Notice to public of dissolution of partnership.]—

Fowler v. Nankin, 11 W.L.R. 586 (Alta.).

—Letter reflecting on physician's professional skill — Justification.]—

Williams v. Morris, 4 W.L.R. 99 (B.C.).

—Offer of apology—6 and 7 Vict. c. 96 (Imp.)—Newspaper libel.]—

Goode v. Journal Publishing Co., 6 W.L.R. 511 (N.W.T.).

—Statement of defence — Newspaper — Mistake.] — In an action for libel, the words complained of were the concluding words of a newspaper article referring to the plaintiff and speaking of his conduct and conviction with H., "the notorious London promotor." It was said that the word "conviction" was a misprint for "connection." The defendant pleaded that the article was one of considerable length, and contained many statements concerning the plaintiff, all of which, except that expressly complained of in this action, were true in substance and in fact, and but for the mistake the whole of the article would have been true in substance and in fact, and such mistake was made without any malicious motive or intent. The Master in Chambers ordered this paragraph to be struck out with leave to the defendants to amend by substituting such allegations as might be proper to set out the alleged mistake:—Held, that the order was right, and the pleading bad whether regarded as in mitigation of damages or in any other view. Beaton v. Intelligencer Printing and Publishing Co., 22 A.R. 97, distinguished.

Kelly v. Ross, 1 O.W.N. 142.

—Libel and slander — Newspaper — Pleading — Security for costs.]—The defendants were the publishers of a newspaper, in which an article appeared, headed "A Girl's Confession," stating that "a young lady of Walkerton claims she had a hand in the shooting of the Chinaman." The "young lady" was not named in the article, but was spoken as a constant visitor at the Chinaman's laundry, and on intimate terms with the Chinaman, and it was said that her visits became "odorous." The plaintiff, a young girl, alleging that the article referred to her, sued for defamation. In the

fifth paragraph of her statement of claim she set out the article with an innuendo that she had been guilty of attempt to murder and was an immoral person. By the 6th paragraph she alleged that her name was given to a detective by the defendants as the person referred to in the article:—Held, that paragraph 6 did not aid claim for libel, but was in itself a count for slander, and could not be struck out, nor could the defendants have security for costs in respect of that paragraph, as the Act 9 Edw. VII. c. 40, s. 12, sub-s. 2, does not apply to slander by the publishers of a newspaper. The statute is one passed for the benefit of a class, and those invoking it must comply strictly with the practice. An affidavit made by one of the defendants, not filed upon the original motion, was not allowed to be read upon an appeal. Upon a motion for security for costs the defendants must show the nature of the defence. When they allege good faith, they must show the facts surrounding the publication, as that their good faith may be ascertained. It is not enough for the defendants to say that there was reasonable ground for their belief that the publication was for the public benefit—they must say why they thought so.

Greenhow v. Wesley, 1 O.W.N. 996, 1001.

—Action for defamation — Verdict for defendants — Perverse verdict — Nominal damages.]—

Green v. World Printing & Publishing Co., 8 W.L.R. 210 (B.C.).

—Libel — Charge against civic employee by alderman — Justification — Public interest — Privileged communication — Damages.]—

Barthe v. Lapointe, 4 E.L.R. 339 (Que.).

—Privilege — Invitation to libel — Relevancy — Sufficiency — Necessity for setting out facts — Justification — Particulars — Specific instances.]—

Laird v. Scott, 9 W.L.R. 349 (Sask.)

—Criminal libel — Allegations as to immoral conduct of Minister of the Crown—Public interest.]—

Rex v. Crockett, 1 E.L.R. 330 (N.B.).

Conciliatory plea — Embarrassing matter.]—

Bligh v. Warren, 7 E.L.R. 305 (N.S.).

Criminal libel — Acquittal—Subsequent action for costs—Taxation.]—Plaintiff had been prosecuted by defendant in a criminal Court for defamatory libel and acquitted. No demand was made when the verdict was given for a condemnation of defendant for costs, but plaintiff afterwards sought to recover them by action. After hearing the cause in the Superior Court the presiding Judge discharged the délibéré to enable the plaintiff to have his costs taxed before the Judge who presided at the criminal trial, which was done, and the cause was reheard:—Held, that plaintiff could claim his costs and disbursements from defendant by an ordinary action though he had not asked for a condemnation against defendant therefor at the time of the verdict. That the Judge who presided at the criminal trial could, even after proceedings in such action, tax such costs and disbursements.

Mackay v. Hughes, 19 Que. S.C. 367 (S.C.)

—Husband's liability—Libel by wife.] —In an action against husband and wife for damages for a libel published by the wife, the jury returned a verdict for $10:—Held, by Martin, J., that the husband was liable, and that the costs should follow the event.

Mackenzie v. Cunningham, 8 B.C.R. 206.

—"Blackmailing"—Innuendo — Onus of proof—Contradictory evidence—Nonsuit.] —The word "blackmailing" is libellous per se requiring no innuendo, and it does not lie upon the plaintiff to prove the falsity of the charge. For the purposes of the trial it is presumed in his favour, and the onus is on the defendant to prove it to be true if justification is pleaded. Semble, per Boyd, C.:—The better view is that colloquial use has broadened the meaning of the word so that it may not have a criminal connotation. In an action for two libels where the words used in one were not libellous per se and were not, fairly taken, capable of the meaning alleged in the innuendo:—Held, that the trial Judge was right who had, after motions made for a nonsuit both at the close of the plaintiff's case, and after all the evidence was in, on which he reserved judgment, given judgment dismissing the action after a verdict was rendered by the jury in favour of the plaintiff. But as to the other, where the truth of the charge was not admitted by the plaintiff or proved on uncontroverted evidence, and where the evidence as to the use of the word "blackmailing" was contradictory:—Held, that it was for the jury to pass upon the evidence, and the judgment dismissing the action on the ground that there was no evidence to go to the jury should be set aside and the verdict of the jury in favour of the plaintiff restored. Judgment of Meredith, J., 32 O.R. 163, reversed in part by the Divisional Court.

Macdonald v. Mail Printing Co., 2 O.L.R. 278.

—Privileged communication—Malice—Evidence.]—Plaintiff, who was local agent of a life insurance company, was dissatisfied with the remuneration he was receiving

and decided to retire, and another agent was appointed to succeed him. Shortly afterwards defendant, who was general manager of the company, wrote to a policy holder, who was also a client of plaintiff's, stating that plaintiff had been "removed" from the agency, and that this was only done "because it was clearly necessary," and, adding, "I now find that he has collected money, which, up to the present time, we have been unable to get him to report." At the time the letter complained of was written it was untrue to the knowledge of defendant that plaintiff had been dismissed from his office as agent of the company, or that he had collected any of the moneys of the company for which he had been unable to get him to account:—Held, that the letter was clearly libellous, but that if it was written bona fide, to a policy holder in the company, even though the charges contained in it were false, and could not be justified, the occasion was privileged, and defendant would not be liable. On the trial, counsel for plaintiff asked the trial Judge to instruct the jury that if it was proved that defendant stated in the letter that which he knew to be false, it was evidence from which actual malice might be inferred. The learned trial Judge declined to do so, on the ground that the point was already sufficiently covered. Held, that the point upon which the trial Judge was asked to direct the jury involved a point material for their consideration, and that, as the learned Judge had not directed the jury as asked, there must be a new trial.

Miller v. Green, 33 N.S.R. 517.

—Privileged communication — Malice — Charge to jury—Evidence.]—On the trial of an action claiming damages for a libel alleged to be contained in a privileged communication the Judge charged the jury as to privilege and added "if the defendant made the communication bona fide, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him:—Held, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him. One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact. Held, that as to prove malice the writer's knowledge of the falsity of the fact was the material point the sense in which he may have used the words was the governing consideration. The Judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff. Judgment of the Supreme Court of Nova Scotia (Miller v. Green, 32 N.S.R. 129), affirmed.

Green v. Miller, 31 Can. S.C.R. 177.

—Discovery—Justification — Immorality—Disclosure of name of paramour.]—The defendants having in their newspaper charged the plaintiff with immorality, he sued them for libel, and the defendants pleaded that the charge was true. The plaintiff having required particulars, the defendants set forth that he lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars:—Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her.

Macdonald v. Sheppard Publishing Co., 19 Ont. Pr. 282.

—Previous libel—Subsequent libel—Admissibility.]—In an action for libel evidence may be given of a previous publication by the plaintiff connected with the libel complained of, but not of a publication subsequent to the libel, at any rate, where it makes no reference to the defendant. Stirton v. Gummer, 31 O.R. 277, and Downey v. Stirton, 1 O.L.R. 186, followed.

Downey v. Armstrong, 1 O.L.R. 237.

—Libel in pleading.]—A party who complains of a libel contained in a pleading is not bound to postpone his action in damages for such libel until the case in which the pleading was filed is decided, and such action if taken will not be dismissed as premature.

Wilkins v. Major, 4 Que. P.R. 172 (Davidson, J.).

—Evidence—Admissibility—Previous libel—Subsequent libel.]—In an action for libel evidence of a previous provocatory libel on the plaintiff's part is admissible in mitigation of damages; but evidence of a subsequent libel by the plaintiff is not admissible. Nor can the defendant be permitted to show that the plaintiff has attacked the character and reputation of others. It having been elicited in cross-examination of the plaintiff that the defendant had recovered damages for pre-

vious and subsequent libels before mentioned in an action against the proprietor of the newspaper of which the plaintiff was editor, the trial Judge told the jury to take that fact into consideration:—Held, not misdirection.

Downey v. Stirton, 1 O.L.R. 186.

—Defamation—Privilege — Malice.] — A niece wrote to her aunt, with whom she was on terms of great intimacy and whom she was in the habit of staying with, a letter making, on the authority of a correspondent, statements derogatory to the character of a clergyman well known to niece and aunt, who was a frequent visitor at the aunt's house, and it was alleged on one side and denied on the other that in the letter, which had been destroyed, the niece told the aunt "to spread this about town at once:"—Held, that such a moral and social duty existed as made the communication a privileged one; and that though a direction to spread the statement about would be some evidence of malice, it should have been left to the jury to say whether the direction had been in fact given.

Fenton v. Macdonald, 1 O.L.R. 422 (C. A.).

— Privilege—Interest — Publication to clerk.]—One of the defendants, the secretary of a trade association, prepared a statement for circulation among the members of the association, and gave it to a person whom he occasionally employed, with instructions to copy it. This statement contained an allegation that the plaintiff was unworthy of credit:—Held, that, as the publication to the members of the association would have been privileged, in the absence of malice, on the ground of interest, the publication to the copyist was also privileged, being a reasonable means employed to make the communication to the others. Lawless v. Anglo-Egyptian Cotton and Oil Co. (1869), L.R. 4 Q.B. 262, followed. Held, also, that the finding of the jury that "there was no ground of action" was in effect a finding that the words were not defamatory.

Harper v. Hamilton Retail Grocers' Association, 32 O.R. 295.

—Criminal libel—Suspended sentence — Breach of recognizance for good behaviour —Fresh libels.]—Where a person has been released from custody on a criminal charge upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, and judgment moved against the offender. Where such a recognizance has been given in proceedings for libel, the publication of fresh libels against the prosecutor is no breach of good behaviour under such recognizance, for the defendant may have complete defences against such charges of libel, and the prosecutor must be left to his remedy by action or indictment.

Rex v. Young, 2 O.L.R. 228.

—Publication—New trial.] — Defendant took a copy of an alleged libellous resolution to the editor of a newspaper who dictated it to his stenographer and handed defendant's copy back to her. Before the stenographer extended his notes another copy of the resolution was found in the office and from it the printer set up the type:—Held, reversing Irving, J., who dismissed the action on the ground that it was not shown that defendant was the cause of publication, that there should be a new trial.

Mackenzie v. Cunningham, 8 B.C.R. 36.

—General damages—Particulars.] — When in an action based on a libel plaintiff demands damages without indicating their nature the Court should presume that he asks for exemplary damages and will not order particulars to be furnished.

Gauvreau v. Chapais, 18 Que. S.C. 135 (S.C.).

—Justification—Particulars — Appeal — Res judicata.]—The libel originally complained of in the statement of claim stated that the plaintiff had been cashiered from the army for cheating at cards, and also that divorce proceedings had been taken against him. The defendants pleaded justification to the whole, and added two clauses to the same paragraph of their statement of defence, one of which related to the first charge and the other to the second. The first of these clauses was as follows: "The plaintiff was obliged to leave the army on the ground that he had cheated at cards, and stories of the peculiar character of the plaintiff's card playing and of his having been cashiered from the army for cheating at cards were in circulation in the city of Vancouver." The plaintiff applied for an order striking out both these added clauses, but the application was refused on the ground that the defendants were entitled to plead them as particulars of the defence of justification. There was no appeal from this order, but the plaintiff amended (by leave) by striking out so much of his complaint as related to the divorce proceedings, and the defendants then struck out of their defence the second clause, relating to the divorce proceedings. An application was then made to strike out the first clause, that relating to the plaintiff being cashiered from the army, and was refused by the Master and by a Judge in Chambers on appeal:—Held, per Falconbridge, C.J., that the plaintiff was not

prejudiced by the clause; and, moreover, approving Dodge v. Smith (1901), 1 O.L. R. 46, that a second appeal was not to be encouraged in a case of this kind. Per Street, J., that the matter of the second application was res judicata by the order made on the first application and not appealed against.

Bateman v. Mail Printing Co., 2 O.L.R. 416 (D.C.).

—Jury notice.]—In actions of libel it is not necessary to file and serve a jury notice.

Puterbaugh v. Gold Medal Manuf. Co., 3 O.L.R. 259.

—Costs in libel action when verdict for nominal damages only—King's Bench Act, Rule 926.]—When the jury in an action for libel finds a verdict for plaintiff with only one dollar damages, the defendant should not be ordered to pay costs.

The Manitoba Farmers' Hedge and Wire Fence Co. v. The Stovel Co., 14 Man. R. 55 (Dubuc, J.).

—Criminal libel—Costs—Depositions not used at trial—Abortive trial—Cr. Code, ss. 833 and 835.]—In a criminal libel action, defendant, in support of his plea of justification, obtained a commission and had the evidence of certain witnesses, out of the jurisdiction, taken, for use at the trial. The evidence was used at the first trial and the jury disagreed. At the second trial the jury again disagreed. At the third trial defendant was acquitted, but the evidence was not used owing to the private prosecutors giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner:—Held, that as the commission evidence was not put in by defendant as part of his case defendant should be deprived of the costs of it. Held, also, that defendant was not entitled to the costs of the abortive trials.

Rex v. Nichol, 8 B.C.R. 276 (Drake, J.).

—Criminal libel—Costs—Taxation or action for—Stay—Cr. Code, ss. 833 and 835.]—N., after his acquittal in a criminal libel action, proceeded to tax his costs and moved before the trial Judge for certain costs, and on obtaining an order with which he was dissatisfied, abandoned the taxation and commenced a civil action against the prosecutors for his costs:—Held, by Irving, J., on a summons for a stay of proceedings, that plaintiff should not be allowed to pursue both remedies at once, but as in the other action there was no appeal he allowed this action to proceed on terms.

Nichol v. Pooley, 9 B.C.R. 21 (Irving, J.).

—Pleading — Defence — Fair comment—Absence of justification—Striking out defences.]—In an action for an alleged libel contained in an article in the defendants' newspaper, the defendants pleaded fair comment, but did not set out the facts upon which it was alleged the article was fair comment, or allege the truth thereof:—Held, that the defence was bad, and should be struck out.

Crow's Nest Pass Coal Co. v. Bell, 4 O.L.R. 660 (Div. Ct.).

—Libel in newspaper—Publishing company—Liability of president signing declaration—Art. 2924 R.S.Q.]—The president and manager of a company formed for the publication of a newspaper and who also signed the declaration required by Arts. 2924 et seq. of the Revised Statutes of Quebec, may be held responsible for a libel published in such newspaper jointly and severally with the company.

Migneron v. Compagnie de Publication de La Patrie, 5 Que. P.R. 329.

—Libel in pleading—Right of action of person injured—Public policy.]—(1) The action against a party for a libellous statement in a judicial proceeding, is a matter concerning the relation of the subject to the administration of justice, and, as such, is governed in the Province of Quebec by the law of England. (2) Under the law of England, no damages can be recovered for injurious words, forming part of a judicial proceeding, pleaded in good faith, with probable cause and without malice, and which words are relevant to the issue, although they may be subsequently shown to be false and injurious Semble, an action for such injurious statements, instituted before the determination of the suit in which they were pleaded, is premature; but, in the present case, it was unnecessary to pronounce formally upon this point, the action being dismissed on other grounds.

Wilkins v. Major, 22 Que. S.C. 264 (Archibald, J.).

—Criminal libel—Costs—Taxation or action for—Stay.]—Where the accused, after his acquittal in a criminal libel action, proceeded to tax his costs and moved before the trial Judge for certain costs, and on obtaining an order with which he was dissatisfied abandoned the taxation and commenced a civil action against the prosecutors for his costs, the civil action will be allowed to proceed only on terms of the plaintiff undertaking to abide by such order as may be made therein as to the costs of the abandoned taxation in the criminal case.

Nichol v. Pooley, 9 B.C.R. 363, 6 Can. Cr. Cas. 269 (Full Court, affirming Irving, J.).

—**Pleading setting out whole article—Immaterial issue.**]—The very words complained of in an action of defamation must be set out by the plaintiff, in order that the Court may judge whether they constitute a cause of action—it is not sufficient to give the substance or purport with innuendoes—it is sufficient to set out the libellous passages, provided nothing be omitted which qualifies or alters the sense, and as the libel itself must be produced at the trial, and the defendant is entitled to have the whole of it read:—Held, that the plaintiff was entitled in this action to set out in the statement of claim the whole article complained of. But, held, also, that certain words in another paragraph which tendered an issue not material but which might be embarrassing should be struck out.

Hay v. Bingham, 5 O.L.R. 224 (Falconbridge, C.J.K.B.).

—**Privilege—Proof of malice—Admissibility of evidence—Misdirection.**]—G., local manager for Nova Scotia of the Confederation Life Association, of which M. had been a local agent, wrote to Mrs. Freeman, a policy-holder, the following letter: "I think you know that at the time of my recent visit to Bridgetown, I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which up to the present time, we have been unable to get him to report, and I am told that he is doing and saying all he can against myself and the company. The receipt for your premium fell due May 30th, days of grace June 30th. If you have made settlement of the premium with Mr. Miller your policy will, of course, be maintained in force, and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so I am prompted to write you this letter and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continue the policy?" In an action for libel it was shown that he had not been dismissed from the agency, but wanted larger commissions in continuing, which were refused, and that he was not a defaulter, but was dilatory in making his returns. On the trial Mrs. Freeman gave evidence, subject to objection, of her understanding of the letter as imputing to M. a wrongful retention of money:—Held, that such evidence was improperly received and there was a miscarriage of justice by its admission. The Judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and his protection is taken away." Held, that this was misdirection; that the question for the jury was not the truth or falsity of the statements, but whether or not, if false, the defendant honestly believed them to be true, so that it was misdirection on a vital point. The majority of the Court were of opinion, Girouard and Davies, JJ., contra, that as defendant had asked for a new trial only in the Court below, this Court could not order judgment to be entered for him, and a new trial was granted. Judgment of the Supreme Court of Nova Scotia (Miller v. Green, 35 N.S. Rep. 117), reversed.

Green v. Miller, 33 Can. S.C.R. 193.

—**Jurisdiction—Venue.**]—An action based on a letter containing defamatory matter, sent from the district of Three Rivers to the address of a person living in the district of Arthabasca where it was received and read, may be brought in the latter district.

Marcotte v. Therien, Q.R. 22 S.C. 315 (Cir. Ct.).

—**Mercantile agency—Incomplete report of Court process—Privilege.**]—In a mortgage foreclosure action, the Lion Brewery Co. as second mortgagees was joined as a party defendant, and a mercantile agency published in a notice or circular, distributed amongst its subscribers, that a writ had been issued against the Lion Brewery Co., claiming foreclosure of a mortgage and indicating by means of the words "et al" that there were other defendants:—Held, in an action by the Lion Brewery Co. against the mercantile agency, that the publication was libellous and not privileged.

Lion Brewery Co., Ltd. v. The Bradstreet Co., 9 B.C.R. 435 (Irving, J.).

—Words of abuse—Natural signification—Innuendo.]—The defendant, a tax collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. should pay them. He subsequently wrote and mailed to the plaintiff a postal card, stating: "I saw J. S. this morning. He said make the S. B. pay it." In an action for libel, in which plaintiff claimed that "S. B." applied to him and meant "son of a bitch.":—Held, that there was no reasonable evidence to go to the jury that the letters conveyed the meaning attributed to them by the plaintiff; that in their natural signification they were not actionable, and that the plaintiff had failed to prove his innuendo.

Major v. McGregor, 5 O.L.R. 81 (Britton, J.); affirmed 6 O.L.R. 528 (C.A.).

—Libel in newspaper—Failure to verify report—Retraction — Damages.]—Where a false report, implicating an entirely innocent person in the commission of a serious crime, has been published in a newspaper, not maliciously, but without any effort to verify the statements contained therein, the fact that the newspaper was about to go to press at the time the information was received is not a valid excuse for failure to investigate the truth of the charge; and the fact that subsequently a retractation and apology were published in the same journal, while it may be taken into consideration in the assessment of damages, is not a sufficient reparation for the wrong inflicted on an innocent person by a false accusation. The Court in such a case will award exemplary damages to an amount in proportion to the degree of negligence proved.

Auburn v. Berthiaume, 23 Que. S.C. 476 (Doherty, J.).

—Debtor disposing of property—Verdict for damages—Fraud.]—The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the defendant enjoined from disposing of his property, even where the plaintiff shows upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property.

Burdett v. Fader, 6 O.L.R. 532, affirmed 7 O.L.R. 72.

—Postal card — Threatening suit.]—One who, without malice, sends his debtor a postal card on which he gives the latter notice of his intention to sue unless the debt is paid is not liable in damages to the debtor even though third persons have seen the card.

L'Hemeux v. Heroux, Q.R. 25 S.C. 126 (Cir. Ct.).

—Libel in plea—Allegation of false representations—Probable cause.]—The denial in a plea that a fire occurred accidentally and from cause unknown, does not imply or insinuate that the assured criminally set the fire. Allegations in a plea by an insurance company, that the assured made false representations in his application for insurance, made false solemn declarations after the loss, as to the value of his stock, with fraudulent intent, and that in swearing to false exaggerated statements, the assured did not swear the truth and rendered himself guilty of fraud and his policy null, when pertinent to the issue, and pleaded in good faith and with probable cause, are not libellous or defamatory.

Morrison v. Western Assurance Company, 24 Que. S.C. 111 (Rochon, J.).

— Publication — Privilege—Dictating letter to stenographer.]—The manager of defendant company handed to his stenographer to be typewritten a draft letter written in the interest of the company, but unconnected with its ordinary business, which contained defamatory statements:—Held, on the authority of Pullman v. Hill & Co. [1891]1 Q.B. 524, that privilege was taken away by the publication to the stenographer, and the defendant company was liable. Pullman v. Hill & Co., [1891] 1 Q.B. 524, commented on. Judgment of the Divisional Court, 5 O. L.R. 680, reversed.

Puterbaugh v. Gold Medal Furniture Manufacturing Co., 7 O.L.R. 582 (C.A.).

—Notice of Action—Labour unions—Malicious notices and statements issued by—Publication of.]—The statement of claim in an action alleged that defendants, the Toiler Publishing Co., and members of certain labour unions, wrongly and maliciously published and circulated hand bills, circulars and newspapers owned and controlled by them, describing the plaintiffs as unfair and their goods as unfair, and of inferior quality and manufactured by apprentices and incompetent workmen, and requesting, persuading and advising the friends of labour and the public generally, not to buy the plaintiffs' goods, and to break up their business, unless certain demands of the union were complied with. An order, made by a Judge in Chambers, dismissing the action for the omission to give notice of action, was set aside by the Divisional Court, and the action allowed to go on to trial when the question of such want of notice could be raised.

Gurney Foundry Co. v. Emmett, 7 O.L. R. 604 (D.C.).

—Newspaper article—Fair comment.] — Defendants published on page 1 of their newspaper an article stating that some women from Seattle had been canvassing some time ago in Victoria for subscriptions for a bogus foundling institution and on being questioned by the police had left town; on page 8 of the same issue there was an article stating that two ladies for the past few days had been selling tickets for a recital by one Greenleaf and that the tickets were being sold "in a manner similar to those for a recital by a gentleman of the same name nearly two years ago which was ostensibly for the benefit of the Orphanage, but which the promoters were obliged to abandon." The manner of selling tickets was as a fact the same in both cases:—Held, that the article on page 1 did not necessarily refer to the plaintiff and that the article on page 8 was a fair comment on a matter of public interest and was true.

Wiles v. Victoria Times, 11 B.C.R. 143 (Irving, J.).

—Criminal libel — Innuendo — Evidence —Extrinsic circumstances—Demand for particulars — Publication without knowledge.]—When an indictment for defamatory libel consisting of words, inoffensive in themselves, but capable, by irony, of being construed as a dishonourable imputation, contains, beyond the offensive words, an allegation of the sense in which they would be understood, the Crown may prove extrinsic circumstances which would cause such sense to be attached to the words. It is not necessary that these circumstances should be set forth in the indictment, and the accused is sufficiently protected from surprise by the right given to him to ask for particulars of the charge. In default of a demand for particulars he cannot object to such evidence and there would be no ground for a reserved case as to the legality of its admission. (2) In the case of a defamatory libel published in a newspaper, where the accused relies upon the plea, under s. 297 of the Criminal Code, that the publication of the libel was made without his knowledge, the Crown may make proof of the publication of former libels of the same kind by the same publisher, in order to fix upon the accused responsibility, in the terms of that section, for his persistency in continuing such publications in the conduct of the newspaper.

Rex v. Molleur, Q.R. 14 K.B. 556, 12 Can. Cr. Cas. 8 and 16.

—Discovery—Examination of defendant—Answers tending to criminate—Witnesses and Evidence Act, s. 5.]—Upon the trial of an action for libel, section 5 of the Ontario Witnesses and Evidence Act, as now enacted by 4 Edw. VII. c. 10, s. 21, would be applicable, and the defendant would not be excused from answering proper questions because the answers might tend to criminate him; and Con. Rule 439 (1250) puts a party on his examination for discovery in the same position as he would be in if he were being examined as a witness at the trial, and he is, therefore, not excused from answering any question that is properly put to him, upon the ground that the answer to it may tend to criminate him, and if he objects to answer on that ground, his answer is within the protection of section 5. Regina v. Fox (1899), 18 P.R. 343, applied.

Chambers v. Jaffray, 12 O.L.R. 377 (D.C.).

—Unfair criticism—Exemplary damages.] —In a suit for libel, where no material or actual damage is proved, the plaintiff may recover exemplary damages.

Filiatrault v. "La Patrie," 28 Que. S.C. 380 (Curran, J.).

—Newspaper—Publication of matter contained in statutory declaration—Claim of privilege.]—The publication of libellous matter in a newspaper cannot be justified on the ground that it was published "as a matter of public news" or "in the bona fide belief that it is in the public interest that the matters referred to should be made public." Neither can the publication be justified on the ground that the matter complained of has been embodied in a statutory declaration made before a justice of the peace with the object of bringing the charges contained in the declaration before the municipal council having power to inquire into the charges made and to dismiss the official complained of. Under the heading of "Scott Act Inspector Accused of Bribery," the defendant company printed in their newspaper an item to the effect that M. had made a declaration before a justice of the peace accusing plaintiff, the county Canada Temperance Act inspector, of attempted bribery, and stating that, in the declaration referred to, it was alleged that plaintiff, on two different occasions, promised that he would not prosecute M. if the latter would give him a certain sum of money, which he refused to do. At the trial the statutory declaration referred to was tendered in evidence, on behalf of defendant, as evidence of bona fides, and was rejected by the trial Judge:—Held, that the evidence was rightly rejected, and that defendant's appeal must be dismissed with costs. Also, that the making of the statutory declaration before the magistrate was not a necessary preliminary to an inquiry into the conduct of plaintiff by the municipal council, and that defendant could not claim privilege

in respect to the publication. Semble, per Graham, E.J., a communication addressed to the warden of the council, and sent to him, might have been considered privileged.

McDonald v. Sydney Post Publishing Co., 39 N.S.R. 81.

— Newspaper interview—Publication — Privilege.]—A defeated candidate in an interview with a newspaper reporter the day after an election informed him that the plaintiff (who was a political opponent and an active party worker) had as soon as it was known that he was in the field, come to and asked him to endorse a note for $1,000, which he refused to do, and had also later, in a speech, accused him of disloyalty. This was the libel complained of. The innuendo alleged was, that the plaintiff had offered his services and support as a bribe and had corruptly offered to desert his party and abandon his principles and support the defendant at the election if he would endorse his note; that his opposition to the defendant's candidature was not due to principle or party loyalty, but to the defendant's refusal to endorse the note; and that because of such refusal the plaintiff not only opposed his candidature, but attacked him personally and accused him of disloyalty. The interview was published and the defendant next day called at the newspaper office and the only thing he found fault with in the report was the omission of a few words in the introductory part. At the trial the Judge allowed the case to go to the jury, who found a verdict in favour of the plaintiff:—Held, that there was evidence that the defendant knew he was speaking for publication and that he authorized what he said to be published in a newspaper; and that the communication was not privileged. Held, however, that the words were not capable of the meaning ascribed to them by the plaintiff and that the motion for a nonsuit at the close of the case should have been allowed. The Capital and Counties Bank, Ltd. v. Henty & Sons (1882), 7 App. Cas. 741, referred to.

Hay v. Bingham, 11 O.L.R. 148 (C.A.).

—Tender and Deposit—Dismissal of Action—Art. 200 C.P.Q.]—An allegation that an article published in a newspaper was simply published as an item taken from another newspaper is no defence or justification in an action for libel. (2) A defendant who has tendered and deposited an amount in Court is estopped from conclusions asking that the action should be dismissed absolutely, he can only pray for dismissal as to the excess of the demand over the amount tendered.

Prevost v. Huard, 7 Que. P.R. 406 (Pelletier, J.).

—Statements made in the exercise of a right — Malice.]—(1) The law of "qualified privilege" of the law of England in the matter of libel and slander corresponds to, and is the same as that of Quebec law, in the same matter, that no action will lie for statements made by a party in the exercise of a right (dans l'exercise d'un droit) unless actual malice is proved. (2) As in England the question of privilege or no privilege is one of law for the Court and not for the jury to determine, so with us, it is for the Court and not for the jury to say whether the defendant in making a statement is in the exercise of a right. (3) Where in a trial by jury of an action for defamation, the jury finds that a statement caused the plaintiff damage to a fixed amount, but was made without actual malice, the Court holding the defendant to have been in the exercise of his rights, or to employ the English equivalent, holding the occasion to have been privileged, will dismiss the action.

Kavanagh v. Norwich Union Fire Insurance Co., 28 Que. S.C. 506 (Davidson, J.).

—Discovery —Source of information.] — See DISCOVERY.

Massey-Harris v. De Laval Separator Co., 11 O.L.R. 591.

— Discovery as to honest belief—Privilege.]—See DISCOVERY.

McKergow v. Comstock, 11 O.L.R. 637.

—Privileged occasion—Letter copied by clerk—Publication.]—In an action for libel the declaration alleged that the defendant falsely and maliciously published a letter containing defamatory matter, and addressed and sent it to the plaintiff, and that this letter was dictated by the defendant to his stenographer who extended the notes and transcribed the same by a typewriter, which transcribed copy was signed by the defendant and sent to the plaintiff. The defendant by his pleas denied malice, and alleged that the letter was drafted by him and given to his typewriter to be copied; that the typewriter was his confidential clerk, and as such was accustomed to deal with letters of a confidential nature, and that the typewriting of the letter in question was done in the performance of her duty as such confidential clerk that no person except the defendant and the typewriter saw the letter, and its contents were not disclosed to any person other than the plaintiff:—Held, on demurrer that the pleas admit a publication and do not show that the occasion was privileged, and if proved, would not be an answer to the prima facie cause of action, alleged in the declaration, and were bad on demurrer.

Moran v. O'Regan, 38 N.B.R. 189.

—**Notarial protest—Exercise of right — Publication.**]—Objection by an interested party by means of a notarial protest to a member of a municipal council taking part in a discussion or vote on the ground that such member had received favours from the party maintaining the opposite interest and would be susceptible of partiality in his favour, is the exercise of a right and, in the absence of proof of a fraudulent or malicious intention to cause injury, does not give rise to a recourse in damages for defamation. The sending by a notary of a protest to a party is not a publication of the matter contained in it and does not, therefore, constitute the fact of defamation.

Montreal Brewing Co. v. Vallières, Q.R. 15 K. B. 201.

—**Public press—Justification.**]—It is the English law, under which the constitutional liberty of the press exists in Canada, which applies to actions for defamation in newspapers and to the defences founded on privilege and on fair comment. Under this law the concurrence of three elements is necessary to relieve the author of a defamatory writing of civil liability. (1) It is necessary that the writing be true. (2) That it deals with facts of interest to the public. (3) That it was published in the public interest and without malice.

Marcotte v. Bolduc, Q.R. 30 S.C. 222.

—**Qualified privilege—Statement made by a garnishee in his declaration.**]—No action will lie for defamatory statements made in good faith by a garnishee in his declaration upon a seizure by garnishment.

Daoust v. Charbonneau, 30 Que. S.C. 188 (C.R.).

—**Non-trading corporation created under the Benevolent Societies Act—Libel of, whether actionable.**] — A non-trading corporation, having the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury, as a trading corporation.

Chinese Empire Reform Association v. Chinese Daily Newspaper, 13 B.C.R. 141.

—**Libel—Prima facie innocent publication —Failure to prove innuendo.**]—An action for libel will be dismissed when the publication complained of does not on the face of it apply to the plaintiff and he fails to prove the innuendo that it was meant to apply to him.

Morrell v. Grant, 30 Que. S.C. 327 (C. R.).

—**Qualified privilege — Proceedings in a Court of law.**]—An impartial and accurate report in the public press of any proceeding in a Court of law is privileged, and this rule applies to the publication of pleadings (declarations, exceptions, rejoinders, etc.) before issue joined, as well as after trial.

Shallow v. Gazette Printing Co., 31 Que. S.C. 338. (See next case).

—**Verdict of jury opposed to Judge's charge—New trial, grounds for.**] — Two substantive allegations of wrong-doing on the part of plaintiff as a minister of the Crown having been alleged, and there being no proof of the truth, and no justification for one of such allegations, the jury, after a charge in favour of plaintiff, returned a verdict in favour of the defendant:—Held, on appeal, that there should be a new trial.

Green v. World Printing and Publishing Co., 13 B.C.R. 467.

—**Actions for libel—Newspaper—Court of the place where the whole cause of action has arisen.**]—In actions for libel in a newspaper, the place where the whole cause of action has arisen is that of the place where the newspaper is published. Hence, when an action is brought in another district in which the paper is circulated, but in which the plaintiff does not reside, it will be deferred on a motion in the nature of a declinatory exception, to the district of publication.

Dubuc v. Delisle, 33 S.C. 456.

—**Confidential clerk—Publication—Privileged occasion.**]—The defendant, a merchant, in a letter accused the plaintiff of theft and threatened to expose him. This letter was handed to a confidential clerk and copied, and the copy was signed by the defendant and sent by post to the plaintiff:—Held, that the writing of such defamatory statements did not fall within the ordinary business of a merchant, and the giving of it to his clerk to copy was a publication and the occasion of such publication was not privileged.

Moran v. O'Regan, 38 N.B.R. 399.

— **Plea of justification—Agreement to settle action — Implied undertaking — Breach of agreement.**]—The defendant in an action for libel, who, having pleaded justification, enters into an agreement with the plaintiff by signing an explicit document and thereby undertaking to join in a request to the Court to have judgment entered according to its terms at a later date, impliedly binds himself not to renew his libellous attacks during the interval, and if he does so he violates his agreement and matters will be considered as placed in statu quo ante.

Choquette v. Parent, Q.R. 16 K.B. 481.

—**Accusation of malversation as a director of a company.**]—A newspaper sued in damages for having published that the plaintiff as president of a company had purchased privately some real estate to resell it with profit to the company cannot plead, (1) That the plaintiff as mayor of the city has negotiated a loan to the great loss of the citizens of the city. (2) That plaintiff was bound to put the defendant in default either by letter or otherwise, to publish an explanation or a retraction. These allegations will be struck on an inscription in law.

Garneau v. La Vigie Co., 10 Que. P.R. 370.

—**Justification—Onus of proof—Fair comment.**]—(1) If truth of an alleged libellous statement is proven, the defendant is not liable for damage resulting to the plaintiff from any improper inference drawn from the fact stated. (2) In an action for damages for publication of a libel, a plea of justification places upon the defendant the onus of proving the truth of the assertion; and this onus is not discharged by simply proving facts from which the truth of the libel might possibly be inferred; the inference from the facts must be necessary or inevitable. (3) The plea of "fair comment" is only referable to a case where the facts taken as the basis of the comment are either admitted by all the parties or proven to be true. (4) The facts alleged in support of the plea of justification will be taken into consideration in awarding damages.

Patterson v. Plaindealer Co., 2 Alta. R. 29.

—**Newspaper—Security for costs—Right of sub-editor to security.**]—In an action for libels contained in a newspaper the defendant moved for security for costs under R.S.O. 1897, c. 68, s. 10, alleging in his affidavit that he was the "sporting editor" of the newspaper, and that he had the sole control and editorship of the sporting and dramatic intelligence:—Held, that as the editor of a department of a newspaper, he was entitled to security for costs. Semble, that all who are engaged in any capacity in the work of publishing the newspaper in which an alleged libel appears are entitled to the protection given by the statute. The plaintiff having moved under Con. Rule 1278 for leave to appeal from the above decision. Held, that leave could not be given under either branch of the rule, as there were no "conflicting decisions by Judges of the High Court upon the matter involved in the proposed appeal," and there appeared to be no "good reason to doubt the correctness" of the order sought to be appealed from. The defendant's affidavit as to merits said, "I am advised by my solicitor and I believe that I have a good defence on the merits," the statute requiring "an affidavit by the defendant or his agent . . . that the defendant has a good defence upon the merits." Held, that the affidavit was sufficient. Robinson v. Morris (1908), 15 O.L.R. 649, distinguished. The statute requires that the defendant's affidavit should show "that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous." The defendant swore that the words used by him were "innocent and harmless." Held, that this was equivalent to swearing that the grounds of action were trivial and frivolous. The Master in Chambers is not to be considered "a Judge of the High Court," under s. 15 of the Act, and the order made by him was, therefore, not a final one under that section, but was subject to appeal to a Judge of the High Court. Quære, whether the order of Meredith, C.J., being "an order made under s. 10 by a Judge of the High Court," was non-appealable under s. 15.

Robinson v. Mills, 19 O.L.R. 162.

—**Particulars in libel action—Examination for discovery.**]—Action for libel in charging the plaintiff with not accounting for moneys received as agent for defendants. The defendants pleaded privilege and set out certain circumstances which they alleged created the privilege. They also pleaded in justification of the libel. The plaintiff applied for particulars and the defendants, while not denying his right to particulars, claimed the right to examine him for discovery before being compelled to deliver particulars. The plaintiff however, refused to attend for examination until after the delivery of particulars by the defendants:—Held, that the plaintiff should forthwith attend at his own expense for examination and that the defendants should deliver at once particulars of the grounds of their belief the words complained of were true.

Timmons v. National Life Assurance Co., 18 Man. R. 465.

—**Privileged publications — Reports of judicial proceedings—Pleadings filed in civil actions.**]—The publication of the statements contained in a pleading filed in the course of a civil action, merely because such statements form part of such a pleading, is not a privileged publication within the rule which throws the protection of privilege about fair reports of judicial proceedings. The judgment appealed from Shallow v. Gazette, Q.R. 17 K.B. 309, reversing the judgment of the Superior Court, Q.R. 31 S.C. 338, was affirmed.

Gazette Printing Co. v. Shallow, 41 Can. S.C.R. 339.

—Contempt of Court—Libellous publications pending trial of action for slander—Prejudice—Fair trial.] — Libellous language is not necessarily a contempt of Court; the applicant for committal for contempt must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending. A motion by the defendant in an action for slander to commit for contempt of Court the editor of a newspaper for publishing articles, pending the action and before trial, commenting on the matters in question in the action, was dismissed, and with costs, where it did not appear from the evidence and it was not fairly to be inferred from the articles, that there would be an interference, or that there was any attempt to interfere, with the ordinary course of justice in the matter of a fair trial—the slanderous words alleged having been uttered and the articles published in the course of a contested parliamentary election, and the whole frame of the articles being to separate the legal aspect of the case from the political.

Guest v. Knowles, 17 O.L.R. 416.

—Venue.]—The party injured by a libellous article has his recourse for damages against the editor in the district in which the newspaper is issued and the injury caused since that is the district in which the injurious and damaging attack was made and where the cause of action arose. The new Code of procedure in saying "where the whole cause of action arose" makes no change in the law respecting the right in such actions of suing in a district other than that in which the defendant resides.

Chicoutimi Pulp Co. v. Delisle, Q.R. 34 S.C. 294.

—Privilege—Fair comment—Mitigation of damages.]—It is no defence to an action for libel, that the publication complained of purports to represent the assertions of a third party, or even the mere repetition by such third party of the assertions of another; such facts can be considered only in mitigation of damages. While a newspaper may publish a report of the proceedings of a public body, and comment upon facts and statements then made that may be defamatory to individuals, it is not fair comment as against any such individuals after a considerable interval of time to republish such statements as facts or as alleged facts. Fair comment must never consist of the assertion of fact; it consists of opinions and inferences from facts assumed to be true. A newspaper publishing and commenting upon proceedings in a judicial or semi-judicial investigation may comment upon the fact that further damaging evidence against a party might have been given if the tribunal had been disposed to receive it, but it is not fair comment to state such evidence, or the purport of it:—Semble, that the jury (or Judge sitting without a jury) may take into consideration the fact that the libellous statements were matters of public notoriety in the community previous to their publication by the defendant in mitigation of damages.

Patterson v. Edmonton Bulletin Company, 1 Alta. R. 477.

—Notice of action—Anonymous correspondent.]—Section 4 of the Libel Act, C.S. 1903, c. 136, providing for notice of action, does not apply to an anonymous correspondent, not being a regular correspondent of the newspaper, who causes a libel to be published therein.

Underwood v. Roach, 39 N.B.R. 27.

—Libel in a newspaper—Damages.]—An action taken in the district of Quebec for damages alleged to have been caused in that district by the publication (circulation) therein of a newspaper, containing a libellous article alleged to have been written in Chicoutimi and printed and published in said newspaper in Chicoutimi, by defendant, as editor of said newspaper, to satisfy the alleged hatred and malice of the proprietor thereof for the plaintiff, will, upon motion declining the jurisdiction of the said Court, in the district of Quebec, upon the ground: (1) That plaintiff and defendant both reside in Chicoutimi where the action was served, and (2) because "the whole cause of action" alleged in the declaration, did not arise in the district of Quebec—be referred to the district of Chicoutimi for trial and judgment. The difference between "right of action" (C.C.P. 34) and "the whole cause of action" (C.P. 94) discussed.

Dubuc v. Delisle, 10 Que. P.R. 252.

—Matter of defence charging crime — Particulars.]—In an action for libel, the defendant in the first place pleaded generally denying the matters alleged in the statement of claim. Subsequently he applied to amend by pleading justification, and filed the proposed amended defence. The matters relied upon by way of justification charged the acceptance of bribes by the plaintiff when holding a municipal office, and it was objected that the Court should not permit an amendment charging fraud or crime, and it was also objected that the matters charged were not stated with sufficient particularity:—Held, that the allowance of an amendment setting up fraud is discretionary with the Judge and in some cases permissible, and in this case the amendment should be allowed. 2. That it is not now necessary to put the particulars relied upon by way of justification in the pleading, but such

particulars, if not pleaded, must be subsequently delivered, and the proposed amended pleading was not therefore bad, although all the matters therein alleged were not stated with sufficient particularity.

Laird v. Leader Publishing Co., 2 Sask. R. 1.

LICENSE.

See LIQUOR LICENSE; MUNICIPAL LAW.

LIEN.

I. MECHANICS' AND BUILDERS' LIENS.
II. WOODMAN'S LIEN.
III. BY CONDITIONAL SALE.
IV. SOLICITOR'S LIEN.
V. MARITIME LIEN.
VI. MISCELLANEOUS LIENS.

I. MECHANICS' AND BUILDERS' LIENS.

Lien of material-man—Several buildings—Entire contract.]—Where one owner enters into an entire contract for the supply of material to be used in several buildings, the material-man can ask to have his lien, under the Mechanics' and Wage Earners' Lien Act, follow the form of the contract, and that it be for an entire sum upon all the buildings. If the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to show the facts, and, if the facts cannot be ascertained, less violence will be done to the statute by construing it as indicated than by rendering it nugatory in many instances in which the Legislature apparently intended a lien to exist. And when, after the lien has attached to several distinct buildings, the owner has sold one or more, the equities which then arise between the owners of the several buildings may be worked out upon the principles applied where part of a property subject to a mortgage is sold and the mortgagee seeks to enforce his remedy against both parcels. Where an action to enforce a lien for material supplied by the plaintiffs under one contract for several buildings was brought against several defendants having separate interests in the land sought to be charged, a summary application by the defendant G., who made the contract with the plaintiffs, and was also alleged to have an interest in the land, to vacate the registry of the lien, upon the ground that there could be no valid lien against several buildings, was dismissed; it being held, that it was not so clearly demonstrated that the lien was bad that it should be vacated upon a summary application by G., who was not in a position to invoke the benefit of the Registry Act. Dunn v. McCallum (1907), 14 O.L.R. 249, distinguished. Claiming a lien upon too much property will not invalidated it altogether.

Ontario Lime Association v. Grimwood, 22 O.L.R. 17.

—Overpayment to contractor—Liability of owner of land.]—Judgment of Supreme Court of Alberta in Breckenridge v. Short, 2 Alta. R. 71, reversed, and judgment at trial restored.

Travis v. Breckenridge, 43 Can. S.C.R. 59.

[Leave to appeal refused by Privy Council, Feb. 28, 1911.]

Mechanic's lien — Miner's lien — Consolidated actions—Joint or several judgment.]—Though several lienholders may bring suit on their respective and distinct claims in one action and judgment may be entered for the whole amount of said claims, yet for the purposes of appeal each claim is deemed to be severable, and the adjudication thereon is a distinct one, and not appealable unless it amounts to $250.

Gabriele v. Jackson Mines, 2 M.M.C. 399, 15 B.C.R. 373.

—Mechanic's lien — Appeal — Amount adjudged.] — In an action on a mechanic's lien, the amount adjudged to be owing was $172.05. S. 24 of the Mechanic's Lien Act enacts that there is no appeal where the amount claimed to be owing is adjudged to be less than $250. Therefore an appeal from the judgment was dismissed.

Gillies Supply Co. v. Allan, 15 B.C.R. 378 (C.A.).

—Building contract — Action to enforce liens — Payment in full to contractor — Prejudice to existing liens.]—

Gorman v. Henderson, 8 W.L.R. 422 (Alta.).

—Lien of sub-contractor — Oral agreement by owner with sub-contractor.]—

Wasdell v. White, 4 W.L.R. 562 (Man.).

—Time for registering lien—Time of completion of work — Repairing trifling defects.]—

Kilbourne v. McEwan, 6 W.L.R. 562 (N. W.T.).

—Building contract — Payment of part of contract price to contractor—Abandonment of work by contractor — Prejudice of existing liens — Liability of owner for work done or material supplied after abandonment.]—

Union Lumber Co. v. Porter, 8 W.L.R. 423 (Alta.).

—Non-completion of work by contractor — Payments made by owner beyond contract price, after liens arisen, directly to workmen and material men.]—

Breckenbridge Lumber Co. v. Travis, 10 W.L.R. 392 (Alta.).

—Right to lien — Workman for material man.]—
Allen v. Harrison, 9 W.L.R. 198 (B.C.).

—Saskatchewan Mechanics' Lien Act, 1907 —Proof that material supplied was actually used in building.]—
Montjoy v. Heward School District, 10 W.L.R. 282 (Sask.).

—Appropriation of payment made by contractor to material men with owner's money.]—
Lemon v. Dunsmuir, 5 W.L.R. 505 (B.C.).

— Summary proceeding to enforce lien—Contemporaneous personal action.] — The plaintiffs began a summary proceeding against the defendants under the Mechanics' Lien Act to enforce their lien, and also began an action against the same defendants to recover the sum of money in respect of which the lien was sought to be enforced. An application to stay the action was refused.
Hamilton Bridge Works Co. v. General Contracting Co., 1 O.W.N. 34.

— Time when last work done and last materials supplied — Trivial but not merely colourable work — Bona fides.]—
Steinman v. Koscuk, 4 W.L.R. 514 (Man.).

— Claim of lien — Sufficiency — Separate properties — Particulars.]—
Crapper v. Gillespie, 11 W.L.R. 310 (Sask.).

— Mechanics' liens — Payments made by owner to contractor without notice of liens previously attached — Final certificate of architect withheld — Effect on liens — Liquidated damages for delay in completion — Deduction from contract price — Extension of time.]—
Lundy v. Henderson, 9 W.L.R. 327 (Alta.)

— Building contract — Abandonment of work by contractor — Completion by owner — Payments to contractor — Prejudice of existing liens — Liability of owner for work done and material supplied after abandonment.]—
Union Lumber Co. v. Porter, 9 W.L.R. 325 (Alta.).

—Building erected by tenant on demised premises—Interest of landlord not subject to claims of lien-holders — Termination of lease by notice for default — Right of lien-holders to relief against forfeiture.]—
High River Trading Co. v. Anderson, 10 W.L.R. 126 (Alta.).

— Mechanics' lien — Practice and procedure.]—Instituting proceedings to realize a claim means that they shall be instituted against all parties whose interests are to be affected by such proceedings. The adaptability to the Territories of the practice existing in Ontario under the Mechanics' Lien Act of Ontario discussed.
McGuirl v. Fletcher, 3 Terr. L.R. 137.

—Contract — Divisible and severable.]—A plumber agreed in a single written document to install plumbing and heating apparatus in each of two houses situated on two adjoining lots, for the sum of $620 for each house:—Held, the contract contained two severable or divisible promises, one in respect to each house. The work in connection with the house on lot No. 30 was completed on the 29th July, 1908, and that in connection with the house on lot No. 29 on the 15th June, 1909; the sewer connections from both houses were joined in a line between the two lots. Held, a claim of mechanics' lien filed against both lots on the 1st February, 1909, in respect of the whole contract price for the two houses, was filed too late to preserve the lien against lot 30.
A. Lee Co. v. Hill, 2 Alta. R. 368.

—Time of registration—Goods supplied—Entire contract—Notice of lien of sub-contractor to owner.]—Defendant B. contracted with defendant F. to build a house for the latter. Plaintiff supplied at different times during the work hardware and installed plumbing and heating apparatus and not being paid filed a lien. The last work done was on the furnace on January 3rd, the other work done by plaintiff having been completed and material supplied at an earlier date. The lien was filed on February 2nd. No formal notice was given by Smith to Fry of his claim as a sub-contractor but payment of the account had been discussed between them on several occasions, and Fry had promised to protect Smith. Fry also claimed that the work had not been finished by Bernhardt in accordance with the contract, that no architect's certificate had been produced and that he was entitled to set off certain damages. It appeared, however, that he had taken possession of the premises and that accounts had been stated to some extent and a balance found due:—Held, that the plumbing, heating and building hardware were all supplied with the same object by the one party on the one hand to the one party on the other, standing in the same relationship and were so supplied as material and labour coming within the scope of the plaintiff's business and were so bound into one as to form an entire contract and not as separate contracts or deliveries and the last work on the whole being done on the 3rd of January the lien was filed in time. 2. That the defendant, Fry, by his conversation with plaintiff and assurance of protection of the account had waived notice of claim of lien. 3. That by taking possession of the

premises, selling the same and stating accounts with Bernhardt, Fry had accepted the work and waived the presentation of an architect's certificate. 4. Damages for delay in performance can not be set off against a lienholder.

Smith v. Bernhardt, 2 Sask. R. 315.

—Preferred claims of lien-holders — Company — Registration after commencement of winding-up.] — The commencement of a mechanic's lien is coincident with the commencement of the work. Liens claimed by different lien-holders were in respect of work done in building upon the lands of a company prior to the date of the service of a petition for the winding-up of the company, but some of the claims for liens were not registered until after that date, though all within 30 days after the commencement of the liens:—Held, that all the liens existed by force of the Mechanics' Lien Act prior to the service of the petition, and their efficacy and precedence were not disturbed by the subsequent winding-up proceedings; and the lien-holders had a valid claim attaching upon the land and to be paid in priority to ordinary creditors. S. 84 of the Winding-up Act, R.S.C. 1906, c. 144, does not apply to mechanics' liens. The lien-holders had, therefore, preferential claims upon the assets of the company in liquidation.

Re Clinton Thresher Co., 1 O.W.N. 445 (Boyd, C.),

— Work done by sub-contractor after time for filing lien expired — Attempt to preserve lien — Trespass.]—

Sherritt v. McCallum, 12 W.L.R. 637 (B. C.).

—Materials furnished — Request of owner —Implication.]—

Fortin v. Pound, 1 W.I.R. 333 (B.C.).

— Contract for painting — Items in dispute — Credits.]—

McKenzie v. Murray, 11 W.L.R. 123 (Sask.).

—Building erected by lessee — Liability of "owner."]—S. 4. of the Alberta Mechanics' Lien Act (6 Edw. VII. c. 21) gives to any contractor or materialman furnishing labour or materials for a building at the request of the owner of the land a lien on such land for the value of such labour or materials. Sub-s. 4 of s. 2 provides that the term "owner" shall extend to and include a person having any estate or interest "in the land upon or in respect of which the work is done or materials are placed or furnished at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work is done, etc." By s. 11 "every building . . . mentioned in the fourth section of this Act, constructed upon any lands with the knowledge of the owner or of his authorized agent . . . shall be held to have been constructed at the request of such owner," unless the latter gives notice within three days after acquiring such knowledge that he will not be responsible. The lessee of land, as permitted by his lease, had buildings thereon pulled down and proceeded to erect others in their place, but was obliged to abandon the work before it was finished. The owner of the land was aware of the work being done but gave no notice disclaiming responsibility therefor. Mechanics' liens having been filed under the Act:—Held, that the interest of the owner in the land was subject to such liens. Judgment appealed from varying that at the trial (Scratch v. Anderson, 2 Alta. L.R. 109) in favour of the lien-holders, affirmed.

Limoges v. Scratch, 44 Can. S.C.R. 86.

—Mechanics' liens — Extension of time for payment — Action begun before expiry of extended time.]—

Speers v. McAlfee, 7 W.L.R. 275 (Alta.).

—Lien of sub-contractor — Settlement between contractor and owner — Payment in cash and by promissory note.]—

McCauley v. Powell, 7 W.L.R. 443 (Alta.).

—Lien of sub-contractor — Filing — Time of completion of work — Unimportant work done after substantial completion.]—

Swansen v. Mollison, 6 W.L.R. 678 (Alta.)

— Extras — Onus — Date of completion — Quality of work — Mechanics' Liens Ordinance — Priority of lien over mortgage.]—

Withey v. Francomb, 6 W.L.R. 390 (N. W.T.).

—Contract with school district—Right to file lien.]—A school district duly organized in Saskatchewan and declared to be a corporation let a contract for the erection of a school building. A sub-contractor filed a mechanic's lien against the building, and not being paid brought action to enforce the lien. It was objected that the lien was not enforceable against the lands of a school district:—Held, that the lands of a school district were liable to be sold under the provisions of the Mechanics' Lien Act. 2. The provisions of s. 9 of the School Assessment Ordinance providing a means of realizing the amount of a judgment against a school district do not exclude other remedies.

Lee v. Broley, 2 Sask. R. 288.

—School board—Installation of furnace in building—Performance of sub-contract.]—The lands of a school board may be made subject to a mechanic's lien. Lee v. Broley, 11 W.L.R. 38, 2 Sask. L.R. 88, followed. The installation of a furnace in a building comes within the terms of s. 4 of the Alberta Mechanics' Lien Act. If the Act is to be strictly construed against the person

claiming the lien, it is so only in the construction of the sections dealing with the creation of the lien, and not of those dealing with its enforcement; and, even as to the former, s. 14 of the Act requires only a substantial compliance. A sub-contractor is bound to show a substantial performance of his own contract with the contractor, but is not bound to a strict compliance with the terms of the principal contract. S. 24 of the Act gives the Court power, in a lien action, to deal fully with the rights of all the parties who are before it. Upon the evidence, the plaintiff, a sub-contractor, was held, to have strictly complied with his contract with the principal contractor, and to be entitled to enforce his lien, notwithstanding that the furnace which he installed was rejected by the owners, a school board:—Held, also, that there was no unreasonable delay on the plaintiff's part in completing his work.

Mallett v. Kovar, 14 W.L.R. 327 (Alta.).

—Mechanics' liens—Trade custom—Method of computing bricks—Unreasonable usage.] —In an action in a County Court to enforce a mechanic's lien, the plaintiff's statement of the work done not complying with s. 12 of the Mechanics' Lien Act of 1900, an amendment of the plaint was allowed, it being held, that s. 13 gave power so to amend. The plaintiff's contract was to lay bricks by the thousand, but he sought to affix to it an alleged usage of bricklayers, that, in a contract to lay bricks by the thousand, unless kiln count is specified, the method of ascertaining the number of thousands is by measuring the wall. There was no evidence that this alleged usage was known to the defendant, and he stated that it was not known to him:—Held, that the alleged usage was an unreasonable one, and not binding on the defendant; and the plaintiff was entitled to recover for laying only the actual number of bricks in the wall, that is, on the basis of kiln count. The bricks were put into the wall in a wet condition, and it was shown that, in order to make good work, the bricks should be dry. The wall fell down, and the plaintiff rebuilt part of it, but it cost the defendant $590 in labour to do the rest of the work:—Held, that the defendant was entitled to a set-off $250 as claimed by him.

Allen v. Deane, 14 W.L.R. 622 (B.C.).

—Building contract—Progress estimates—Architect's certificate—Condition precedent—Certificate given after action begun.] —Work was done and materials supplied by the plaintiffs for the defendants in connection with the building of an hotel, under a written contract dated the 26th June, 1907. The plaintiffs undertook to complete the the work, to the satisfaction of an architect, in accordance with specifications and drawings and with the conditions of the agreement, for $115,000, which the defendants were to pay as the work progressed in monthly payments representing 85 per cent. of the amount of the work done and materials supplied, and for this percentage the architect was to issue progress estimates each month, on which payments were to be made, and the final payment was to be made on the expiration of thirty-one days after the plaintiffs had fulfilled the agreement. Payments were to be made only upon the written certificates of the architect that they were due. The plaintiffs were to complete and have ready for occupation by the 1st January, 1908, the first and second flats and part of the basement; to complete the remainder, except the outside finishing, by the 1st April, 1908; and to complete the whole by the 15th May, 1908. A large amount of the work was done, and nine progress estimates, the last dated the 1st June, 1908, were given by C., acting for the architect, amounting to $57,533.36. The amounts mentioned in five of these certificates were paid by the defendants, and a portion of the sixth; the defendants refused to make any further payments, on the ground that the plaintiffs were in default in not procuring and delivering to the defendants a bond guaranteeing the performance of the contract, which, by the contract, the plaintiffs undertook to do within fifteen days from the date of the contract. The plaintiffs thereupon stopped work on the building, and on the 14th July, 1908, brought this action to recover the amount alleged to be due to them for all work done and materials supplied by them, and to enforce their lien therefore under the Mechanics' and Wage Earners' Lien Act. Pending the action and on the 19th July, 1909, ten days before the trial, the architect gave the plaintiffs another progress estimate in which he estimated the cost of the work to the date of the estimate at $64,263.49:—Held, that the defendants' refusal to make further payments was not justifiable, nor were the plaintiffs justified in discontinuing work. The plaintiffs were not entitled to be paid anything but the sums for which the architect had given them progress estimates; and were not entitled, in this action, to recover for the amount of the estimate of the 19th July, 1909, nor to recover on a quantum meruit. By clause 13 of the contract, provision was made for the payment of insurance premiums by the defendants during the progress of the work, but at the cost and expense of the plaintiffs, until the completion of the basement and the first and second flats, which were to have been, but were not, completed by the 1st January, 1908, but the defendants were to pay the cost and expense of the insurance from and after the 1st January, 1908. Held, that the plaintiffs were not chargeable with the amount paid by the defen-

dants for fire insurance subsequent to 1st January, 1908.

Kelly v. Tourist Hotel Co., 20 O.L.R. 267.

—Lien of sub-contractor—Time for registering—Completion of work.]—The plaintiffs were sub-contractors for the installation of the heating system in a hospital, and completed their work, as the workmen thought, early in December, 1908, but, upon a test being made it was ascertained that the plant was not sufficient to heat the building to the required temperature. As the hospital was then being used, it was impossible to turn off the water and make alterations in the plant, and the alterations could not be and were not made until May. The plaintiffs were acting in good faith; they registered their lien within 31 days from the time of completing the alterations in May—the work then done being for the purpose of increasing the efficiency of the plant so that it would heat the building in accordance with the terms of the guarantee given by the plaintiffs:—Held, that it was substantial work, and not work that could be described as being done to remedy slight defects, such as stopping leaks; and therefore the lien was registered in time. Day v. Crown Grain Co., 39 S.C.R. 258, followed.

Whimster v. Crow's Nest Pass Coal Co., 13 W.L.R. 621.

—Claims of sub-contractors—Price to be paid by conveyance of land.]—The defendant C. entered into an agreement with the defendant D. to build two houses of the value of $3,000 each, the consideration being the transfer to C. of 3 lots and the payment of $3,000, half of which money was to be paid when $3,000 had been expended, and the remainder paid and the lots transferred as soon as the buildings should be completed according to the specifications and all claims satisfied. Before the completion of the houses, and after the payment to C. of about $2,200, D. gave notice to C. that unless he completed the houses within a specified time they would be taken out of his hands, and the amount expended in completion would be deducted from the sum payable to him, without prejudice to any claim for delay or damages by reason of imperfection in construction or in quality of material. C. did nothing more under the contract, and D. completed the houses, expending more than the balance payable under the contract, and also claiming damages, etc. The three lots had not been conveyed to C.:—Held, that the plaintiffs, who did work and furnished materials for the buildings, and had registered mechanics' liens against the property built on, and established by evidence their rights thereto, were entitled to the equity in the 3 lots, after the satisfaction of D.'s claim for payments made and damages. Judgment of Stuart, J., 11 W.L.R. 603, reversed, and judgment to be entered declaring the plaintiffs entitled to liens, and directing a sale of the 3 lots, the proceeds of such sale to be applied, first, in payment of the amount (to be ascertained by the Master) which D. was entitled to deduct over and above the sum of $3,00, and secondly, in satisfaction of the plaintiffs' claims—the balance, if any, to be paid to C.

Head Co. v. Coffin, 13 W.L.R. 663.

—Preservation of lien—Work done after final certificate and acceptance of building—Sub-contractor—Alteration in work.]—Where a plaintiff claims to revive a mechanic's lien by means of material supplied and work done after the completion of a building, and after the architect has given the final certificate, it is incumbent on him to prove clearly that the material was supplied and the work done in pursuance of and as a part of his original agreement. The defendant built a house, which she supposed was completed on the 15th September, 1909, when her architect accepted it, and 40 days later issued his final certificate. The final payment was made on the 8th November. On the 26th January, 1910, the plaintiff, a plumber, changed a register, the original one not being according to specifications. A month before that the contractor had left Victoria, and the plaintiff knew it. The architect and the defendant were not aware that anything further was to be done, and the defendant did not know, until served with the summons in this plaint to enforce the lien, that the register had been changed:—Held, that the change in the register was not to be regarded as part of the work to be done under the plaintiff's sub-contract so as to keep the lien alive. It was sought to make the defendant personally liable because her husband had requested the plaintiff to do the work. Held, that the facts shown were not sufficient to justify a finding that the husband was the wife's agent.

Lawrence v. Landsberg, 14 W.L.R. 477 (B.C.).

—Material-man—Preservation of lien—Last delivery—Articles used for temporary purpose.]—Under s. 4 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, c. 153, it is not enough that the materials are furnished to be used upon or in the building—the lien attaches only in virtue of materials furnished to be used in the making, constructing, erecting, fitting, altering, improving or repairing the erection or building. The significance of the term "furnishes any materials to be used" is that, unless the material is furnished by the material man for the purpose of being used in the building or other work, it cannot be the subject of a lien, even though used. Where the plaintiffs had contracted to supply the hardware for use in the construction of a building, and the last delivery upon which

they relied for preservation of their lien—the registry of the claim of lien being within thirty days of that delivery, but more than thirty days after the last previous delivery of materials—was of certain bolts, of trifling value and used for a temporary or experimental purpose only:—Held, that these articles were not furnished in such manner as to enable the plaintiffs to claim a lien for their price upon the land of the owners, within the meaning of the Act; and so the whole claim fell to the ground. Judgment of a Divisional Court, 20 O.L.R. 303, reversed.

Brooks-Sanford Co. v. Theodore Telier Construction Co., 22 O.L.R. 176.

—Privilege—Materials—Notice.]—The person who furnishes materials for construction of a building acquires a lien for his debt only on the essential condition of giving to the owner of the land, before delivery, notice of the contract to furnish containing a statement of the cost and specifying the immovable for which they are intended. Cf. Carrière v. Sigouin, Q.R. 18 K.B. 176. The promise of sale of the land by the owner to the contractor to whom the materials have been sold and delivered, which is not registered is of no effect as against third parties in whatever relates to the creation of the lien.

W. Rutherford & Sons Co. v. Racicot, Q.R. 19 K.B. 428, affirming 36 S.C. 97.

Workman's privilege—Furnishing materials to contractor.]—A manufacturer who enters into an agreement with a contractor to deliver a number of closets intended for a building which the contractor has undertaken to construct, is not a workman, but a furnisher of materials. The registry by the manufacturer of a workman's lien upon the immovable of the owner to secure payment of the price of the closets is void under the circumstances, the manufacturer not being entitled to other security for such payment than that given by law in Arts. 2013g, 2013h, 2013i, 2013l, C.C., when he conforms to the provisions of these several articles. The contract between the manufacturer and the contractor is a sale and not a letting of work (louage d'ouvrage). To enable a workman to claim a lien upon the immovable of an owner it is essential that he should be employed upon such immovable. It is not sufficient for him to work at and finish materials intended for the building which the owner constructs or causes to be constructed.

Montmorency Cotton Mills Co. v. Gignac, 10 Que. Q.B. 158.

—Materials for building—Notice—Registry.]—When the owner of land builds on it, the person furnishing materials who desires to obtain a right of hypothec should, before delivery of the material, give notice to him who lends money to the owner, and a notice given too late to such lender will not suffice to give said right of hypothec. When two portions of the same land have been sold by separate contracts to different purchasers, and buildings are put upon it, the furnisher of material for the building should, in the particulars of claim (bordereau) which he registers under Art. 2013 C.C., indicate the part of the land belonging to each purchaser, and his registration will have no effect if he describes the whole land as being the property of the two purchasers.

Paquette v. Mayer, 18 Que. S.C. 563 (C.C.).

—Builder's lien—Registry—Sub-contract—Delays.]—The holder of a note secured by a builder's lien may, in suing on it, claim a declaration of the existence of the lien in his favour. A contractor may take, in his own name, a builder's lien, not only for the work done by himself, but also for that done by a sub-contractor, and in these circumstances it is not necessary that his contract with the sub-contractor should be made known to the owner of the works to be constructed. The time limited for registry of a builder's lien runs from the date on which the works were entirely completed and not from that on which the person entitled to the lien begins to profit from their construction before completion. The owner of the works to be constructed cannot take advantage of the lien being registered too late nor even of entire failure to register it.

La Banque Jacques Cartier v. Picard, 18 Que. S.C. 502 (S.C.).

—Mechanic's lien—"Notice in writing of such lien"—Letter—R.S.O. c. 153, s. 11, sub-s. 2.]—A letter to the owners from sub-contractors furnishing materials, asking him when making a payment to the contractor for the building in question to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made to-day" is sufficient "notice in writing" of a lien under the Mechanic's Lien Act, R.S.O. c. 153, s. 11, sub-s. 2. Judgment of a Divisional Court, 32 O.R. 27, affirmed.

Craig v. Cromwell, 27 Ont. App. 585.

— Mechanic's liens—Trial—Appointment in writing—Notice of trial.]—Under s. 35 (1) of the Mechanic's Lien Act, R.S.O. 1897, c. 153, the Judge or officer fixing a day for the trial of an action brought under that Act, is to do so in writing, and a notice of trial under that section given by a party who has not obtained a signed appointment from the Judge or officer, is not effective. The notice of trial must

be served at least eight clear days before the day fixed, as provided by s. 36.

McIver v. Crown Point Mining Co., 19 Ont. Pr. 335.

—Mechanic's lien—Mineral claim—Work done at request of holder of option — Whether or not lien lies.]—Defendant, a mine owner, gave C. an option to buy a mine for $25,000.00, with liberty to work it, the net proceeds to be applied towards payment. The plaintiffs claimed liens for labour while employed by C. in working it under the agreement. C. did not exercise his option:—Held, by the full Court, that the plaintiffs were not entitled to liens under the Mechanic's Lien Act. There is no lien given for cooking under the Act.

Anderson v. Godsal, 7 B.C.R. 404.

—Privilege—Suppliers of materials.]—Although the right of suppliers of materials is called in Art. 2013(1) C.C. (59 Vict. Q. c. 42), in the French version "un droit d'hypothêque" and in the English version "a hypothecary privilege," the right is nevertheless of the nature of a privilege and not of the nature of a hypothec, and all suppliers for the same building who have availed themselves of the privileges of the article and registered their claims, rank concurrently.

Jamieson v. Charbonneau, 17 Que. S.C. 514.

—Mechanic's lien—One lien against owners of different properties.]—Action to enforce mechanic's lien. Two of the defendants were husband and wife owning separate adjoining lots of land. The husband employed the plaintiff in the erection of two houses, one on each lot, and the plaintiff, not being paid for his work, registered a claim of lien upon the estate or interest of Mr. and Mrs. Smith, in the two lots, for an amount claimed to be due him for work on the two houses, without apportioning the amount as between the two:—Held, that the registered claim was not sufficient to bind both lots and that effect could not be given to it against one of the lots only for the proper amount, and that the action must be dismissed with costs as against the defendant Lister, who was a mortgagee. Carrier v. Friedrich, 22 Gr. 243; Oldfield v. Barber, 12 P. R. 554, and Rathbun v. Nayfield, 87 Mass. 406, followed. Held, also, that if plaintiff desired it, or the defendants, the Smiths, consented, there might be judgment declaring a lien in plaintiff's favour against them for amounts claimed and costs and sale on default in the usual terms.

Fairclough v. Smith, 37 C.L.J. 670 (Killam, C.J.).

—Mechanic's lien—Certificate of action imperative—Sections 8 and 24 of R.S.B.C. 1897, c. 132.]—The certificate of action required under s. 24 of the Mechanic's Lien Act, must be filed within the time therein limited, otherwise the lien ceases to exist.

Dunn v. Holbrook and Bain, 7 B.C.R. 503.

—Hypothecary action—Work on immovable—Enhanced value — Privilege—Art. 2013 C.C.]—The enhanced value given to an immovable by a workman is settled by valuation at that time of the decree when the moneys are insufficient to pay the workman who has registered a privilege (lien) or in case the increased value is disputed by parties interested. The contention when it can take place should be raised by a pleading au fond and not by inscription en droit. The defendant being owner of the immovable the workman need not allege the increase in value.

Therien v. Hainault, 5 Que P.R. 61 (Sup. Ct.).

—Contract on two adjoining buildings—Lien for work done on one—Registration —Extent of work done.]—Where a contract was made with the respective owners of adjoining lands, on which two separate buildings were erected, but included under one roof, for the repair thereof at one entire price, separate accounts being kept of the work done and materials furnished on each building, a lien attaches, and can be enforced under Mechanic's Lien Act against the lands of each of such owners for the price of the work done and the materials provided on the buildings respectively. The findings of the local Master, who tried a mechanic's lien action, as to the fact of the work being done and the materials furnished within thirty days prior to the lien being registered, and as to the extent of the said work and materials, was upheld, although the evidence was contradictory, there being no evidence to support such findings.

Booth v. Booth, 3 O.L.R. 294 (Div. Ct.).

— Mechanic's lien—Mining location — Wages of blacksmith and cook.]—A blacksmith employed for sharpening and keeping tools in order for the work of mining is entitled to a lien for his wages on the mining location, but a cook, who does the cooking for the men employed, is not. Adjoining mining locations when they are water lots if "enjoyed" with the mining location on which the mine is situate are subject to liens for work performed on the mine.

Davis v. Crown Point Mining Co., 3 O.L.R. 69 (Div. Ct.).

— Statutory action to realize—Joining other causes of action—Parties—Architect.]—In an action begun under s. 31 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, c. 153, by the filing of a statement of claim to realize a lien creat-

ed by the Act, the plaintiff cannot include other causes of action and other matters. Where the plaintiff in such an action claimed to be entitled to a lien against the owner of land who had erected a building thereon, and joined as a defendant the architect of the building, whom he charged with fraudulently refusing to give a certificate for the amount which the plaintiff claimed to be entitled to recover, and asked that the architect might be ordered to pay the amount claimed with damages, for his fraudulent breach of duty, and the costs of the action, the name of the architect was struck out. Semble, that, as against the owner, the claim to a proper certificate might be maintained in this action as one of the matters involved in the claim to a lien.

Bagshaw v. Johnston, 3 O.L.R. 58.

—Action begun by statement of claim — Service out of Ontario—Jurisdiction to allow.]—There is no authority in the Courts of this province to allow service out of Ontario of a statement of claim filed as the initial step in an action. In re Busfield—Whaley v. Busfield (1886), 32 Ch. D. 123, followed. Such service is not a matter of practice, but of jurisdiction, and Rule 3 does not enable the Court to apply the analagous procedure as to writs of summons. Semble, that if there were power to allow service of such a statement out of Ontario, it could not be allowed nunc pro tunc after it had been effected without an order. Service out of Ontario of a statement of claim, the initial proceeding in an action to enforce a mechanies' lien, under R.S.O. 1897, c. 153, upon foreigners resident in a foreign country, and all subsequent proceedings, set aside. History of the legislation in Ontario as to service out of the jurisdiction.

Pennington v. Morley, 3 O.L.R. 514.

—Mechanics' lien—Woodmen's lien—Action for wages—Pursuing both remedies—Estoppel.]—Where a workman has recovered part of his wages by seizure and sale in a joint action with other workmen against his employer under the Woodman's Lien for Wages Act, he is estopped from proceeding under s. 27 of the Mechanics' Lien act for the balance of his wages.

Wake v. Canadian Pacific Lumber Co., Ltd., 8 B.C.R. 358.

—Registration—Description of property—Art. 2168 C.C.]—The description of an immovable, in the notice for registration of a workman's privilege, as "part of lot 4101, of the cadastre of the Parish of Montreal," but omitting the conterminous properties, does not comply with Art. 2168 of the Civil Code, which provides that in any place where the official plans are in force the true description of a part of a lot is by stating that it is part of a certain official number upon the plan and in the book of reference, and mentioning who is the owner, and the properties conterminous thereto, and such notice does not create any privilege.

Therrien v. Hénault, 21 Que. S.C. 452.

—Lien on interest of purchaser of land under agreement not carried out—Rights of workmen as against vendor.]—The purchaser of a lot of land under an agreement of sale fixing 15th August, 1901, for payment of the purchase money, was allowed to enter into possession on the 15th June, 1901, and to commence building on the land. He continued the expenditure of money upon the premises after the date fixed for payment, with the knowledge and concurrence of the vendors, but eventually abandoned the purchase without having paid anything to the vendors. Then they notified him that, as he had not complied with the terms of the purchase as to time, his interest had ceased. The plaintiff's claim was for a lien on the interest of the purchaser in the property for work done by him in the erection of the building, but he submitted to the lien of the vendors for the full amount of the purchase money of the land:—Held, that the vendors could not, under the circumstances, put an end to the rights of the purchaser by giving such a notice, and that, apart from the provisions of s. 11, sub-s. 2 of the Mechanics' and Wage-Earners' Lien Act, 61 Viet., c. 29, the plaintiff was entitled to the lien asked for with the usual inquiries and directions.

Hoffstrom v. Stanley, 14 Man. R. 227.

—Builder's lien—Computation of time—Art. 2013 (b) C.C.]—The thirty days provided by Art. 2013 (b) C.C. for registry of the lien of a labourer, workman or contractor, are computed from the time when the construction of the building on which they have worked is ended, and not from the date on which it was first used.

Quintal v. Benard, 20 Que. S.C. 199 (Sup. Ct.).

—One lien against owners of different properties.]—A mechanics' lien registered against two lots of land owned by different persons in respect of work done upon two houses, one on each of the lots, on the order of one of the owners and for an amount claimed to be due for the work on both houses, without apportioning the amount as between the two, cannot be enforced under the Mechanics' and Wage-Earners' Lien Act, 1898, nor can effect be given to the lien as against one of the lots only for the proper amount. Currier v. Friedrick (1875), 22 Gr. 243; Oldfield v. Barbour (1888), 12 P.R. 554; and Rath-

bun v. Hayford (1862), 87 Mass. 406, followed.

Fairclough v. Smith, 13 Man. R. 509 (Killam, C.J.).

— Mechanics' lien—Waiver—Estoppel — Proof in insolvency.]—See EXEMPTIONS.

Re Demaurez, 5 Terr. L.R. 84.

—Failure to complete—Set-off of damages —Bill of exchange.]—See BILLS AND NOTES.

McDougall v. McLean (No. 2), 1 Terr. L.R. 450.

— Repairs of ships—Possessory lien — Parting with possession.]—Action to recover the value of work done in repairing vessels and to establish a lien therefor on the vessels. A possessory lien at common law exists only in cases where the party claiming the lien has the possession of the goods, and if he once part with the possession after the lien attaches, the lien is gone. The claimant must have exclusive and continuous possession, and, if the things are moved from the place of repair, it must be to a place where absolute and entire dominion over them can be retained.

Hackett v. Coghill, December 7, 1903 (Boyd, C.).

—Costs—"Actual disbursements"—R.S.O. 1897, c. 153, s. 42.]—The "actual disbursements" which, by section 42 of the Mechanics' Lien Act, R.S.O. 1897, c. 153, may be allowed as against an unsuccessful claimant in addition to an amount equal to twenty-five per cent. of the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and a fortiori not counsel fees charged by the solicitor himself when acting as counsel. Judgment of Falconbridge, C.J., affirmed.

Cobban Manufacturing Company v. Lake Simcoe Hotel Company, 5 O.L.R. 447 (D.C.).

—Affidavit verifying statement of claim—Particulars of residence of plaintiffs.]—In the case of an action under the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, c. 153, the affidavit verifying the statement of claim, required by s. 31 (2), may be made by the plaintiffs' solicitor as agent. The plaintiffs were day labourers, who did work for the defendants on a railway in an unorganized district, and it was set forth in the statement of claim that they resided in that district; the name and address of the plaintiffs' solicitor were also stated therein:—Held, that it was not necessary to give more precise particulars of the places of residence of the plaintiffs.

Crerar v. Canadian Pacific Railway Co., 5 O.L.R. 383, 2 C.L.R. 107 (Boyd, C.).

—Builder's privilege—Contractor stipulating directly with proprietor.]—(1) A contractor who stipulates directly with the proprietor of a building which is being constructed, is entitled to register a privilege under the terms of Article 2013 C.C., as amended by 59 Vict. (Q.), c. 42. (2) The "additional value," referred to in the above Article, is the additional value given to the immovable by the work at the time it is done.

Garlarneau v. Tremblay, 22 Que. S.C. 143 (Archibald, J.).

—Mechanics' lien — Action — Parties—Execution creditor — Incumbrance arising pendente lite.]—Under section 36 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, c. 153, it is the persons who are incumbrancers at the time fixed for service of trial, and those only, who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in. After service of notice of trial in an action to enforce a mechanic's lien against the lands of the defendants, but before the trial, the petitioners, who were judgment creditors of the defendants, placed a fi. fa. against goods and lands in the hands of the sheriff of the county in which the lands of the defendants lay. The petitioners were not served with any notice of trial, and did not appear at the trial nor prove any claim, but the judgment given upon the trial recited that it appeared that they had some lien, charge or incumbrance on the lands, created subsequent to the commencement of the action, and declared that the plaintiffs and others were entitled to liens:—Held, that the name of the petitioners and all reference to their claim should be stricken out of the judgment.

Haycock v. Sapphire Corundum Co., 7 O.L.R. 21 (Meredith, C.J.C.P.).

—Mechanic's lien—Priority—Jurisdiction to order—Notice to parties affected.] — The holders of mechanics' liens filed against mineral claims owned by a company which was subsequently ordered to be wound up, recovered judgment thereon in the County Court the same day the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of Holmes, a surveyor, who held the field notes of the survey made by him, and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims and retain a lien on them until he was paid. The liquidator applied to the Court for leave to accept the proposal and an order was made, without notice to the lien holders,

giving Holmes a first charge on the claims for his debt and the amount advanced by him. Afterwards, on Holmes' application, an order was made, on notice to the liquidator but without notice to the lien holders, that the claims be sold to pay his charge. The lien holders did not appeal from either of the last orders, but applied for leave to enforce their security and that they be declared to have priority over Holmes:—Held, by the Full Court that the order giving Holmes priority over the lien holders was made without jurisdiction and the lien holders were not bound by it.

Re Ibex Mining and Development Company, 9 B.C.R. 557.

—Mechanics' lien—Building contract — Pretended tender—Penalty clause.] — Where a tender for the erection of a building is made and accepted, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the contractor is entitled to recover on a quantum meruit. The fact that the plaintiff's tender was made for the purpose of deceiving other tenderers did not estop the plaintiff from disputing its bona fides as against the defendant. Failure by the owner to supply material which the contract provides he shall supply discharges a penal clause. Where a building contract provides for the certificate of an architect and no architect is appointed, the provision is inoperative.

Degagne v. Chave, 2 Terr. L.R. 210.

—Lien for goods supplied to sub-contractor—Notice — Failure to give — Words "placed or furnished."]—B. contracted with the defendant company to transfer to them a quantity of land, and to erect and equip a mill and to do other work, for an agreed sum in bonds and shares of the company and other considerations. It was subsequently agreed, verbally, that a portion of the proceeds of the bonds and shares transferred to B. should be retained by a trust company as security for the performance by B. of his contract for the erection of the mill, to be paid out as the work progressed. In an action against the company by the sub-contractor by whom the machinery for the mill was supplied:—Held, that, in the absence of notice, the company was not liable to the plaintiff for failure to retain out of the moneys paid to B. the percentage required to be retained under the provisions of the Mechanics' Lien Act. Also, that the transaction which took place when the title to the property was transferred to the company, and the bonds and shares, the consideration therefor, were delivered to B., was not one within the provisions of the Mechanics' Lien Act, s. 8, and that the company was not required to retain anything on that date for the benefit of future contractors. Also, that as the bonds and shares constituted the price or consideration not only for the construction of the mill, but for the land and other property transferred to the company, the price to be paid for the construction of the mill could not be ascertained so as to enable the claim for work or machinery to be enforced against the property. Also, that the lien for goods or materials placed or furnished under s. 3 of the Act, commences when the goods or materials are so placed or furnished, and that, as against the owner, this cannot be said to have occurred until they have reached his property.

Smith Co. v. Sissiboo Pulp and Paper Co., 36 N.S.R. 348. (See the next case.)

—Machinery furnished—Contract price.] —Under the Mechanics' Lien Act of Nova Scotia, R.S.N.S. (1900), c. 171, a lien for machinery for a mill does not attach until it is delivered, and if the contractor for building the mill has then been fully paid, there is nothing upon which the lien can operate, as by section 6 of the Act the owner cannot be liable for a sum greater than that due to the contractor. B., holder of more than half the stock of a pulp company, for which he had paid by cheque, and also a director, offered to sell to the company, land, build a mill and furnish working capital on receipt of all the bond issue and cash on hand. The offer was accepted, and all the stock, issued as fully paid up, was deposited with a trust company, and the cash, his own cheque and the price of five shares, given to B. The stock was sold, and, from the proceeds the land was paid for, the working capital promised given to the company, and the balance paid to B. from time to time, as the mill was constructed. The machinery was supplied by an American company, but when it was delivered all the money had been paid out as above: —Held, affirming the judgment appealed from (36 N.S.R. 348), that as all the money had been paid before delivery, the company was not liable under the Mechanics' Lien Act to pay for the machinery. Held, also, that s. 8 of the Act, which requires the owner to retain 15 per cent. of the contract price until the work is completed did not apply, as no price for building the mill was specified, but the price was associated with other considerations from which it could not be separated.

Morgan Smith Company v. Sissiboo Pulp and Paper Company, 35 Can. S.C.R. 93.

—Building contract—Lien for materials furnished to contractor—Occupation of building by owner—Acceptance of work.]

—Persons supplying materials to the contractor for the building of a house are not entitled to the benefit of the provisions of section 12 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, by which, in the event of the contract not being completed, wage-earners may enforce liens against the percentage of the contract price which the owner is required to hold back under section 9 of the Act; but, if the contract price is payable by instalments, the general lien holders may enforce their liens pro rata to the extent of any earned instalments in so far as the same remain unpaid in the hands of the owner, although the work is not completed. (2) The occupation of the uncompleted house by the owner and the mortgaging of it, for a sum to be paid to the contractor in accordance with one of the terms of the contract, do not estop the owner from setting up against the lien holder that the house has not been completed and that consequently, no more money is due under the contract.

Black v. Wiebe, 15 Man. R. 260 (Perdue, J.).

—Lien of sub-contractor when contractor fails to complete work—Percentages to be kept back by owner—Successive jobs on distinct orders.]—Where nothing is payable under a building contract until the whole of the work is completed, but the owner voluntarily makes payment to the contractor as the work progresses, to the extent of the value of the work done, a sub-contractor who has not been paid is entitled, under section 9 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, as against the owner, to a lien for the amount due him, to the extent of twenty per cent. of such payments. Russell v. French (1898), 28 O.R. 215, followed. Plaintiff's claim consisted of charges for different jobs, all in his line of business, but ordered at different times, and, as to the first job, if considered separately, his lien was not filed within the time required by the statute:—Held, that, under such circumstances, a mechanic should not be required, in order to secure payment, to file a lien after completing each piece of work, and that filing his lien after he has completed all his work is sufficient.

Carroll v. McVicar, 15 Man. R. 379 (Richards and Perdue, JJ.).

—Workman's lien—Description of property—Valuation—Notice of registry.] —The fact that, in a schedule for registering a workman's lien, the immovables affected are described as "two lots of land or emplacements known and designated under the numbers 2C and 3C of the official sub-division of lot No. 907," instead of describing them as in the cadastre, namely, "two lots of land known and designated under the numbers 2 sub-division C and 3 sub-division C both of the sub-division of the official lot No. 907" does not constitute an irregularity sufficient to make void the registration of the lien, especially when the description in the schedule was identical with that in the document by which the owner (who had acquired the immovables from the respondent) had obtained his title and with that in the procès-verbal of seizure and when the registrar, on presentation of the schedule, had inscribed it upon the immovables as described in his office. In this case the respondent who had sold the immovables had filed on the record a declaration that the land was not worth more than $3,000 (the property with the erections thereon had been sold for $5,000) and an hypothecary creditor, represented by respondent's attorney, had directed that the money be distributed without proceeding to an appraisement:—Held, that the respondent, who was dominus litis, was considered as having acquiesced in the omission of a valuation and was not entitled to complain that the increased value given to the land by the new erections had not been fixed by valuation. Failure of the workman to notify the owner of the immovable within three days after registration of the schedule, Art. 2103 C.C., does not affect the validity of the registration or of the lien.

Daniel v. Macduff, Q.R. 13 K.B. 361.

—Costs of sale and reference to Master —Limitation of 25 per cent.]—The expression "costs of the action awarded in any action under this Act by the Judge or local Judge trying the action" in section 37 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, refers to the costs up to and including the trial, and means the costs which are allowed by the Judge at the hearing and entered in the judgment, and the provisions of that section, limiting the costs to be allowed in such action exclusive of disbursements to twenty-five per cent. of the amount of the judgment, do not apply to the subsequent costs of sale and proceedings before the Master, which may be dealt with by the Judge as in other cases. Gearing v. Robinson (1900), 19 P.R. 192, followed. The judgment pronounced empowered the Master to tax and add to the plaintiffs' claim the costs of the subsequent proceedings, and the Master under it allowed the ordinary costs of a sale conducted in his office, and there was no appeal from the judgment:—Held, on an appeal from the taxation, that the Court could not interfere with the provisions of the judgment. Section 31 of the Act provides an alterna-

tive mode of proceeding to enforce a lien in which the Judge disposes of everything necessary to realize the claims without a reference to the Master, and section 39 provides that, when the least expensive course is not taken by the plaintiff, the costs allowed shall not exceed what would have been incurred if the least expensive course had been taken. Held, per Richards, J., that it could not be assumed that proceedings under section 31 would have been any less expensive than those which had been taken. Per Perdue, J., that the question as to the least expensive course should have been dealt with, if at all, by the Judge who tried the action, and the taxing officer had no power, without a special direction in the judgment, to determine which would have been the least expensive course.

Humphreys v. Cleave, 15 Man. R. 23 (Richards and Perdue, JJ.).

— Assignment—Debt "due"—Consideration—Lien holder—Priority.]—E., a subcontractor, commenced work on the 19th August, 1903, completed it on the 11th October, 1904, and registered his lien on the 12th October, 1904. On the 14th November, 1903, the contractor by whom E. was employed, assigned $2,588.32 of the amount "due" to him from the owner on his contract, to D., another subcontractor, who duly gave notice thereof to the owner. At the time of this assignment $2,588.32 had been earned under the contract, but it did not become payable until the giving of the architect's certificate, on the 4th November, 1904:—Held, that under the Mechanics' Lien Act. s. 4, E.'s lien related back to the commencement of his work, and under s. 13 it was entitled to priority over D.'s assignment, for the full amount of the lien, and not merely for that portion thereof actually earned by E. up to the date of the assignment. Held, also, that the assignment was valid, and bound the debt assigned, though it was not payable at the date of the assignment. Held, also, that a debt due and owing is a sufficient consideration for an assignment of a chose in action, and that the assignment was, therefore, not revocable or impeachable as being voluntary.

Ottawa Steel Castings Co. v. Dominion Supply Co. 25 C.L.T. 58 (Scott, Local master.).

—Claim for goods supplied sub-contractor —Failure to retain percentage—Notice—Identification of premises.]—C. & W., who were awarded a contract to place heating apparatus in a hotel building, owned by the defendant D., ordered materials required from plaintiffs in a letter stating: "We have secured contract for hotel which requires above goods":—Held, that these words sufficiently identified the building for which the goods were required. The sub-contract was made September 29th, 1902, and the final payment was made by D. to the principal contractor on the 21st November, 1902, when the work was all through, without retaining fifteen per cent. for 30 days, as required by the Mechanics' Lien Act, R.S. (1900), c. 171, s. 8. Held, that D. was required to retain the percentage whether he had notice of the sub-contract or not, and that he paid it at his own peril if there was a subcontractor in existence who was prejudiced by the payment. Smith v. The Sissiboo Pulp Co., 30 N.S.R. 348, distinguished.

Dominion Radiator Co. v. Cann, 37 N.S. R. 237.

—Contractor's lien — Conservatory attachment.]—A contractor for making timber by the job has, for what may be due him, the lien given by Art. 1994c of the Civil Code. (2) A creditor having a lien upon movables may, as a rule, exercise the right by conservatory attachment to secure his privilege.

Ross v. St. Onge, Q.R. 14 K.B. 478.

—Time for registering — Completion of work—Satisfaction of architects—Work done after registration of lien.]—Under a contract made with the railway company for the erection of a building, the work was to be done to the entire satisfaction of certain architects. The plaintiffs, who were sub-contractors for a part of the building, ceased work on the 20th May, under the belief that their contract was completed, and their secretary-treasurer on the 8th of June, made an affidavit stating such to be the fact, with a view of having a lien registered, which was done on the 24th June. The architects, however, were not satisfied, and required further work to be done, and this was accordingly done in June, and again in August, and it was not until the 4th of August that the architects were satisfied and accepted the work:—Held, that under the contract the architects, being the persons to determine when the work was completed, it was not so completed until they had signified their approval, and therefore the lien was registered in time.

Vokes Hardware Co. v. Grand Trunk Railway Co., 12 O.L.R. 344 (D.C.).

—Parties to action—Suit by sub-contractor against contractor.]—A., an owner of property, who has employed a contractor to build a house for him, and before the filing of a lien under the Manitoba Mechanics' and Wage-Earners' Lien Act, by a sub-contractor for his claim against the contractor, has sold and conveyed all his interest in the land to a purchaser, is

neither a necessary nor a proper party to the action afterwards commenced to realize the lien, as the plaintiff could not have any relief against him. Although the plaintiff's claim would be limited to the amount due by A. to the contractor and he would have to prove what that indebtedness was, yet that would not justify making A. a party, as the plaintiff could prove that indebtedness at the trial or on a reference to the Master without having A. before the Court.

Christie v. McKay, 15 Man. R. 612 (Mathers, J.).

—Meaning of "claim"—Personal remedy of workman.]—(1) A workman under a contractor engaged in the repair of a building for the owner, is entitled, under sections 9 and 12 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, to a lien on the building for his unpaid wages to the extent of the twenty per cent. of the payments made, that the owner should have held back from the contractor, but did not. Carroll v. McVicar (1905), 15 M.R. 379, followed. (2) A workman who has brought his action under the above Act, can not in that action avail himself of the personal remedy given by the Builders' and Workmen's Act, R.S.M. 1902, c. 14, against the proprietor for the full amount of his claim in cases where a pay list is not kept and the proprietor neglects to see that the workmen are paid. (3) The word "claim" in the second paragraph of section 4 of the first-named Act, providing that no lien shall exist under the Act for any claim under twenty dollars, means the amount actually due to the claimant under his contract or employment, and not the amount to which his right or remedy against the land may on inquiry be found to be limited.

Phelan v. Franklin, 15 Man. R. 520 (Richards, J.).

—Misdescription of land—Right to amend lien—Interest of timber licensee in land.]—Where the land sought to be charged by lien is misdescribed in the lien affidavits, the Court will not give leave to amend by correcting the description, as that would in effect be creating a lien, and the statute provides a specific mode for creating a lien. Section 54 of the Land Act, which vests in the holder of a special timber license all rights of property in all trees, timber and lumber cut within the limits of the license during the term thereof, does not give any estate in the land itself chargeable under the Mechanics' Lien Act.

Rafuse v. Hunter, 12 B.C.R. 126 (Wilson, Co.J.).

—Building contractors—Sub-contractors—Suppliers of materials.]—The privilege given to labourers, workmen, architects and builders by the Civil Code, Arts. 2013 et seq., extends only to persons of the classes mentioned under engagement with the owner of lands or the building contractors employed by him, and does not enure to the benefit of sub-contractors or persons furnishing labour or materials without direct agreement with or knowledge of the owner.

Fréchette v. Ouimet, Q.R. 28 S.C. 4 (Sup. Ct.).

—Time for filing—General authority conferred verbally—Subsequently limited by writing.]—Whether material is supplied in good faith for the purpose of completing a contract, or as a pretext to revive a right to file a lien, is a question of fact for the trial Judge, and his decision on such fact should govern. Where an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third party acting bona fide. Whether authority has been conferred on an agent is a question of fact, which may be proved by showing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred. When the relationship of debtor and creditor is established on the hearing of a claim for a mechanic's lien, the jurisdiction of the County Court Judge to give a judgment in personam arises under section 23 of the Mechanics' Lien Act Amendment Act, 1900. A principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterwards, against such third persons dispute its existence.

Sayward v. Dunsmuir, 11 B.C.R. 375.

—Material supplied—Request, privity and consent and credit of owner.]—Under the Mechanics' Lien Act, in order to create a lien on the property of the owner in favour of the material man, there must in all cases be a request of the owner and the furnishing of the materials in pursuance of that request, either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. In the circumstances of this case, it was held that the person who had furnished the materials had a direct lien upon the land and as against the owner, and not a sub-lien upon the moneys owing by the owner to the contractor or upon the statutory drawback. Graham v. Wil-

liams (1884), 8 O.R. 478; (1885), 9 O.R. 458; Blight v. Ray (1893), 25 O.R. 415; Gearing v. Robinson (1900), 25 A.R. 364, considered.

Slattery v. Lillis, 10 O.L.R. 697 (D.C.).

—Mechanics' Lien Act—Material man, lien by—Appropriation of payment on account.]—Defendant Horrobin contracted to build a house for defendant Henshaw. Horrobin contracted with plaintiffs to supply the lumber and building materials. Previous to this, Horrobin, who was indebted to the plaintiffs, gave them a 30-day note for $1,700, on which, about due date he paid them $1,000 on account, in doing which he overdrew his bank account by about that sum. A few days afterwards he was paid the sum of $1,200 by cheque, stated on its face to be "re Mrs. Henshaw." This cheque Horrobin endorsed over to his bank, making good his overdraft, which he had obtained on the strength of the promise of defendant Henshawe's payment. Plaintiffs applied the $1,000 payment to the reduction of the overdue note. Horrobin, through injuries received from a fall, was unable to give evidence at the trial so that the statement by plaintiffs' accountant that there was no appropriation by Horrobin of the $1,000 to defendant Henshaw's account, was not contradicted. Plaintiffs placed a lien on the building for $948.45. The trial Judge came to the conclusion that the $1,700 note must have included some of the materials supplied for the house in question, and that defendant Henshaw was entitled to a credit of some amount which the accounts ought to show, and dismissed the action as against defendants:—Held, on appeal, that there had been no appropriation by Horrobin, but held, on the facts, that as there had been a shortage in delivery of lumber entitling defendant Henshaw to a certain credit, the claim had been brought for too much and there should be a reference.

British Columbia Mills v. Horrobin, 12 B.C.R. 426.

—Mechanics' lien—Lien of material man—Registration of one lien against three separate owners.]—A material man is not entitled, under the Mechanics' Lien Act, R.S.O. 1897, c. 153, to register, as one individual claim, a lien for the amount due for materials supplied by him to a contractor, against all the lands jointly of the owners of different parcels of land, who have made separate contracts with the contractor for the erection of houses on their respective parcels. Neither can the registered lien nor the statement of claim in such a lien proceeding be amended so as to claim against each parcel the amount entering into the construction of the building thereon. The owners of separate parcels of land made separate contracts with a contractor for the erection of houses on their respective parcels and materials were furnished by a material man to the contractor, which were used by him in the erection of the houses:—Held, that the material man was not empowered, under the Mechanics' Lien Act, to register a lien for the total amount against all the lands jointly.

Dunn v. McCallum, 14 O.L.R. 249.

—Statement of claim—Computation of time for filing—Commencement of action.]—The 90 days allowed by section 24 of the Mechanics' Lien Act, R.S.O. 1897, c. 153, for commencing an action to realize a claim, are not to be computed exclusively of long vacation. Although such an action is begun by a proceeding called a "statement of claim," the Rules of Court with respect to the filing of the statement of claim in an action begun by writ of summons, are not applicable to it. Where the last of the materials in respect of which the plaintiffs claimed a lien were furnished on the 30th May, 1907, and the lien was registered within a month, but the action for the enforcement was not begun by the filing of a statement of claim until the 23rd September, 1907, it was held that the lien had ceased to exist.

Canada Sand, Lime and Brick Co. v. Ottaway, 15 O.L.R. 128.

—Mechanics' Lien Act—Dominion Railway—Jurisdiction.]—A lien under the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, c. 153, cannot be enforced against the railway of a company incorporated under a Dominion Act, and declared thereby to be a company incorporated for the general advantage of Canada. Decision of a Divisional Court, 13 O.L.R. 169, affirmed.

Crawford v. Tilden, 14 O.L.R. 572 (C. A.), 6 Can. Ry. Cas. 437.

—Completion of contract—Time for filing claim.]—The time limited for the registration of claims for liens by section 20 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, does not commence to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder. The judgment appealed from, 16 Man. R. 366, was reversed. The Court refused to quash the appeal on the ground that the right of appeal had been taken away by section 36 of the statute above referred to.

Day v. Crown Grain Company, 39 Can. S.C.R. 258, affirmed, Crown Grain Co. v. Day [1908] A.C. 504.

—Pleading.]—Under section 45 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, and the form No. 7 in the schedule of forms appended to the Act, it is permissible for a defendant, in an action under that Act, to plead that the lien asserted by the plaintiff was not filed, and that the proceedings had not been instituted, within the time required by law, but not that the plaintiff was not entitled to said lien which is only an allegation of a conclusion of law.

Imperial Elevator Co. v. Welch, 16 Man. R. 136.

—Reserve of percentage of contract price —Payments to material men and wage-earners out of the reserve.]—The owner of a building in course of erection, when the contract price exceeds $15,000, being required by section 9 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, to keep back fifteen per cent. of the amounts from time to time earned by the contractor and retain such percentages until thirty days after the completion or abandonment of the contract for the benefit of sub-contractors who may become entitled to file liens under the Act, must reserve such percentages at his peril, and cannot afterwards, in an action by a person who has supplied materials, deduct therefrom any payments he may have made under section 10 of the Act for wages or materials in order to prevent the filing of liens therefor, as section 10 at the end expressly says in effect that payments made under it are not to "affect the percentage to be retained by the owner as provided by" section 9.

McArthur v. Martinson, 16 Man. R. 387.

—Taking promissory note for amount of claim.]—Notwithstanding sub-section (e) of section 24 of the Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, if a person claiming a lien under the Act takes a promissory note for the amount and discounts it he thereby forfeits his right to a lien.

Arbuthnot Co. v. Winnipeg Manufacturing Co., 16 Man. R. 401.

—Contractor—Notice.]—In the matter of a lien the prescribed formalities are essential and should be strictly observed; a builder desiring to preserve his lien as such should give the owner of the immovable on which he wishes to have a lien a notice in writing of the contract within eight days from the date on which it was signed pursuant to the provisions of Art. 2013c C.C.

Moreau v. Guimont, 8 Que. P.R. 424 (Loranger, J.).

—Discounting promissory note for claim.] —The provision in sub-section (e) of section 24 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, that the acceptance, by a person claiming a lien under the Act, of any promissory note for the claim shall not merge, waive, pay, satisfy, prejudice or destroy any lien created by the Act, unless the lien holder agrees in writing that it shall have that effect, does not protect the lien holder if he discounts or transfers such note and in that event his lien is lost.

National Supply Co. v. Horrobin, 16 Man. R. 472.

—Mechanics' lien—Statement of claimant's residence and description of goods supplied.]—A claim for a lien under the Mechanics' Lien and Wage-Earners' Act, R.S.O. 1897, c. 153, was made out on a printed form, and was against the contractor for the erection of certain buildings, whom the claimant believed to be, although another person was the owner. The claim was for "material supplied" on or before a named date, no description of the materials being given and no mention being made of the commencement of the lien, words for that purpose contained in the printed form having been struck out. The claimant's residence was given as "of Toronto":—Held, 1. That the claimant's residence was sufficiently designated. 2. That the claim against the contractor was sufficient, the Act merely requiring it to be made against the owner or person believed to be the owner. 3. That it was not necessary to give the date of the commencement of the lien; and 4. That while the statement "materials supplied" was not a substantial compliance with the Act, yet under s. 19 it did not invalidate the lien, no prejudice being occasioned thereby; and that the lien was therefore valid.

Barrington v. Martin, 16 O.L.R. 635.

—Parties—Procedure to add—Striking out unnecessary or improper parties.] — The proper interpretation of ss. 18, 19, 20 of the Mechanics' Lien Act is:—"Once an action to enforce a mechanic's lien is commenced it is improper for another lien holder, in respect of the same subject matter, to commence an action, because all suits or proceedings brought by a lien holder shall be taken to be brought on behalf of all lien holders who became parties within the time limited for instituting proceedings":—Semble, that where a lien holder is plaintiff in an action on his lien, it is improper to join other lien holders as parties defendant. Held, such other lien holders may become parties by order of a Judge on ex parte application under s. 18.

Gardner v. Gorman, 1 Alta. R. 106.

—Contract price payable in instalments—Default.]—Where the contract price is payable in instalments, if default is made in payment of an instalment, the contractor, prior to the falling due of the later instalments, can commence proceedings under the Mechanics' Lien Act to enforce his lien. The words in s. 7 of the Act: "No further proceedings shall be taken in the action until after such extension of time," are to be construed distributively, and default in payment of any deferred payments entitles the lien holder to take any further proper proceedings in the action. Section 17 of the Act, requiring the contractor to post up a copy of the pay roll, etc., is intended solely to protect the labourers, and to afford the owner the means of securing himself from liability to the labourers, and non-compliance by the contractor with this section does not prevent his lien coming into existence, or nullify a lien already existing, or prevent the lien holder from keeping it alive by commencing proceedings, in accordance with the Act.

Spears v. Bannerman, 1 Alta. R. 98.

—Jurisdiction of District Court.]—Held, that the District Court has no jurisdiction in an action to enforce a mechanic's lien filed under the provisions of the Mechanics' Lien Ordinance of the Northwest Territories before the Mechanics' Lien Act of 1907 came into force; but such lien must be enforced in the Supreme Court of Saskatchewan.

The Craftsmen v. Hunter, 1 Sask. R. 88.

—Mechanic's lien—Limit of costs—Counsel fee.]—Counsel fees not shown to have been actually disbursed by the solicitor are not taxable as disbursements in a mechanic's lien action. Cobban v. Lake Simcoe (1903), 5 O.L.R. 447, followed.

Leibrock v. Adams, 17 Man. R. 575.

—Jurisdiction—Proceedings by originating summons—Costs.]—Section 21 of the Mechanics' Lien Act is merely permissive, and does not exclude the ordinary procedure by writ of summons:—Held, the combined effect of the Mechanics' Lien Act, s. 2, sub-s. 1, and the District Court Act, ss. 23 and 24, and the Supreme Court Act, ss. 9 to 23, is to vest in the District Court jurisdiction in mechanics' lien cases where the amount involved is under four hundred dollars; but in such cases the Supreme Court has concurrent jurisdiction. Semble, costs as between party and party will, however, in such cases as a rule only be allowed on the scale or tariff applicable to the District Court, in whichever Court proceedings are instituted.

Freeze v. Carry, 1 Alta. R. 81.

—Workman's lien—Sub-contractor — Notice to owner.]—The lien on immovables under Art. 2013 et seq. C.C., exists for the benefit of workmen in the service of sub-contractors though no notice of the sub-contract has been given to the owner. It is sufficient if there is given to the latter a verbal notice, before a witness, that the workmen have not been paid for each term of payment due them. Therefore, they can register their claims in the manner and for the purposes provided for by Art. 2013c C.C.

Rousseau v. Toupin, Q.R. 32 S.C. 228.

—Builder's lien—Sub-contractor—Notice—Service on architect—Art. 2013c C.C.] — Notice given by a sub-contractor after the expiration of eight days as provided by Art. 2013c C.C., does not give rise to the lien provided for by that Article. The architect employed to superintend the construction of a building is not agent of the owner for the purpose of being served with such notice.

Sharpe v. Budd, Q.R. 17 K.B. 17.

—Computation of time—"Thirty days," how calculated—Promissory note of owner.]—The Mechanics' Lien Act, 6 Edw. VII. c. 21, s. 13, provides that "the lien shall . . . cease . . . after the expiration of thirty-one days, . . . after the claimant has ceased from any cause to work thereon, or place or furnish the materials therefor":—Held, that the doing of work, or supplying materials, even of a trivial character, should be taken into consideration in determining when the claimant "has ceased," etc., etc., if the work was done, or material furnished, in good faith, to complete the contract, and not colourably to revive the lien. Held, further, that if the claimant has delayed completion, in order to give the owner time to arrange for payment, by arrangement with the owner, and work is then done to keep the lien alive, the owner having accepted the benefit of the delay, and the work being necessary, the completion of such work will be taken as the date upon which the claimant "has ceased," etc., etc.; and semble, it makes no difference that such work was merely part of an "extra." It revives the lien in respect of the whole work. Section 35 provides that: "Every lien shall absolutely cease to exist after the expiration of thirty days, after the filing of the affidavit . . . unless the claimant shall have instituted proceedings . . . . and a certificate thereof is duly filed." Held, that in computing the period of thirty days, fractions of a day will not be considered, and hence where the affidavit was registered 12th December at 11 a.m., and certificate filed on the 11th January, at 11.30 a.m., the filing was in time. Held, that the claimant does not waive, release, lose or extinguish his lien, even to the extent of the amount of the note, by

taking and negotiating the owner's promissory note in part payment of the amount then due. The claimant is entitled to enforce his lien for the full amount due him. Held, that the words in s. 4: "land . . . . occupied thereby or enjoyed therewith," are not necessarily restricted to the particular lot upon which the building is situated, but will include other (adjoining?) lots intended for use with the house.

Clarke v. Moore, 1 Alta. R. 49.

—Employment of workmen "by the day."]—A workman employed at a rate per hour is not a workman employed "by the day" within the meaning of s. 3 of the Builders' and Workmen's Act, R.S.M. 1902, c. 14, and can have no direct claim against the proprietor, under s. 4 of the Act, for his wages earned in the erection of a building by his employer for the proprietor.

Dunn v. Sedziak, 17 Man. R. 484.

—Manitoba Act, R.S.M. c. 110, s. 36, limiting right of appeal ultra vires.] — By s. 101 of the British North America Act, 1867, the Parliament of Canada was authorized to establish the Supreme Court of Canada, the existing statute being R.S.C. 1906, c. 139, ss. 35 and 36 of which define its appellate jurisdiction in respect of any final judgment of the highest Court of final resort now or hereafter established in any Province of Canada. The Manitoba Mechanics' and Wage-Earners' Lien Act, R.S.M. c. 110, s. 36, applies to the suit under appeal and enacts that in suits relating to liens the judgment of the Manitoba Court of King's Bench shall be final and that no appeal shall lie therefrom:—Held, that the provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act.

Crown Grain Company v. Day, [1908], A.C. 504.

—Claims of wage-earners — Abandoned contract—Ascertainment of sum upon which percentage to be computed.] — The defendant P. contracted to build a house for the defendant T., but abandoned the contract when the work was not half done. Liens were claimed by wage-earners, and proceedings were had under the provisions of the Mechanics' Lien Act. It was contended that s. 14 (3) lays down a rule for wage-earners, in a case in which the contract has not been completely fulfilled, different from the rule in any other set of circumstances, and that the only thing to be looked at is the value of the work done and materials furnished by the contractor:—Held, that the interpretation of the words of s. 14 (3) "the percentage aforesaid shall be calculated on the work done and materials furnished by the contractor," is to be found from an examination of the course of legislation, and there is nothing therein to indicate that "the percentage aforesaid" is not the same percentage as that in s. 14 (1) and in s. 11 of the present Act; and, therefore, in ascertaining the amount upon which is to be computed the 20 per cent. provided by the Act, the value of the work done and materials furnished is to be calculated upon "the basis of the price to be paid for the whole contract."

Cole v. Pearson, 17 O.L.R. 46.

—Mechanic's lien—Certificate of lis pendens.]—Under section 22 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 110, in order to preserve a mechanic's lien, it is necessary, besides commencing an action, to register a certificate of lis pendens in respect thereof, according to form No. 6 in the schedule, in the proper registry or land titles office within the time prescribed, and a certificate that some title or interest in the land is called in question, without any reference to a mechanic's lien, is not a sufficient compliance with the statute. Although the lien may be registered before commencing or during the progress of the work, yet an action thereon cannot be commenced before completion.

Curtis v. Richardson, 18 Man. R. 519.

—Material man—Notice.]—The lien of the person who supplies materials for an immovable of which they become part only arises on observance of the necessary condition of giving notice to the owner before delivery, specifying the contracts under which they are supplied, their cost and describing the immovable for which they are intended.

Carrière v. Sigouin, Q.R. 18 K.B. 176, affirming 33 S.C. 423.

—Mechanic's lien—Time of registration—Goods supplied—Entire contract.]—Defendant B. contracted with defendant F. to build a house for the latter. Plaintiff supplied at different times during the work hardware and installed plumbing and heating apparatus, and not being paid filed a lien. The last work done was on the furnace, on January 3rd, the other work done by plaintiff having been completed and material supplied at an earlier date. The lien was filed on February 2nd. No formal notice was given by Smith to Fry of his claim as a sub-contractor but payment of the account had been discussed between them on several occasions, and Fry had promised to protect Smith. Fry also claimed that the work had not been finished by Bernhardt in accordance with the contract, that no architect's certificate had been produced and that he was entitled to set off certain damages.

It appeared, however, that he had taken possession of the premises and that accounts had been stated to some extent and a balance found due:—Held, that the plumbing, heating and building hardware were all supplied with the same object by the one party on the one hand to the one party on the other, standing in the same relationship, and were so supplied as material and labour coming within the scope of the plaintiff's business and were so bound into one as to form an entire contract and not as separate contracts or deliveries and the last work on the whole being done on the 3rd of January the lien was filed in time. (2) That the defendant Fry by his conversation with plaintiff and assurance of protection of the account had waived notice of claim of lien. (3) That by taking possession of the premises, selling the same and stating accounts with Bernhardt, Fry had accepted the work and waived the presentation of an architect's certificate. (4) Damages for delay in performance cannot be set off against a sub-contractor (Ord. 1903, c. 18).

Smith v. Bernhardt, 2 Sask. R. 315.

—Contract with school district—Right to file lien.]—A school district duly organized in Saskatchewan and declared to be a corporation, let a contract for the erection of a school building. A sub-contractor filed a mechanic's lien against the building, and not being paid, brought action to enforce the lien. It was objected that the lien was not enforceable against the lands of a school district:—Held, that the lands of a school district were liable to be sold under the provisions of the Mechanics' Lien Act. 2. The provisions of s. 9 of the School Assessment Ordinance providing a means of realizing the amount of a judgment against a school district do not exclude other remedies.

Lee v. Broley, 2 Sask. R. 288.

—Material for building—Notice.]—The notice required by Art. 2013g, C.C., 59 Vict. c. 46, s. 2, to give to the person furnishing materials for a building a lien under the first paragraph of Art. 2013 and the hypothec provided for by Art. 2013 C.C. is necessary whether he deals directly with the owner or by sub-contract from the contractor.

Racocot v. The W. Rutherford & Sons Co., Q.R. 36 S.C. 97 (Ct. Rev.).

—Lien of del credere agent—Filing certificate lis of pendens—Neglect of registrar—Payment by promissory note.]—Del credere agents supplying materials have such an interest in the goods as entitles them to a mechanics' lien, as material men under the Mechanics' Lien Act. One claim of lien can be filed in respect of all goods supplied, though from different principals, and the time for filing it will run from the date of the last delivery, irrespective of whose goods constitute it. Delivery of the certificate of lis pendens to the land titles office before 4 p.m. on the last day for filing is, as against the "owner," a sufficient "filing" within the Act; notwithstanding that the registration is not completed until the next day:—Semble, that the lien holder cannot be prejudiced by the neglect of the registrar; but quære, where a question of priority arises as against rival encumbrancers who may have been misled by the registrar's error. A mechanic's lien is not waived by the claimant accepting and negotiating a promissory note from the contractor. Where the claimant, a material man, had delivered a small quantity of brick by the contractor's orders, some six weeks after he had been given a promissory note for the bulk of the material supplied by him, under a general contract to supply all the brick required; and it appeared that more bricks were at the time still required for the completion of the building, and it was not shown that the claimant had not acted in good faith, or that the arrangement for supplying the bricks had been terminated when the note was given:—Held, that the claimant had not "ceased from any cause to place or furnish materials," prior to such last delivery, although it was not shown that the brick had gone into the building, and whatever the motives of the contractor in giving the order. In an action to enforce a mechanic's lien the onus does not lie upon the plaintiff to show that there is a sum of money owing by the owner to the contractor out of which the lien can be realized. If this is disputed it is a matter of defence.

Gorman v. Archibald, 1 Alta. R. 524.

—Costs—Commission of 25 per cent. — Several successful lien claimants.]—Under section 37 of the Mechanics' and Wage-Earners' Lien Act, R.S.M. 1902, c. 100, where there are several successful lien holders besides the plaintiff, the maximum of costs, exclusive of disbursements, that can be allowed to the plaintiff is twenty-five per cent. of the total amount awarded to him and the other lien holders, reduced by the total sum of costs awarded to the other lien holders, so that in no event shall the defendant have to pay in costs, exclusive of disbursements, a sum greater than twenty-five per cent. of all sums awarded against him to lien holders in the action.

McDonald Dure Lumber Co. v. Workman, 18 Man. R. 419.

—Payment by owner to contractor—Liability of owner limited by contract price — Lien claimed by partnership of which

"owner" a member.]—A lien arises and attaches, under the Mechanics' Lien Act, as soon as work is done or materials furnished, subject to be increased or decreased in amount, from time to time, as further work is done or materials furnished, on the one hand, or payments made to the lien holder on the other hand. Payments made by the owner to the contractor after the lien has attached, as no discharge of such liens for work and materials; but neither the owners nor the land can be held liable to the lien holders for a greater aggregate sum than the amount of the contract price. A claimant under the Act is not bound to give any notice of lien to the owner. A lien claimed by a partnership stands in no different position to any other lien by reason of "the owner" being a member of the partnership. Judgment of Harvey, J., 1 Alta. R. 109, affirmed.

Ross v. Gorman, 1 Alta. R. 516.

—Court sale—Arrears of taxes—Vendor and purchaser—Mechanics' lien action — Plaintiffs' right to costs.]—The right, title and interest of certain parties under a lease of lands was offered for sale by the Court, pursuant to a judgment in a mechanic's lien action. The lands were, at the time of the sale, subject to a tax imposed by the Supplementary Revenue Act, 1907, though this was not known either to the vendors or purchaser:—Held, that the purchaser took subject to the tax, and the utmost relief to which he was entitled was to have the contract wholly rescinded. Per Anglin, J.:—Where, in a Mechanics' Lien Act, the defendants unsuccessfully appealed to the Divisional Court. Held, that the Master should have added to the amount allowed the plaintiffs the costs of the appeal successfully opposed by them. Per Anglin, J.:—The judgment in the action having directed the Master to compute and tax subsequent interest and subsequent costs, the Master should have taxed to the plaintiffs their costs in connection with the sale proceedings, the same not exceeding 25 per cent. of the judgment recovered, R.S.O. 1897, c. 153, s. 41, and not merely the disbursements.

Wesner Drilling Co. v. Tremblay, 18 O. L.R. 439.

—Mechanic's lien—Sub-contractor—Material man—Registration of lien—Time—Material not actually used in building or placed on land—R.S.O. 1897, c. 153, ss. 4, 22.]—The plaintiffs contracted with E. to supply him with lumber to be used in the construction of a building which he was erecting for the defendant on lands in Port Arthur, at the price of $454.82. The lumber was sent in different shipments, the last of which arrived at Port Arthur on the 11th November, 1907, and was taken possession of by E.'s foreman, but was not in fact used in the defendant's building or placed upon his land. E having made default in payment, the plaintiffs on the 10th December registered a claim for lien on the lands under the Mechanics' Lien Act for the price of the lumber:—Held, that the lien was registered too late, as it was not registered until more than thirty days had elapsed since any material furnished by the plaintiffs had been placed upon the land or used in the construction of the building. Bunting v. Bell (1876), 23 Gr. 584; and Hall v. Hogg (1890), 20 O.R. 13, considered. Semble, that the lien would have attached if the material had been placed upon the land, under the control of the owner within the thirty days, even although not incorporated in the building.

Ludlam-Ainslie Lumber Co. v. Fallis, 19 O.L.R. 419.

—Mechanics' lien—Time of completion — Notes discounted by bank — Notice to owner.]—By agreement dated the 23rd of December, 1907, the defendant, National Construction Company, Limited, agreed with the defendant Jsong Mong Lin to construct a building upon the property of the last named defendant for the sum of $80,000. The plaintiffs furnished material from time to time during the course of construction. The construction company got into financial difficulties and was unable to complete its contract. On the 24th of October, 1908, a deed of the property from Jsong Mong Lin to her husband, Loo Gee Wing, was executed and deposited in the land registry office with the application to register same. On the 28th of October, 1908, the plaintiffs' solicitors in the Coughlan case, sent to the defendant, Jsong Mong Lin, by registered mail, a notice addressed to her, care of Loo Gee Wing, Victoria, B.C., which notice was in the following terms: "We beg to notify you that J. Coughlan & Company intend to file a mechanic's lien against your property in the city of Victoria, being lots 1 and 2, westerly 10 feet of lot 3, in block 29, district lot 541, for the balance due, amounting to $5,180.92, for goods and materials supplied and work done by the National Construction Company on the building on the above mentioned lots, if not paid to us at once." On the same day that this notice was posted the plaintiffs filed a mechanic's lien in respect of their claim in the County Court office at Vancouver, and on the 27th of November, 1908, commenced action to enforce same. McLean Bros. and other lien claimants had meanwhile commenced their actions in which Loo Gee Wing was made party defendant as owner, and on the 7th of December, 1808, an order was made by Grant, Co.J., upon the application of Loo

Gee Wing, consolidating this and the other actions pending. McLean Bros. had served upon Loo Gee Wing a notice similar in terms to the above. On the trial the claim of the present plaintiffs (J. Coughlan & Company) came on first for hearing and upon the conclusion of the evidence the learned Judge dismissed the plaintiffs' action on the grounds that Loo Gee Wing, the owner of the property, was not before the Court in the Coughlan case, that there was no notice given to the owner of the property in the terms of s. 3 of the Mechanics' Lien Act Amendment Act, c. 27, of the statutes of 1907, and that such notice as was given was not given within 15 days before the completion of the work:—Held, that s. 2 of the Mechanics' Lien Act Amendment Act, 1907, has no application where action is begun more than 15 days before the completion of the work. Held, further, that "15 days before the completion of the work" means 15 days before the completion of the work of the building as a whole and not 15 days before the completion of the delivery of the material by the vendor. Section 24 of the Mechanics' lien Act Amendment Act, 1900, enacts that where in any action for a lien the amount claimed to be owing is adjudged to be less than $250, the judgment shall be final and without appeal. Held, that this applies only where a sum of money has been awarded, and that the existence of a valid lien is presupposed. The plaintiffs, J. Coughlan & Company, Limited, having during the course of construction given a receipt for payments which they had never received. Held, that they were estopped from claiming such amount against the owner. Promissory notes having been received and discounted by the lien holder for the materials supplied. Held, that the lien was not thereby waived.

Coughlan v. National Construction Co., 14 B.C.R. 339.

—Mechanics' liens—Material man—Material supplied outside of contract—Time for registration.]—The words "the last material" in section 22, sub-s. 2, of the Mechanics' and Wage-Earners' Lien Act, R. S.O. 1897, c. 153, providing that " a claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished and placed," mean the last material furnished by the material man under his contract, where there is a distinct contract; and where he furnishes materials outside of his contract, the time for registering his claim for lien in respect of the material supplied under the contract begins to run from the time of the last delivery of material under the contract, without regard to the time for delivery of material outside of the contract. Lindop v. Martin (1883), 3 C.L.T. 312, and Morris v. Tharle (1893), 24 O. R. 159, distinguished.

Rathbone v. Michael, 19 O.L.R. 428.

—For wages—Builders' and Workmen's Act, R.S.M. 1902.]—Section 4 of the Builders' and Workmen's Act, R.S.M. 1902, c. 14, making a proprietor directly liable for payment of the wages of workmen employed by a contractor doing any work for him, effects what may be termed a statutory assignment to the workmen, to the amount of their unpaid wages, of the moneys payable by the proprietor to the contractor, so that the workmen are entitled to priority over the claims of creditors holding garnishing or other orders against the proprietor in respect of such moneys, and such creditors are entitled to be paid out of any balance in the order in which notices of their several claims were given to the proprietor. In such case it makes no difference that the proprietor has made a payment to the contractor which diminishes the amount available for such other creditors.

Bryson v. Rosser, 18 Man. R. 658.

—Charge against a mine—Assignment of proceeds of ore extracted.]—The lien upon a mine as provided in section 8 of the Mechanics' Lien Act, R.S.B.C. 1897, c. 132 (as enacted by s. 12 of c. 20, 1900), is a lien on the mine itself and not on any fund arising from the sale of ore extracted from the mine.

Law v. Mumford, 14 B.C.R. 233.

— Workmen's privilege—Registration — Failure to institute action—Cancellation of registration.]—A workman who causes his claim to be registered on the immovable on which his work is performed in order to secure a privilege or hypothec under Art. 2013b C.C., but neglects to bring suit within the delay prescribed in the article, is not bound to cause the registration to be cancelled at his expense. The owner of the immovable must put him in default (en demeure) to sign the discharge, attend to the cancelling and pay the cost.

Roy v. Gariepy, 36 Que. S.C. 238.

—Liability of owner when cost of building exceeds the contract price—Payments by owner.]—The expressions "the owner shall not be liable" and "to make the owner liable," contained in ss. 19 and 32 of the Mechanics' Lien Act, do not refer to personal liability, but refer only to the liability of the property to which a lien attaches. The effect of ss. 19 and 32 is to limit the amount of the liens for which the property can be liable to the amount of the contract price; and when the time is reached when payments already proper-

ly made in satisfaction or prevention of liens and the amounts unpaid for which liens exist, together equal the contract price, no liens can arise thereafter. Payments made by the owner, to be proper payments and relieve the owner from liens which have attached, must reach the lien holders, and one lien holder may not be preferred to another so as to defeat that other's lien, the acceptance and negotiation of a note for a portion of the price of goods furnished, for which a lien exists, does not destroy the lien, unless there is an agreement in writing as contemplated by s. 7 of the Act. The defendant Travis, the owner, claimed that the plaintiffs were estopped from prosecuting their claim for lien, their manager having recommended the contractor (the defendant Short) as a fit and proper person to take the contract for the construction of buildings for the defendant Travis:—Held, even if the plaintiffs' manager, under such circumstances as would bind the plaintiffs, did represent the defendant Short to be a fit and proper person, and the defendant Travis acted on the manager's representation, to his prejudice, a claim for the material supplied to the defendant the contractor could in no way be considered as a denial of the truth of the representation, and the principle of estoppel was, therefore, not applicable. On dismissal of plaintiffs' action, and also of defendants' counterclaim, the Court of Appeal will not, on appeal by plaintiffs from the judgment dismissing the action, review the judgment dismissing the counterclaim, unless the defendants also appeal.

Breckenbridge v. Short, 2 Alta. R. 71.

II. WOODMAN'S LIEN.

—Woodmen's Lien Act—Writ of attachment.]—An affidavit and statement of claim in form 1 of the Act is sufficient to obtain an order for a writ of attachment under s. 9 of the Woodmen's Lien Act, S.C., 1903, c. 148, and such order will not be set aside although the defendant was solvent and had been held to bail for the same cause of action, and these facts were not disclosed to the Judge on the application for the attachment. The merits of the claim will not be inquired into on an application to set aside the attachment.

Day v. Crandall, 39 N.B.R. 289.

—Woodmen's liens—Promissory note—Acceptance for wages—Suspension of lien.]—On the day before the maturity of a promissory note accepted by the plaintiff from the defendants in payment for his services in getting out logs for the defendants, the plaintiff filed a lien under the Woodmen's Lien Act, and brought this action, in which he sought to enforce the lien and to recover a personal judgment against the defendants for the amount of wages for which the note was given:—Held, that the plaintiff, before the maturity of the note, had no cause of action either for wages or for the enforcement of the lien, and the action therefore failed.

Wilson v. Doble, 13 W.L.R. 290.

—Liens for driving logs.]—
See TIMBER.

—Notice to contractor and owner — Art. 1944c. C.C.] — The notice that should be given by a wood-cutter to the contractor to enable him to exercise his lien on the wood which he has cut is not required when the contractor has admitted in a writing the debt of the wood-cutter and given him an order for payment on the owner of the wood.

Harvey v. Harvey, 19 Que. S.C. 155 (Cir. Ct.).

—Woodmen's Lien Act (N.B.) 1894—Logs and timber — Meaning of — Contractor — Whether entitled to lien — Estoppel.] — The appellant, under a contract in writing made by him with the respondent, for an agreed price per thousand, cut upon the land of the respondent a quantity of logs, and hauled them to a portable mill upon the land, where they were manufactured into deals, planks, etc. The work was performed in part by the appellant himself with his team, though there was no stipulation to that effect between the parties, but chiefly by labourers and teams, by the terms of the contract hired and paid by the appellant. A portion of the amount due to the appellant under the agreement being unpaid, he caused an attachment to be placed upon the above mentioned deals, planks, etc., claiming a lien thereupon by virtue of The Woodmen's Lien Act, 1894. This attachment was set aside by the Judge of the County Court of K. Upon appeal:—Held, per Hanington and Landry, JJ. (Tuck, C.J., dissenting), that the words "logs and timber," as employed in sub-s. 1 of s. 2 of the above Act, were not intended to include deals or other manufactured lumber; also held, per Hanington, Landry, Barker and McLeod, JJ. (Tuck, C.J., dissenting), that the evidence showed the appellant to be a contractor, and not within the class of persons for whose benefit, by s. 3 of the Act, liens were established; also held, per Hanington, J., that the respondent, by giving a bond in order to secure the payment of the amount claimed if the lien should prove effectual, and thus obtaining a release of the deals, etc., attached, did not estop himself from disputing the validity of the lien.

Baxter v. Kennedy, 35 N.B.R. 179.

—Woodmen's lien — When part recovery under a bar to proceedings under Mechanics'

Lien Act.] — See Wake v. C.P.R., 8 B.C.R. 358, supra.

—Estoppel — Proceedings under Mechanics' Lien Act.] — See this title, sub-heading MECHANICS' LIEN.

(Wake v. C.P. Lumber Co., 8 B.C.R. 358.)

—Woodmen's Lien Act — Findings on questions of fact — Fraud—Demand of amount due—Sheriff's charges.]—In proceedings under The Woodman's Lien Act, 1894, an order allowing the claimant's lien will be set aside if the evidence discloses an attempt on the part of the claimants acting in collusion with the defendant to defraud the owners, notwithstanding that the Judge in the Court below has found that the evidence established the claimants' lien. Under s. 6 of the Act, that there must be a demand of the specific amount due before the issue of the attachment. Where attachments for three claims were served by the sheriff at the same time and place, the sheriff is entitled to full fees, including mileage, on each writ.

Murchie v. Scott, 36 N.B.R. 161.

—Lumberman's employee.]—The lien given by Art. 1994c. C.C. extends only to the workman who labours at manufacturing the wood, and to him for wages alone; it does not extend to one who is merely a creditor for the hire of a horse used to draw the wood.

Rheaume v. Batiscan River Lumber Co., Q.R. 23 S.C. 166 (Cir. Ct.).

—Lumberman — Notice.] — A man who, having worked for the jobber of a lumberman, has given the notice required by Art. 1994c. C.C. (Que.), is a creditor of the latter.

Rheaume v. Batiscan River Lumber Co., Q.R. S.C. 71 (Cir. Ct.).

— Lien, woodman's — Lumber — Saw-mill men.] — A lien is not given to saw-mill men by The Woodman's Lien for Wages Act (B.C.), but only to those engaged in getting the timber out of the forest.

Davidson v. Frayne, 9 B.C.R. 369 (Hunter, C.J.).

—Sub-contractor — Marking logs — Possession.] — Plaintiff, a sub-contractor of G., defendant, had made a certain number of ties in the winter of 1901-2. G. had the ties made for the intervenant S. Plaintiff not having been paid took a saisie conservatoire against G. on which was seized all the wood which G. had taken out for S. and which had been put in a boom on the river at Saumores. Plaintiff did not make S. a party and the latter intervened and contested the seizure:—Held. 1. The law creating a lien is an exception to the common law and should be strictly construed; he who invokes a lien should establish its existence under a special law creating it. 2. The lien created by Art. 1884c. C.C. applies only to woodcutters or day labourers for payment of wages, but not to contractors or sub-contractors for payment of the contract price, of advances and disbursements made by them. 3. He who, under a contract or sub-contract, cuts wood on his land, converts it by his labour into ties, logs, etc., and delivers it to the person with whom he made the contract, cannot claim on this wood the lien given by Art. 1884c. even though the value of the standing wood was very little. 4. In case of insolvency the lien of the vendor can only be enforced within the 30 days following the delivery of the wood; a saisie conservatoire issued after this delay upon the wood sold cannot be maintained. 5. The lien of the vendor can only be enforced when the goods sold remain in possession of the purchaser in the same state as when sold and so that their identity can be clearly and surely established. Placing the trade mark of dealers in wood upon logs which have been got out for them by contractors is a sufficient taking of possession and evidence of the transfer of property in the logs.

Dallaire v. Gauthier, Q.R. 24 S.C. 495 (Sup. Ct.).

— Wages — Independent contractor — Payment to contractor without production of receipted pay-rolls.] — Under the sections of the Mechanics' Lien Act relating to woodmen's wages, a person by requiring only the production of the pay-roll is not relieved of liability to the workmen for the amounts due them from the contractor; he must have produced to him a receipted pay-roll.

Young v. West Kootenay Shingle Co., 11 B.C.R. 171 (Morrison, J.).

Woodmen's Lien for Wages Act, R.S.B.C. 1897, c. 194, s. 3—"Woodman" — Hire of horses.]—

Muller v. Shibley, 8 W.L.R. 42 (B.C.).

— Actions to enforce — Time for filing woodmen's liens — "Last day's labour or services" — Termination of engagement.]—

Heaney v. Lobley, 11 W.L.R. 545 (Y.T.).

— Woodman's lien — Enforcement of lien —Agreement to give time — Waiver — Condition.]—

Munroe v. Cameron, 6 W.L.R. 703 (Y.T.).

— Woodman's lien — Cutting timber — Contract of sale—Insolvency.] — The lien given by Art. 1994 (c.) C.C. to workmen hired to cut wood in the forest to secure payment of their wages ceases from the time that the wood passes into possession of a third party who has bought it and paid the price. But the lien is not extinguished by sale of the wood so cut if, in fact, there has been no delivery and it remains in possession of the vendor, and this is so

even when the purchaser has made advances to the vendor to an amount exceeding that realized from the subsequent sale of the wood by the curators of the estate of the insolvent vendor.—A contract for sale of the wood, executed before and during the cutting, the consideration of which is advances and prior debts, is not a fraud on the rights of the unpaid workmen since they retain their lien on the wood notwithstanding. In this case the wood in the litigation was sold, by authority of the Court, by the curators of the estate of the wood merchant and the proceeds deposited in Court subject to the final adjudication. By the judgment of the Superior Court part of the wood was declared to be the exclusive property of the petitioners (purchasers) and part subject to the lien of the workmen:—Held, that the curators were not obliged to remit directly to the petitioners the proceeds of sale of the portion belonging to them but should make a regular distribution of it in the usual form of a dividend sheet.

In re Hurtubise, Q.R. 26 S.C. 137 (Ct. Rev.).

—Of sawyer on lumber—Hypothecation.]— See BANKING.

(Chew v. Traders Bank, 19 O.L.R. 74.)

III. BY CONDITIONAL SALE.

See SALE OF GOODS.

IV. SOLICITOR'S LIEN.

See SOLICITOR.

V. MARITIME LIEN.

See SHIPPING.

VI. MISCELLANEOUS LIENS.

—Hackman—Lien on passenger's baggage for fare.]—A cabman who undertakes to drive a passenger to his destination is justified in detaining a portion of the passenger's baggage as a means of enforcing payment of his legal fare, but he has no other right than this, and where plaintiff having been tendered the legal fare demanded an equal amount for baggage carried, which the passenger, defendant's servant, was unable at the moment to pay, but which plaintiff was told would be paid on the return of defendant, who was expected to arrive immediately, and plaintiff was proceeding to carry away a portion of the baggage, and defendant arriving grasped plaintiff's horse by the head and stopped the carriage:—Held, that defendant was justified in taking the action he did to regain possession of his servant's property. Where on the trial of an action claiming damages for assault the jury declined to accept the directions of the trial Judge, and, disregarding the evidence of defendant and two credible witnesses by whom he was supported, contradicting plaintiff's statements as to any personal assault, and accepting the evidence of plaintiff, who appeared to have been under the influence of intoxicants at the time, gave their verdict in plaintiff's favour. Held, that there must be a new trial. Also, that in such a case the opinion of the trial Judge, who has all the parties before him, and is in a position to estimate the credit to be given to them, is of peculiar value.

McQuarrie v. Duggan, 44 N.S.R. 185.

—Threshers' Lien Ordinance—Seizure by assignees of grain threshed for third person.]—The plaintiff's grain on his farm was seized by the defendants, purporting to be assignees of C., who had threshed the grain for the plaintiff, and who was, as the defendants alleged, entitled to a lien on the grain under the Threshers' Lien Ordinance. At the time of the seizure only $38.89 was owing by the plaintiff to C., and that sum was, by agreement between the plaintiff and C., not then payable. The alleged assignment to the defendants was after this agreement. It was a general assignment of all earnings of a threshing machine used by C. in threshing the plaintiff's grain:—Held, that the defendants had no legal right to make the entry and seizure; and, the defendants' seizure being for $160, it was, at all events, for an excessive amount, and illegal. There is no authority under the Ordinance to seize any quantity of grain and claim a lien thereon without ascertaining positively the amount owing and also the quantity of grain seized. Quære, whether a thresher's lien could be considered as assigned by virtue of a general assignment of earnings. Semble, also, that the seizure was illegal by reason of the provisions of the Threshers' Employees Act, 1909. Held, also, that the plaintiff was entitled to substantial damages; the annoyance caused to him and the injury to his credit and reputation by the seizure were to be considered.

Semple v. Sawyer & Massey Co., 13 W. L. R. 428.

—Carter—Movables.]—The droit de retention of movables is indivisible and affects not only the mass of the movables but each of the units of which it is composed for the total sum due. Thus, the carter who conveys the furniture of a house to a warehouse has a lien on each article for the full price of cartage and even after delivery of a part he cannot be compelled to deliver the balance except on payment of all that is due to him.

DeSenneville v. Baillargeon, Q.R. 37 S.C. 215.

—Threshers' Lien Act (Man.).]— See WORK AND LABOUR.

Hollingsworth v. Lacharite, 19 Man. R. 379.

Board in convent — Art. 2006 C.C.] — The debt incurred for board in a convent for the previous twelve months of children of an insolvent constitutes a privilege on the insolvent's property.

Sisters of the Congregation of Notre Dame v. Bilodeau, 18 Que. S.C. 152 (Cir. Ct.).

—Threshers' Lien Ordinance — Computation of amount of grain threshed — Automatic weigher — Evidence — Burden of proof — Custom.]—

Gilby v. Johnston, 7 W.L.R. 493 (Sask.).

—Miner's liens.]—See MINING.

—Seizure of movables — Sale — Lien of lessor.] — When movables are seized, the debtor (saisie) cannot, by selling them with the immovable containing them to a third party and taking a lease from such third party of the immovable and the movables seized, confer on the latter the privilege of lessor capable of being opposed to the seizing creditor on the distribution of the proceeds of the sale of the movables on proceedings taken by another creditor.

Dagenais v. Honan, 17 Que. S.C. 478 (S. C.).

—Charge on land — Prior lien — Voluntary conveyances.] — The defendant who had been for some years in possession of a farm purchased by his father with the intention of giving it to him, and who had in fact devised it to him, purchased a machine from the manufacturers giving his notes therefor, and at the same time executed a document which was duly registered, and in which it was stated that the land had been so "willed" to him that he had a good title thereto, and would not further encumber it, and he thereby charged it with the payment of the notes. The father subsequently conveyed the land to the defendant, but upon the condition of his executing a mortgage, which he did to certain persons who had advanced moneys to him. The defendant, on the ground that the land had been conveyed to him on an alleged trust for his family, conveyed it to his wife, the consideration being $1.00 and love and affection, and the wife, for the like consideration, conveyed it to an infant son:—Held, that the charge in favour of the manufacturers was enforceable against the defendant and those claiming under him, by the plaintiff, the assignee of the manufacturers, but was subject to the mortgage; and the evidence displacing any trust in favour of the defendant's family, the conveyances by the defendant and his wife must be treated as merely voluntary and subject to the plaintiff's charge.

Abell v. Middleton, 2 O.L.R. 209.

—Vendor's lien—Timber—Cut and uncut — Interest in land — Identification.] — The owner of land by agreement in writing sold the timber on it, removable within three years, taking promissory notes from the purchaser in payment. The purchaser, who was acting as an agent, assigned all his interest in the agreement to his principal and transferred the notes made by his principal to the landowner, who subsequently sold and conveyed the land and all her interest in the timber and notes to the plaintiff. The assignee of the purchaser's rights cut and removed some of the timber from the land and cut and piled on the land a lot of cordwood, which he sold to the defendant, but did not pay the notes. The defendant, who had notice of the contract for the sale of the timber and of the non-payment of the price, sought to remove the wood: — Held, that the sale of the timber was that of an interest in land in respect of which the plaintiff was entitled to a vendor's lien for the amount of the notes, which was not displaced by the cutting and sale of the timber so long as it could be identified and remained on the land, and that he was entitled to an injunction. Summers v. Cook (1880), 28 Gr. 179, followed.

Ford v. Hodgson, 3 O.L.R. 526.

— Banker's lien — Overdrawn accounts — Partner's separate account.] — Where the members of a firm have separate private accounts with the bankers of the firm, and a balance is due the bankers from the firm, the bankers have no lien for such balance on the separate accounts.

Richards v. Bank of B.N.A., 8 B.C.R. 143, affirmed.

Richards v. Bank of B.N.A., 8 B.C.R. 209 (Full Court).

— Threshers' Lien Act (Man.), 57 Vict. c. 36 — Lien on grain for price of threshing other grain — Seizure of excessive quantity. —A thresher cannot, under the Threshers' Lien Act, 57 Vict. c. 36, maintain a lien on grain for the threshing of which he had been paid to recover the price of a subsequent unpaid threshing. The plaintiff, by his notice put up on the granary, asserted his claim to a lien upon all the grain contained in it which was worth about $86; but the Court found that the amount of the claim for threshing for which he could, under the Act, at the time of the posting of the notice, enforce a lien on such grain, if the proper steps were taken, was only about $26:—Held, that the quantity of grain which the plaintiff attempted to retain was unreasonably large for the amount owing, and that, under s. 2 of the Act, he had forfeited his right of retention of any of it.

Simpson v. Oakes, 14 Man. R. 262.

— Goods of boarder — Right of retention— Art. 1816a. C.C.]—1. The lien upon the goods of a boarder cannot be exercised ex-

cept by the persons specially mentioned in Art. 1816a. of the Civil Code. 2. A person who has become responsible to a physician for professional services rendered to a boarder has no right to retain the goods of the latter as security for the value of such service.

Goulet v. Brunelle, 5 Que. P.R. 223.

— Innkeeper — Goods of third parties.]— The proprietor of an hotel, inn, etc., under the provisions of Art. 1816a. C.C., has a lien upon the effects of a guest only and none on those belonging to other persons and brought upon the premises by his guest.

Taylor v. O'Brien, Q.R. 24 S.C. 407 (Cir. Ct.).

— Innkeeper — Pledge.] — The privilege given by law to an innkeeper on the personal effects of his boarders is one of strict law and cannot be extended by the Court even for reasons based on equity.—An innkeeper cannot, under Art. 1816a. C.C., hold the effects of a guest to secure the repayment of money paid for medical attendance and advanced to the guest to enable him to proceed on his journey. A commercial traveller cannot, to secure his personal liabilities, give in pledge the samples entrusted to him by his employer.

Gilmour v. Snow, Q.R. 27 S.C. 39 (Cir Ct.).

— Boarding house keeper.] — Defendant was a boarding house keeper, and plaintiff, while staying with him in a transient manner, brought a large quantity of personal property, consisting of household effects and other articles, to the defendant's house, and left them there, in the meanwhile becoming indebted to the defendant for board. There was some dispute as to the amount due, and the defendant refused to deliver the goods until payment, and claimed a lien on goods to the value of about $1,000 for a small balance due for board:—Held, that a boarding house keeper's lien extends to all goods brought to the premises by the lodger while a guest, and not merely to goods brought for the purpose of the journey. (2) That the lien extends to all the goods, no matter how great the value as compared with the amount due.

Newman v. Whitehead, 2 Sask. R. 11.

— Lien on horse for cost of stabling and feed.] — A livery stable keeper has no lien on a horse for its stabling and keep as against the real owner, when the horse was stolen and placed with him by the thief. S. 2 of the Stable Keepers Act, R.S. M. 1902, c. 159, which gives a livery stable keeper a lien on animals for stabling and feeding them and the same rights and privileges for exercising and enforcing such lien . . . as hotel keepers may have or possess in virtue of the Hotel Keepers Act, R.S.M. 1902, c. 75, does not give the livery stable keeper the same right of lien which a hotel keeper has at common law in respect of goods or animals left in his charge by a guest who may have stolen the same, as the latter Act in its terms gives only a lien on the property of persons who may be indebted to the hotel keeper for board or lodging, whatever may be his rights independently of the Act.

Harding v. Johnston, 18 Man. R. 625.

— Of sawyer on lumber.]—

See BANKING.

(Chew v. Traders Bank, 19 O.L.R. 74.)

LIFE INSURANCE.

See INSURANCE.

LIGHT.

—Easement of.]—

See EASEMENT.

—Electric light.]—See that title.

—Gas.]—See that title.

LIMITATION OF ACTIONS.

Ontario.

—Adverse possession—Exclusion of true owner—Occupation of surface—Maintenance of roof projecting over land in dispute.]— Under the Real Property Limitation Act, R.S.O. 1897, c. 133, ss. 4, 5 (1), and 8, the ten years limited by s. 4 begin when the true owner is dispossessed or discontinues possession; the possession to be relied upon by the claimant must be such as involves the exclusion of the true owner; the occupant of the surface of the soil may obtain a title to that surface, while the true owner retains an easement therein, and, subject to such easement, the statutory title is usque ad cœlum; and the right of a person to have his eaves or roof project over another's land is an easement. Therefore, where the defendant claimed title by possession to a strip of land one foot wide, lying between the plaintiff's house and front fence and the true boundary line separating the adjoining lots of the plaintiff and defendant fronting on a city street, and it was not disputed that the defendant had acquired a title to the strip by the statute unless the acts of the plaintiff in maintaining the roof of her house projecting over the strip, or her entries upon the strip, prevented such title accruing:—Held, that the maintaining of the roof was not such a circumstance as to prevent the defendant's exclusive possession, and that all the acts done by the plaintiff, in person or by agent,

in entering upon the strip, were attributable to the easement of access, support, etc.; and it was declared that the defendant had acquired the fee in the strip, subject to the two easements of maintenance of the roof and of the right of access and support for painting, etc., the side of the plaintiff's house and fence next to the strip. Marshall v. Taylor, [1895] 1 Ch. 641, followed.

Rooney v. Petry, 22 O.L.R. 101.

Grant to uses — Deed of appointment — Intervening adverse possession.] — The purchaser of land in 1870 had it conveyed by the vendor to grantees named by him to hold to such uses as the purchaser should by deed or will appoint, and in default of, and until, appointment to the use of the grantees. The purchaser put his mother in possession of the land, and she remained in possession till her death in 1878, her two daughters, the defendants, living with her, and they after her death continued in possession down to the time of the bringing of this action in 1897, no rent having been paid, nor any acknowledgment of title given. In 1892 the purchaser, in alleged exercise of the power, executed a deed of appointment in favour of his solicitor, who, on the following day conveyed to him in fee simple. He died in 1894, having devised the land to the plaintiffs:—Held, that the grantees to uses took an estate in fee simple which was barred before the execution of the deed of appointment, and that that deed did not give a new starting point to the statute, the estate appointed not being within the meaning of the statute, a future estate coming into existence at the time of the exercise of the power. Judgment of a Divisional Court, 30 O.R. 504, reversed, Boyd, C., and Street, J., dissenting.

Thuresson v. Thuresson, 2 O.L.R. 637 (C. A.).

—Criminal conversation — Damages.]—The statute of limitations is not a bar to an action for criminal conversation where the adulterous intercourse between defendant and plaintiff's wife has continued to a period within six years from the time the action is brought. Bailey v. King, 27 Ont. App., 703, affirmed. Quære, does the statute only begin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within the six years preceding the action?

King v. Bailey, 31 Can. S.C.R. 338.

— Annuity — Will — Charge on land — Arrears — Lunatic.] — By a will made in 1872 a testator, who died in the same year, devised land to two sons, "subject to the payment by my said two sons of the sum of $200 per annum, for the benefit of my son Thomas Anson, which said sum, or annuity, or so much thereof as shall be reasonably necessary for the support and maintenance of my said son Thomas Anson, shall be paid yearly and every year, for and during the natural life of my said son Thomas, to the person or persons who may be his guardian or guardians." The son Thomas Anson was of age at the time of the testator's death but was of unsound mind, and he was declared a lunatic in 1898, and the plaintiffs were appointed committee of his person and estate. After the father's death the son lived with his mother, to whom from time to time till February, 1889, payments were made on account of the annuity:—Held, that the annuity was charged on the land; that it was, therefore, by virtue of s. 2 (3) of the Limitations Act, R.S.O. 1897, c. 103, rent within the meaning of that Act; that the payments to the mother, who was the guardian de facto, were good, and that the statute did not begin to run till the last of them was made; that apart from the question of disability the right of action would have been barred at the expiration of ten years from that time; but that by ss. 43 and 44 the time was extended for five years from the removal of disability, or for twenty years; and that, therefore, an action brought in February, 1900, was in time and that six years' arrears could be recovered. Judgment of MacMahon, J., 31 O.R. 504, affirmed.

Trusts and Guarantee Company v. Trusts Corporation of Ontario, 2 O.L.R. 97 (C.A.).

—Title by possession.] — The acts relied on in support of a claim to title by possession were that the claimant had sold the timber off the land in question; had afterwards cleared it and had sowed and harvested one crop of wheat; had then for some years taken hay from it; and had then used it as pasture land. The land was not wholly enclosed, one end being bounded by a marsh, and through this marsh cattle could and did stray into it:—Held, that there had not been such possession as is necessary to bar the right of the true owner.

McIntyre v. Thompson, 1 O.L.R. 163 (C. A.).

— Acknowledgment in writing — Agent — Power of attorney.] — A power of attorney from the executor, resident out of the jurisdiction, of deceased maker of a promissory note to the surviving maker, within the jurisdiction, "to do all things which may be legally requisite for the due proving and carrying out of the provisions" of the will, which, among other things, directs the payment of the testator's debts, does not authorize the surviving maker to bind the estate by an acknowledgment of a debt of which the executor knows nothing, and which is barred at the time. A letter from the executor of one maker of a note to the holder thereof, advising the holder to look to the surviving maker for payment, as he is now doing well, is not a sufficient acknowledgment. A direct acknowledgment of the debt in a letter by the executor of

one maker of a note to the surviving maker is of no avail to the holder.

Judgment of Boyd, C., 31 O.R. 573, affirmed.

King v. Rogers, 1 O.L.R. 69 (C.A.).

— **Easement — Street — Right of ingress and egress.**] — By 52 Vict. c. 53 (O.), an agreement entered into between the Crown on behalf of the University of Toronto and the City of Toronto for the purpose of restoring a lease for 999 years of a block of land, made to the city for a public park, which had been declared forfeited, was validated, under the circumstances set out in the report, and a street which constituted one of the avenues under the lease, made a public street; but such dedication was not of itself to confer on adjacent property owners any right of ingress or egress thereto; and any owner, who had not, prior to said agreement, acquired rights of access, was required to pay such sum therefor as might be awarded under arbitration proceedings or settled between the parties. The plaintiff subsequently purchased from the defendant lands on said street, the deed containing a covenant by the defendant to indemnify plaintiff against the payment of any money, and all loss, costs or damages he might be obliged to pay for access to said street. The plaintiff's right of access being objected to by the University and use of the same forbidden, a settlement was effected by plaintiff agreeing to pay a named sum, part of which was paid down and an undertaking given to pay the balance by yearly instalments:—Held, that the dedication of the street was a limited one, and that the plaintiff was entitled to recover the amount he agreed to pay, and that his remedy was not limited to what he had actually paid. Held, also, assuming that the predecessors in title of the plaintiff had for nearly thirty years before the passing of the Act enjoyed access to and from the avenue, no right thereto had been acquired under the statute of limitations, for the effect of the 52 Vict. c. 53 (O.), was to create a new beginning for the statute; and also by s. 41 of R.S.O. c. 133, the statute could not commence to run until three years after the expiration of the original lease to the city.

Palmer v. Jones, 1 O.L.R. 382.

— **Pleading—Real Property Limitation Act —Specifying section relied on.**] — Held, following Pullen v. Snelus (1879), 40 L.T.N.S. 363, that a defendant pleading the Real Property Limitation Act must set out in his statement of defence, or give particulars showing the section or sections on which he relies.

Dodge v. Smith, 1 O.L.R. 46.

—**Action on judgment — Period of limitation — Renewal of writ — Order nunc pro tunc — Jurisdiction.**] — Notwithstanding R.S.O. 1877, c. 108, s. 23 (see R.S.O. 1897, c. 133, s. 23) twenty years is the period of limitation applicable to an action on a judgment of a court of record. Boice v. O'Loane (1878), 3 A.R. 167, and cases following it, followed in preference to Jay v. Johnston [1893], 1 Q.B. 25, 189. Trimble v. Hill (1879), 5 App. Cas. 342, at p. 344, specially considered. The renewal of a writ of summons after its expiration is matter of judicial discretion, and when a County Court Judge had so renewed such a writ as to defeat the operation of the Statute of Limitations, and the defendant made no attempt to appeal from his order, but appeared to the writ without objection, a Divisional Court, on appeal from judgment in the action, refused to entertain an objection to the validity of the writ. Under Ontario Rule 498 the Court may entertain an application to admit new evidence in a proper case on a County Court appeal, notwithstanding R.S.O. c. 55, s. 51, sub-s. 3, under which such an application must be made before the County Court, and this although the time for applying for a new trial had expired.

Butler v. McMicken, 32 O.R. 422.

—**Joint tenants—Title acquired by prescription.**] — Where of five tenants in common of a farm, three acquired a title against the other two by virtue of the Statute of Limitations:—Held, that the title acquired by the three tenants was a joint tenancy, and that they were thus tenants in common of their original three-fifths and joint tenants of the two-fifths.

In re Livingstone Estate, 2 O.L.R. 381 (D.C.).

—**Medicine and surgery—Malpractice — Ontario Medical Act.**] — An action against surgeons for malpractice was held to be barred by s. 41 of the Ontario Medical Act, R.S.O. 1897, c. 176, not having been commenced within one year from the date when, in the matter complained of, the defendants' professional services terminated, although the plaintiff had twice visited the defendants at their offices within the year, the Court finding that on these occasions she did not go as a patient, but as a person with a grievance, she having previously consulted another surgeon, and also a solicitor.

Town v. Archer, 4 O.L.R. 383 (Falconbridge, C.J.K.B.).

—**Division Courts—Amendment—Statute of Limitations.**] — Action in a Division Court to recover an account for goods alleged to have been sold in 1895. The dates given in the particulars of claim stated that the goods were sold in 1896. The suit was brought within six years of the latter date, but the books of the plaintiff showed that the entries were all made in 1895 (over six years before the entry of the suit). The defendant had merely denied the account

in his dispute note, and did not give notice of an intention to set up the Statute of Limitations as a defence. The defendant was granted leave at the trial to plead the Statute of Limitations, in addition to the denial of liability, on the ground that the particulars furnished were misleading.

Meehan v. Berry, 38 C.L.J. 554 (Hughes, Co.J.).

— Real Property Limitation Act — Parent and child — Tenancy at will — Accrual of right of entry — Caretaker — Effect of entry by consent.]—In the autumn of 1879 the defendant was put by his father in possession of a farm. His father told him that he had bought the farm for him, but the defendant knew that what was done had not the effect of transferring the title to him, and was aware that it must be obtained either by conveyance or devise from his father. The father did not intend to divest himself of the ownership of the farm, but to leave himself free in devising it, as he intended, to his son, to charge it with the payment of such sum as he might think it right to require him to pay. The defendant continued in possession of the farm until his father's death in 1900, occupying it for his own benefit, and having the exclusive enjoyment of the profits; he paid no rent and rendered no service or other return for it, and gave no acknowledgment of his father's title; he also made valuable permanent improvements at his own expense:—Held, that the title of the father had, long before his death, by force of the Real Property Limitation Act, R.S.O. 1897, c. 133, become extinguished. The defendant became, upon his entry with the permission of his father, a tenant at will, and that tenancy never having in fact been determined, the father's right of entry first accrued at the expiration of one year from the commencement of it (s. 5, sub-s. 7), and was barred at the expiration of eleven years. There was no evidence that the defendant was a caretaker or servant of his father. Upon the expiration of the tenancy at will the possession of the defendant became that of a tenant at sufferance, and the running of the statute was not stopped by an entry, unless before the statute had operated to extinguish the title of the testator, a new tenancy at will was created; and this would have been the case even if the tenancy at will had been put an end to in fact, and not merely by force of s. 5, sub-s. 7; the effect of the sub-section is, that it is for the purposes of the statute only that the tenancy at will is to be deemed to be determined at the expiration of a year from the time when it began. Held, however, that there was no entry by the father sufficient to prevent the running of the statute; a visit made by the father to the son, within eleven years before action, when he lived with him on the farm for a few days, was not an entry on the land and did not put an end to the existing tenancy at will. In 1879 and 1880 the farm was assessed in the name of the father as well as of the defendant, to the former as "freeholder," and to the latter as "owner," and from 1880 to 1899 to both as freeholders, and in 1882 this was done at the instance of the defendant, who also knew of the way in which the assessment was made in each of these years:—Held, that this was not evidence of a new tenancy at will created within eleven years before the commencement of the action. Doe d. Bennett v. Turner (1840), 7 M. & W. 226, and (1842), 9 M. & W. 643, distinguished. By an agreement in writing, made a few days after the death of the father, between the devisees and legatees under the father's will, the defendant admitted and acknowledged that, although the farm was occupied by him, the father was at the time of his death the owner in fee simple of it, and agreed to abide by the will and to carry out the terms of it. By the will the father devised the farm to the defendant, charged with the payment of $4,000. This agreement was made before the will had been opened or the contents of it known to the defendant; no doubt existed as to the validity of the will; and the object of the agreement was, though this was not known by or communicated to the defendant, to get rid of any difficulty which might arise if the defendant asserted title to the farm under the Real Property Limitation Act, but the defendant did not in fact know of his rights under that statute. Held, that, in these circumstances, the agreement was not, even when viewed as a family arrangement, binding on the defendant. Fane v. Fane (1875), L.R. 20 Eq. 698, applied and followed. Held, also, that, if there was any election by the defendant to take under the will, it was made under a mistake as to his rights; and besides, if the agreement fell, what the defendant did was relied on as being an election, being a part of the same transaction must fall with it.

McCowan v. Armstrong, 3 O.L.R. 100.

— Husband and wife — Statute of Limitations—Executors and administrators—Right of retainer.] — In 1876 the plaintiff advanced to her husband the purchase money of certain land subject to a mortgage, and which was accordingly conveyed to him. The existing mortgage was paid off and a fresh mortgage was subsequently executed, the plaintiff joining to bar her dower in it. On his death in 1893 he devised the land to the plaintiff and one of his sons in equal shares. In 1901 the plaintiff obtained an order for partition or sale of so much of the land as had not been sold, and a sale being made she filed a claim upon the proceeds as a creditor for the amount originally advanced by her to purchase the lands. The plaintiff alleged that the land was conveyed to her husband to enable him to vote:—Held, that assuming the purchase

money was entrusted by the plaintiff to her husband to invest for her in the purchase of land, that express trust was performed and was at an end when the land was conveyed to him. Held, also, that even assuming the money had been advanced by her by way of loan, her claim was barred by the Statute of Limitations, for there is no reason why the Statute of Limitations should not be applied to such a claim by a wife against her husband in the same way as if she were not his wife. Held, also, that though she was her husband's executrix, she had no longer any right of retainer in respect to her alleged debt, as by her own acts, by registering no caution within twelve months and then treating the property as vested in the defendants, the heirs of her co-devisee, she had put the assets out of her own possession and control. Under all the circumstances of the case, and in view of the conduct of the plaintiff, held, however, that the transaction was not a loan but a gift by the plaintiff to her husband.

Re Starr, Starr v. Starr, 2 O.L.R. 762.

—Against railway company.]—
See RAILWAY.

—Interest — Will — Legacy.]—An administrator with the will annexed, who was also a legatee of moneys charged on land, payable six months after the death of the testator, did not sell the land to pay herself the legacy, but held it for some eight years till it could be sold more advantageously:—Held, that the hand to pay and the hand to receive being one and the same, the Statute of Limitations had no application, and the claim for the legacy was a still subsisting claim, with interest as accessory for the period till the fund was in hand for payment.

In re Yates, 4 O.L.R. 580 (Boyd, C.).

— Executor de son tort — Payment by.] — A payment or acknowledgment by an executor de son tort cannot be relied on to prevent the Statute of Limitations from operating as a bar, where the action in which it is set up is brought against the lawful personal representative of the deceased. But where the executor de son tort has made payments of interest in respect to a promissory note, within six months before action commenced, and the holder of the note brings action against her to make her answerable to the extent of the goods of the deceased come to her hands, it is not open to the defendant, for the purpose of preventing a payment giving a new start to the Statute of Limitations (which effect it would have if made by the lawful representative), to rely on his having been a wrongdoer and not the true representative. As between himself and the plaintiff, as respects payments made by the executor de son tort and their effect, the latter is to be treated as the true representative of the deceased. The Bills of Exchange Act does not deal with the consequences which are to flow from the character which according to its provisions is attached to the promise which a bill or note contains, and therefore these consequences fall to be determined according to the law of the province in which the liability is sought to be enforced.

Cook v. Dodds, 6 O.L.R. 608.

— Default of co-trustee.]—
See TRUSTS AND TRUSTEES.

Gardner v. Perry, 6 O.L.R. 269.

—Action on foreign judgment.]—
See FOREIGN JUDGMENT.

— Nuisance — Trespass — Continuing damage.] — In 1888 the Canada Atlantic Railway Company ran their line through Britannia Terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on said street on which they have since carried on their foundry business. In 1900 they brought an action against the Canada Atlantic Railway Company, alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to their ingress and egress in consequence of such work:—Held, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiff's action was taken the same could not be maintained.

The Chaudière Machine and Foundry Co. v. Canada Atlantic Railway Co., 33 Can. S.C.R. 11.

— Possession of land — Statute of Limitations.] — In 1821 M. obtained a grant of land from the Crown and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years, when he removed to a place a few miles distant, after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons, who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896 the descendants of the younger children of M. gave a deed of this land to B., who proceeded to cut timber from it. In an action of trespass by P.:—Held, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870, which had ripened into a title. If not, the deed to his sons in 1870 gave them exclusive possession and if they had

not a perfect title then they had twenty years after, in 1890.

Bentley v. Peppard, 33 Can. S.C.R. 144.

— Simple contract debt — Conversion into specialty debt — Evidence of.] — Default having been made in the payment of two promissory notes payable to a bank, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed, after reciting the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, the father thereby conveyed the same to the trustees as security, in the first place of his indebtedness, and then for that of the bank, power being given to the trustee to sell the lands on one month's default in payment and on notice in writing by the trustee of his intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay same. In 1893 written notice having been given by the trustee of his intention to sell, a deed of release of all his interest in the lands was given by the defendant to the bank, the deed reciting that it was made to save expense of a sale:—Held, that neither the trust deed nor the deed of release converted the debt into a specialty debt, and the defendant could validly set up the Statute of Limitations as a bar to an action brought in 1902.

Bank of Montreal v. Lingham, 5 O.L.R. 519 (MacMahon, J.).

— Solicitor — Retainer — Termination of— Costs subsequent to judgment.] — The employment of a solicitor to bring or defend an action, subject possibly to his right to claim payment of his costs on judgment being given, does not terminate on the giving of judgment, so long as anything remains to be done which it is the solicitor's duty under his retainer to do for his client's protection; and even, in the absence of such duty, where he does not elect to treat the contract as then at an end, but under his client's instructions acts for him thereafter in subsequent proceedings, consequent upon the judgment, there is a continuation of such original contract. Where, therefore, after the giving of judgment in an interpleader issue the solicitor for the defendant against whom judgment had been given, continued, with the client's knowledge, to act for him in the taxation of the plaintiff's costs, and in the preparation and taxation of certain costs which the defendants were entitled to set off, his appointment continued until the completion of these proceedings, so that as against a claim for the amount of his bill of costs the Statute of Limitations only commenced to run therefrom.

Millar v. Kanady, 5 O.L.R. 412 (D.C.).

—Claim against estate of deceased person— Special agreement — Running account — Terms of credit — Demand.] — The plaintiff claimed from the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1895. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on the 16th May, 1895. This action was begun on the 4th May, 1901. The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible, to get on without the money, and to leave it in the hands of the deceased, who said he would save it for the plaintiff, and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go in to the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinct, was given by another witness:—Held, that there was sufficient corroboration of the plaintiff's statement. Held, also, that the plaintiff was not obliged to prove a definite term for which credit was given; the agreement was in effect one that the testator was to hold the money at least until the plaintiff demanded it; and as there was no demand before the 16th May, 1895, the action was in time. Held, also, that the agreement was not one which offended against the law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it.

Wilson v. Howe, 5 O.L.R. 323 (C.A.).

— To set aside tax sale.]—

See ASSESSMENT.

Kennan v. Turner, 5 O.L.R. 560 (Osler, J.A.).

—Colourable title — Possession of land — Lumbering operations — Evidence.] — The possession of a part of land claimed under colour of title is constructive possession of the whole which may ripen into an indefeasible title if open, exclusive and continuous for the whole statutory period. Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land continuously or at intervals, during any portion of such period.

Wood v. LeBlanc, 34 Can. S.C.R. 627.

— **Simple contract debt — Conversion into specialty debt — Payment or acknowledgment of debt — Evidence of.**]—Two promissory notes, payable to a bank, not having been paid in 1884, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed, after reciting the defendant's indebtedness to the bank, and also to his father, and that the father held certain lands as security therefor, conveyed the same to the trustee as security, in the first place for the father's indebtedness, and then for that of the bank, with interest at seven per cent. from date power being given to the trustee to sell the lands after notice. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no express covenant by him to pay the same. In 1893, on the plaintiffs pressing for payment, deeds of release were executed by the defendant and the other heirs and next of kin of the father, who was then dead, on the understanding that the father's debts had been paid, whereby after referring to the recitals in the deed of 1884, and reciting that the releases were given to save the expenses of a sale, they released to the plaintiff all their interest in the said lands, and subsequently $5,500 was realized by the plaintiffs from a sale of the lands or the timber thereon:—Held, that the effect of the deed of 1884 was not to convert the debt into a specialty debt, nor did the reference in the deed of 1893 to the recitals in the deed of 1884 so incorporate them in the former as to amount to an acknowledgment of the debt; nor did such deed operate as a transfer or assignment of the interest, if any, which the defendant had in his father's estate, as one of his personal representatives nor did the receipt by the bank of the $5,500 constitute a payment by the defendant on account of the debt, so that no bar was created to the running of the Statute of Limitations, and that it could, therefore, be validly set up by the plaintiffs in 1902, Maclennan, J.A., dissenting on the first point, being of opinion that the deed converted the debt into a specialty.

Bank of Montreal v. Lingham, 7 O.L.R. 164 (C.A.).

— **Promissory note — Acknowledgment.**] — After the expiration of six years from the making of certain promissory notes, the maker wrote to the payee's solicitor stating that he acknowledged his indebtedness on the notes so as to prevent the operation of the Statute of Limitations, and that in no event would it have made any difference, for statute or no statute the debt was one he would pay, if it took his last penny. He enclosed a letter to the payee himself, stating that he thereby begged to acknowledge his liability to him on the notes, and that the acknowledgment was made by him to prevent the running of the Statute of Limitations. The maker died a couple of years afterwards:—Held, that the claim was taken out of the operation of the statute, both as to principal and also as to interest due, not only at the maturity of the notes, but also after maturity, by way of damages.

Re Williams, 7 O.L.R. 156 (C.A.).

— **Real Property Limitation Act — Wild land — Boundary — Entry — Occupation—Evidence of possession — Survey.**] — In an action of trespass, the dispute was as to the ownership of a strip of land about 53 links in width, which the plaintiff claimed as part of his lot, 16, and the defendants as part of theirs, 17, or if not, as having become theirs by the operation of the Statute of Limitations. Neither of the lots had ever been entered upon or cultivated, and no fence separating them had ever been built. Both parties had cut timber, and that was the only use that had ever been made of either lot:—Held, that the statute did not apply; to render it applicable it would be necessary to show, if not an entry and cultivation of some part of the land, at least an entry and actual occupation. Semble, that, even if the statute applied, there was not, upon the facts, that clear and unequivocal evidence of possession by the defendants of the strip in dispute which was necessary to bar the right of the true owner. Davis v. Henderson (1869), 29 U.C.R. 344, distinguished. Harris v. Mudie (1882), 7 A.R. 414, considered. Held, however, that the plaintiff's evidence of his title to the land in question as forming part of his lot was not sufficient to establish it. Proper method of ascertaining the true position of the dividing line between lots pointed out.

Huffman v. Rush, 7 O.L.R. 346 (D.C.).

— **Account — Co-owners of land — Partnership — Principal and agent — Trustee —Outlay on land — Rents.**] — The plaintiff sold a half interest in land to the defendant, and they agreed to build houses thereon at their joint cost and to raise part of the money for the purpose by mortgages upon the property, and to contribute the remainder in equal shares. The houses were completed, and rented in 1891. The defendant collected the rents on joint account, and paid out of them the interest on the mortgages and the taxes and other outlays upon the property, sending accounts from time to time to the plaintiff. The plaintiff, alleging that the defendant did not contribute his just share of the cost of the houses, and that he had not properly accounted for the rents, brought an action for an account on the 15th August, 1902:—Held, that the plaintiff was barred by the Statute of Limitations in respect of his claim as to the cost of the houses, and also with regard to the rents, except for six years before the commencement of the action; the plaintiff and defendant were not partners; nor was the defendant

an express trustee for the plaintiff; he was an ordinary agent without any special fiduciary character.

Ross v. Robertson, 7 O.L.R. 413 (Street, J.).

— Acts of ownership — Land in state of nature — Fence built before entry by patentee — Cutting wood — Pasturing cattle — Commencement of statutory period—Knowledge of true owner.] — The plaintiff claimed cancellation of a deed as a cloud upon his title, so far as it affected 14 acres of land as to which the plaintiff alleged title in himself, and sought an injunction and damages in respect of trespass thereon:—Held, upon an examination of the defendant's title deeds, that they did not in fact convey the 14 acres, nor even profess to do so, and therefore the plaintiff was not entitled to cancellation of the deed. Held, also, upon the evidence, that the plaintiff had established his paper title to the 14 acres, and had sufficiently proved the correctness of a survey and plan showing that the 14 acres were outside of the land covered by the defendant's title deeds. The defendant contended that he had exercised such acts of ownership upon the 14 acres more than ten years before action as had dispossessed the plaintiff, and constituted such a possession by himself as to bar the action. The 14 acres had never been built upon or cleared or cultivated or resided upon. The defendant relied upon the building of a brush fence along the south limit of the 14 acres in 1880 or 1881 by his predecessor in title. At that time the title to the 14 acres was still in the heirs of the patentee, who had never taken possession:—Held, that the building of the fence was of no significance as an act of ownership. Being built on the land while it belonged to the heirs of the patentee, it became their property, and the plaintiff having become the owner and having entered in 1888, before the statutory period had run, it became his property as absolutely as if he had built it himself. The defendant also relied upon acts done since 1888, namely, cutting and removing wood and pasturing cattle upon the 14 acres:—Held, that these acts, being intermittent and isolated, were merely occasional acts of trespass, and insufficient to constitute possession of the kind required by the statute to bar the true owner. Semble, also, that the land being in a state of nature, and there being no evidence that the grantee of the Crown, or his heirs or assigns, had taken actual possession, by residing upon or cultivating any portion thereof, until the plaintiff acquired the title of the heirs in 1887, or that they or any of them had any knowledge before that date of the land having been in the actual possession of the defendant or of any one under whom he claimed, even if the defendant's acts amounted to possession, he could not claim to have acquired a title to it, for in such a case time runs from knowledge by the true owner of the entry on his land, and must have run for 20 years to bar his title. Judgment of Teetzel, J., reversed.

Reynolds v. Trivett, 7 O.L.R. 623 (C.A.).

— Mortgage — Interest — Default — Acceleration.] — Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come, and a right of action therefore then arises and the Statute of Limitation then begins to run. Judgment of Street, J., 6 O.L.R. 247, affirmed.

McFadden v. Brandon, 8 O.L.R. 610 (C.A.).

— Railway bonds — Interest coupons — Arrears.] — Bonds under seal issued by a railway company contained a covenant to pay half yearly instalments of interest evidenced by attached coupons, and payment of principal and interest was secured by a mortgage of the undertaking, which also contained a covenant to pay:—Held, in foreclosure proceedings upon this mortgage, that the interest being a specialty debt and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons, whether attached to the bonds or detached therefrom, were entitled to rank for all instalments which had fallen due within twenty years, and not merely those which had fallen due within six years. Judgment of Boyd, C., 6 O.L.R. 534, affirmed. Held, also, that even if the case were dealt with upon the footing of the mortgage being one of realty only, there was the right to rank, for there were no subsequent encumbrancers, and there had been shortly before the claims were filed a valid acknowldgment by the company of liability for all the interest in question.

Toronto General Trusts Corporation v. Central Ontario Railway Company, 8 O.L.R. 604 (C.A.).

—Execution against lands — Renewal.]—

See EXECUTION.

Re Woodall, 8 O.L.R. 288.

— Landlord and tenant — Payment of taxes by tenant.] — The lessee of a house at a yearly rental, without taxes, agreed with the lessor after he had been in possession of the house for some time to pay the municipal taxes and water rates chargeable in respect of the house on the understanding that the amount would be deducted from the rent payable by him. He remained in possession of the house for more than eleven years prior to the time of the bringing of the action, having paid the taxes and water rates each year to the municipal authorities, but not having made any payments to the lessor:—In an action for foreclosure by a mortgagee of the lessor under

a mortgage made subsequent to the lease, it was held that, even assuming the agreement had been intended to relate to future years (which was doubtful), the payments of taxes and water rates did not operate to prevent the bar of the statute. Finch v. Gilroy (1889), 16 A.R. 484, applied.

Brennan v. Finley, 9 O.L.R. 131 (Idington, J.).

— Promissory note — Part payment — Payment by husband out of wife's monies.] — A husband, who had authority from his wife to collect rents for her, and to apply the same as he saw fit, either for his own or her benefit, made payments on the joint promissory note of himself and his wife, but there was nothing to show any specific application of any part of the moneys collected on the note, or her knowledge or consent:—Held, that such payments could not be treated as part payments by the wife on the note, so as to operate as a bar to the running of the Statute of Limitations.

— Title to undivided half of lot — Possession as against co-tenant in common — Husband and wife.] — On and after the 1st March, 1872, the defendants and one A. were the owners as tenants in common of a lot containing 50 acres, and A. alone was in possession. He died on the 30th March, 1872, having by his will devised his undivided half to his wife for life. The remainder descended to his father. After A.'s death his widow continued in possession of the whole lot. On the 4th March, 1873, she intermarried with the plaintiff, and they continued in sole possession until the 24th December, 1887, when they conveyed the south half of the lot to the defendant, who entered into possession thereof. The plaintiff and his wife continued in possession of the north half till the death of the wife, without issue, on the 3rd March, 1903, and after that the plaintiff remained in possession. A.'s father died in 1885, having devised his undivided estate in remainder in the whole lot to the defendant. The plaintiff sought a declaration that he was seized in fee simple of an undivided half of the north half, namely, the defendant's original undivided half, by virtue of possession for more than the statutory period: — Held, that, as against the defendant, the possession was that of the plaintiff's wife, not of the plaintiff and his wife jointly, and that if that possession ripened into a title, it was gained by the wife alone, and during her lifetime. At the time of the marriage she was in sole possession, and as against the defendant's undivided half the Statute of Limitations had begun to run in her favour; the interest in real estate which she thus had secured to her on her marriage by s. 1 of the Married Women's Property Act, 1872, free from any estate or claim of the plaintiff. Semble, although the plaintiff was not entitled to a declaration of title, that he could not be dispossessed by the defendant.

Myers v. Ruport, 8 O.L.R. 668 (C.A.).

— Ontario Railway Act — Limitation of actions — "By reason of the railway."] — The plaintiff brought an action for damages for injuries received in an accident while travelling on an unconditional free pass upon the defendants' railway. The only evidence of negligence was that there was a head-on collision between two cars on the defendants' line, managed by the defendants' servants:—Held, that although brought more than six months after the happening of the accident, the action was not barred under the limitation clause of the General Railway Act, R.S.O. 1897, c. 207, s. 42, incorporated into the defendants' special Act—because it was based on the defendants' breach of their common law duty, founded on their undertaking to carry the plaintiff safely, and not on injury sustained "by reason of the railway" within the meaning of that clause. Semble, that "may prove that the same was done in pursuance of and by authority of this Act and the Special Act" in the latter part of R.S.O. 1897, c. 207, s. 41 (1), mean no more than "may prove that the damage or injury was sustained by reason of the railway," as in the earlier part of the section.

Ryckman v. Hamilton, Grimsby and Beamsville Electric R.W. Co., 10 O.L.R. 419 (C.A.).

— Interest — Arrears — Railway bond — Mortgage — Foreclosure.] — Bonds under seal issued by a railway company contained a covenant to pay half yearly instalments of interest evidenced by attached coupons, and payment of principal and interest was secured by a mortgage of the undertaking, which also contained a covenant to pay:—Held, in foreclosure proceedings upon the mortgage, that the interest being a specialty debt and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons, whether attached to the bonds or detached therefrom, were entitled to rank for all instalments which had fallen due within twenty years and not merely for those which had fallen due within six years. Judgment of Boyd, C., 6 O.L.R. 534, 3 Can. Ry. Cas. 339, affirmed. Held, also, that even if the case were dealt with upon the footing of the mortgage being one of realty only there was the right to rank, for there were no subsequent encumbrancers, and there had been shortly before the claims were filed a valid acknowledgment by the company of liability for all the interest in question.

Toronto General Trusts Corporation v. Central Ontario Ry. Co., 4 Can. Ry. Cas. 70, C.A. (Ont.).

— Administration order — Creditor's claim —Champertous agreement.] — O., a credi-

tor against the estate of A. M. C., a deceased intestate, obtained an order for the administration of the estate of the intestate. On the proceedings in the Master's office, a claim which O. made to have an account of the firm of which he was a member allowed was refused, but a further claim presented by him as the assignee of certain promissory notes made in favour of H. & Co. was allowed. The present appellant, wife of the intestate, presented a petition to the Court to set aside the administration order on the ground that O. at the time the order was made was not a creditor of the deceased intestate, as the assignment of the notes of H. & Co. to him was part of a champertous agreement. The Court held that the judgment for administration enured to the benefit of all the creditors, and as one at least had established a claim under it, the order could not be set aside, but that O. was not entitled to be allowed in the Master's office his claim on the notes, as the transaction between him and H. & Co. in connection therewith was a champertous one. O. re-transferred the notes to H. & Co., and the latter obtained leave to prove the claim thereon in the Master's office, and on appeal from the Master's ruling, it was held that H. & Co. might now assert their title to the notes and prove on them notwithstanding the former champertous agreement with O., and that the order for administration was a bar to the Statute of Limitations running against the notes from the date of that order. Upon appeal this judgment was affirmed by the Court of Appeal.

Cannon v. Howland (1889), 1 S.C. Cas. 119.

—Doweress — Prescription — Heirs at law —Parol admissions.] — C. R., at the time of his death (1864), was the owner in fee of certain lands and died intestate, leaving him surviving his widow, M.R., but no issue. After his death the widow remained in possession and occupation by herself or her tenants up to her death, October 6th, 1881. By lease on the 3rd May, 1881, she demised the premises to the defendant O. for a term of five years and, at the time of her death, O. was in possession as tenant under the lease. The plaintiff was the devisee of the lands under the will of M. R. The defendant R. claimed to be one of the heirs at law of C. R. and procured O. to attorn to him as landlord:—Held, that the widow remaining in possession of the lands of her husband after his death for a period of ten years, acquired a prescriptive right to the fee as against the heirs at law. Held, that admissions made by the doweress that she was bound to her husband's heirs to cut thistles, on the land and it was her duty to take care of the property given her by the heirs, made to persons having no interest in the property, were not sufficient evidence of an agreement with the heirs at law that she was occupying the land in lieu of dower. Held, that a will containing a residuary devise in the words: "All the rest and residue of my estate of which I shall be seized and possessed of or to which I shall be entitled at the time of my decease" was sufficient to include lands the title to which at the time of the making of the will had not, but before the testator's death had, ripened into an estate in fee simple by virtue of the Statute of Limitations.

Oliver v. Johnston (1886), 1 S.C. Cas. 338.

—Trustee—Technical breach—Relief.]—
See TRUSTS.

— Fire insurance — Time limited by policy of re-insurance.]—
See INSURANCE (FIRE).

—Taxes.] — See ASSESSMENT.

—Real Property Limitation Act— Tenant at will — Devise for life to tenant upon condition—Violation of condition.] — A testator, dying in 1873, devised land of which his brother had been in possession since 1848 to his (the testator's) son after the death of his brother, to whom he devised a life estate, "on condition that he neither sells nor rents the same without consent in writing of my son." The brother continued in possession, and on the 1st April, 1895, leased the land (without consent) for one year. The plaintiffs, claiming under the son, sought to recover possession from the devisee of the brother, by an action begun on the 29th May, 1905:—Held, that the brother, having openly set at naught the condition of the will, should not be presumed to have accepted the devise, and the Real Property Limitation Act was a bar to the action. Semble, upon the evidence, that the brother went into possession as tenant at will, and that the statute had run in his favour before the death of the testator.

Cobean v. Elliott, 11 O.L.R. 395 (D.C.).

— Loan to railway company through general manager — Bill of exchange therefor — Acceptance by company — Payments of interest.] — In 1893, E.N., one of the plaintiffs, and mother of her co-plaintiff, at the request of F., her brother, who was the chief executive officer of the defendants' railway, and had the management of its financial matters, lent to the company $4,600, giving him her cheque therefor, payable to his order, which he endorsed over to the company, and it was applied to their purposes, but, through some error in bookkeeping, F. was credited with the loan in the company's books. E.N. received as security for the loan a bill of exchange drawn, according to the company's usual custom, by F., payable to himself, and accepted, under F.'s instructions, by the company's secretary, which F. endorsed over to E.N. The bill was renewed from time to time, inter-

est being paid by the company's cheques, drawn payable to F., and endorsed over to E.N., until 1895, when she, having transferred the bill to her co-plaintiff, the interest thereafter was paid to him. On March 31st, 1899, the amount standing to F.'s credit in the company's boks, including this loan, was transferred on the books, to a firm, of which F. was a member, with out the knowledge of the plaintiffs. The interest thereafter was paid in the same manner as before, but in reality it was paid by F. personally, of which the plaintiffs were not aware. The payment of interest continued until 1900. In an action brought in 1905:—Held, that the plaintiffs were entitled to recover, for that the debt was from its inception, and continued to be, that of the company, and not of F., and that the company were estopped from contending that the payments of interest were not made by them, and that such payments prevented the Statute of Limitations from running against the plaintiffs. The principle of the decision in Re Tucker, Tucker v. Tucker, [1894] 3 Ch. 429, applied.

Nickle v. Kingston and Pembroke Ry. Co., 12 O.L.R. 349 (C.A.).

— Voluntary assignment by debtor for benefit of creditors — Dividend — Part payment.] — A dividend paid by an assignee, under the usual voluntary assignment by a debtor for the benefit of his creditors, is not such a part payment as will take a debt, otherwise barred, out of the Statute of Limitations, 21 Jac. 1, c. 16.

Birkett v. Bisonette, 15 O.L.R. 93.

— Account — Agents or partners — Reference.] — By agreement between them the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of its carriers in Canada at a price named for manufacture; net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfilment of conditions. The agreement was in force for three years when the Barr Co. sued for an account, alleging failure to make proper returns and payments:—Held, reversing the judgment of the Court of Appeal, that the accounts should be taken for the six years preceding the action only. On a reference to the Master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report. Held, that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal.

Hamilton Brass Manufacturing Company v. Barr Cash and Package Carrier Company, 38 Can. S.C.R. 216.

—Title to land — Room in building — Adverse possession — License or easement.] — Possession of an upper room in a building supported entirely by portions of the storey beneath may ripen into title thereto under the provisions of the Statute of Limitations. I., one of several owners of land with a building thereon, sold his interest to a co-owner and afterwards occupied a room in said building as tenant for his business. The room was on the second storey and inside the street door was a landing leading to a staircase by which it was reached. I. had the only key provided for this street door and always locked it when leaving at night. He paid rent for the room at first and then remained in possession without paying rent for twelve years. The annual tax bills for the whole premises were generally, during that period, left in the room he occupied and were sent by him to the managing owner who paid the amounts. In an action to restrain the owners from interfering with his possession of said room and its appurtenances:—Held, reversing the judgment of the Court of Appeal, 15 Ont. L. R. 286, and restoring with a modification that of the trial Judge, 14 Ont. L.R. 17, that I. had acquired a title under the Statute of Limitations to said room and to so much of the structure as rested on the soil to which he had acquired title. Held, per Davies, J.—He had also acquired a proprietary right to the staircase and the portions of the building supporting said room. Per Fitzpatrick, C.J., and Duff, J. — The Statute of Limitations does not as against the party dispossessed annex to a title acquired by possession incidents resting on the implication of a grant. I. had, therefore, acquired no rights in these supports.

Iredale v. Loudon, 40 Can. S.C.R. 313.

—Priority — Conveyance — Limitation.] — S. having obtained a registered conveyance of the land in suit from one of the respondents, executed, more than ten years before action, a reconveyance to both respondents, indorsing thereon a forged certificate of registration, and later on mortgaged it to the apellants within the said ten years:—Held, that under s. 87 of the Registry Act, R.S.O. c. 136, the reconveyance was void against the appellants, who had advanced their money without notice of it. Held, also, that the respondents were not protected by the Limitations Act, R.S.O. c. 133. The reconveyance was valid between the parties thereto, and no action could have been brought against them before the date of the appellants' mortgage, which was within the statutory period.

McVity v. Tranouth, [1908] A.C. 60, reversing 9 O.L.R. 105 and 36 Can. S.C.R. 455.

Quebec.

—Erection of dam—Damages—Art. 5535 R.S.Q.]—The law allowing mill owners to build dams on water courses for the working of their mills creates in their favour a

legal servitude over the lands upon which the dams retain the water. The exercise of this servitude makes them liable to the riparian owners for damages that it causes them. The damages caused not being in consequence of a délit, the action to recover them is not prescribed by two years.

Larochette v. Price, 19 Que. S.C. 403 (S.C.), affirmed in review 23rd Jan., 1900.

—Peremption d'instance—Art. 279 C.P.Q.] —A demand for peremption d'instance is itself an instance within the terms of Art. 279 C.P.Q. and may be declared to be prescribed.

Reid v. Marizzi, 19 Que. S.C. 428 (S.C.).

—Promissory note—Interruption of Prescription—Art. 1235 C.C.]—The proof resulting from failure of a defendant to answer interrogatories sur faits et articles is sufficient to establish partial payments effected by him on a promissory note for more than $50, and, therefore, to prove the interruption of prescription.

Charrier v. St. Pierre, 19 Que. S.C. 103 (S.C.).

—Acknowledgment of debt — Interruption —Art. 2264 C.C.] — The acknowledgment of a debt, not affecting a novation, is prescribed by the same period of time as the debt itself of which it has interrupted the prescription.

Charette v. Lacombe, 17 Que. S.C. 539 (S.C.).

—Employers' liability—Prescription—Bodily injuries.]—Under Art. 2262 C.C. the action of a workman against his employer, for the recovery of damages for bodily injuries received in the course of his employment, is prescribed by one year, and the court is bound to apply the prescription although not pleaded. The doctrine of faute contractuelle does not apply to such case.

Robillard v. Wand, 17 Que. S.C. 456.

—Failure to plead limitation—Defence supplied by the Court of its own motion—Reservation of recourse for future damages.]—The prescription of actions for personal injuries established by Art. 2262 of the Civil Code of Lower Canada is not waived by failure of the defendant to plead the limitation but the Court must take judicial notice of such prescription as absolutely extinguishing the right of action. The reservation of recourse for future damages in a judgment upon an action for tort is not an adjudication which can preserve the right of action beyond the time limited by the provisions of the Civil Code. When in an action of this nature there is but one cause of action damages must be assessed once for all. And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effects of the original injury.

The City of Montreal v. McGee, 30 Can. S.C.R. 582.

—Professional services of advocates and attorneys—Art. 2260, C.C.]—Held, 1. The words "final judgment," in Art. 2260, C.C., which enacts that the action "for professional services and disbursements of advocates and attorneys is prescribed by five years, reckoning from the date of the final judgment in each case," mean final as opposed to interlocutory, and not final in the sense of being the judgment in last resort; and consequently prescription of an attorney's claim against his own client, for the taxed cost in a cause, commences to run from the rendering of the final judgment in the court in which such costs are taxed, notwithstanding the fact that the case may have been taken to review and conducted by the same attorney in that court.

Gilman v. Cockshutt, 18 Que. S.C. 552. Per Archibald, J.

—Limitation and prescription distinguished —Continuing offences.]—1. Limitation of the time within which an action may be brought operates as an extinction of the right to bring it and is an absolute bar to it, of which the Courts must take notice, if it appears on the face of the pleadings. In that respect, it differs from extinctive prescription which only gives rise to a presumption that the obligation affected by it has been discharged, and must therefore be pleaded. 2. The action to recover a penalty accrues, and the limitation period in which it may be taken begins to run, as soon as the offence is committed. 3. When a statute that prescribes performance of an act within a specific delay, makes a failure to comply a penal offence, the letter is committed and the penalty is recoverable at the expiration of the delay so fixed. Hence, the limitation period for bringing the action runs from the same time. Handsley v. Morgan, 5 L.C.J. 54, overruled.

Croysdill v. Anglo-American Telegraph Co., 19 Que. K.B. 193.

—Interruption—Payment for services—Donation à cause de mort.]—The defendant had for several years been agent and solicitor of Dame Léocadie Boucher, who, to show her appreciation of the services which he had rendered, and was rendering every day to her, and also as a mark of her regard, had made him a donation of the sum of $8,000, to be a charge upon her succession from the moment of her death and before division of her property. This donation was annulled by the Superior Court (12 Que. S.C. 162, confirmed in review 13 S.C. 205), on the ground that it was a donation à cause de mort. Defendant thereupon rendered an account of the sums he had received from the executors

in execution of the donation, but set up en compensation a larger amount as being due him from the succession of the deceased for solicitor's fees, costs of agency, etc. The plaintiff in reply alleged that such account was prescribed:—Held, that, notwithstanding the donation in question had been declared void, the prescription of defendant's account had been interrupted by the acknowledgment and promise to pay contained in it, and had been suspended until the death of the donor, the defendant not being able, before then, to claim payment for his services; and that, moreover, the prescription had been interrupted by the payment by the executors of the amount granted by the donation.

Boucher v. Morrison, 20 Que. S.C. 151 (Ct. Rev.).

—**Prescription—Interruption—Cession de biens—Insolvency.**]—The cession de biens does not interrupt prescription. The filing by a creditor of his claim with the curator of the property of an insolvent, and the collocation and partial payment of such claim by the curator will interrupt the prescription.

Coster v. McLean, 20 Que. S.C. 395 (Sup. Ct.).

—**Disturbed possession—What constitutes legal disturbance — Intervention.**]—Plaintiff, by possessory action, complained of being troubled in his possession, by defendants, of the rear portion of lots 2195 and 2196 of the cadastral plan of Three Rivers, extending from "la cîme de la côte" to the river St. Lawrence. Defendants pleaded ownership and possession under arrangements with the Crown. The Canada Iron Furnace Company intervened, claiming ownership of the entire lot No. 2196 under a deed of sale of 30th October, 1890, accompanied by constant possession for over ten years. Plaintiff contested the intervention, alleging that the intervenants could only claim the extent of ground conveyed to their auteur, by sheriff's sale of the 15th February, 1862, and which extended only to the "cîme de la côte," none of which is claimed by the action, the portion so claimed starting from the "cîme de la côte" and going to the river. Intervenants' title expressly covered all the land to the river, which is given both by the title and by the cadastral plan as the boundary thereof. Intervenants were never troubled in their possession judically, the only disturbance being a notarial protest by plaintiff, more than a year and a day prior to the institution of this action, notifying intervenants that he claimed the land now claimed by his action, and requiring them to join in making a line fence along the "cîme de la côte." This protest was not followed by any attempt to obtain possession of the land from the intervenants:—Held (reversing the judgment of the Superior Court, Desmarais, J.), (1) There was no trouble de droit of intervenants' possession within ten years. (2) A notarial protest is not a trouble de droit of possession of land, and does not interrupt prescription. (3) Intervenants' title and constant possession gave them ownership of the land, notwithstanding the title of conveyance to their auteur. (4) Intervenants had a sufficient interest to intervene, having shown a possession which was troubled by plaintiff's action. (5) Possession which affects a whole lot of land renders it unnecessary to prove particular acts of possession, within a year and a day, of any special part of the lot.

Dupré v. Harbour Commissioners of Three Rivers, 23 Que. S.C. 439 (C.R.).

—**Promissory note—Interruption of prescription—Payment of dividends by curator.**]—1. In a commercial matter, partial payments which constitute a tacit acknowledgment which will operate to interrupt the prescription may be proved by oral testimony. 2. Art. 1235 C.C., par. 1, does not apply to a promissory note. The evidence as to promissory notes and bills of exchange being, according to the provisions of Art. 2341, subject to the law of England as it stood in 1849. 3. Payment of dividends by the curator to the estate of a person who has made an assignment of his property for the benefit of creditors (cession de ses biens), has, as regards the interruption of the prescription, the same effect as a payment made by the debtor himself.

Boulet v. Métayer, Q.R. 23 S.C. 289 (Sup. Ct.).

—**Promissory note—Prescription.**]—A note en brevet made by an agriculturist in favor of a non-trader for money lent, is only prescribed by thirty years.

Robert v. Charbonneau, Q.R. 22 S.C. 466 (Ct. Rev.).

—**Rente fonciere—Arrears of rent—Prescription—Interruption of prescription.**]—1. The prescription of five years applies to arrears of a rente foncière. 2. To effect a renunciation of an acquired prescription, both an acknowledgment of the debt and a promise to pay such a debt are necessary. 3. The heirs or legal representations of a party who bound himself by deed, to pay a rente foncière, are not jointly and severally liable for the payment of the rent unless expressly declared to be so; nor are they jointly and severally liable for the costs of an action taken against them in respect of such rent.

Ursulines v. Lampson, 22 Que. S.C. 7 (Andrews, J.).

—**Construction of building — Warranty against defective construction—Commencement of prescription.**]—Held, affirming the

judgment of DeLorimier, J.:—That the prescription of the action against the architect or building contractor, on account of the total or partial loss, within the ten years, of a building erected by them, commences upon the manifestation, within the ten years, of the defect of construction, or that of the foundations, and this action may be brought within thirty years of the time when such defect became apparent.

Archambault v. St. Charles de Lachenaie, 12 Que. K.B. 349.

—Person trading under firm name—Prescription.]—A motion to amend the declaration is a procedure which may prevent dismissal of the action. In this case the respondents sued the appellant and one Charles Lamoureux, the latter as doing business under the name of C. Lamoureux & Co. The writ was served on the last day of the prescribed delay. Lamoureux moved for dismissal of the action as against him alleging that his wife, Dame Maloina Huberdault, and not himself, carried on business under the name of C. Lamoureux & Co. After the filing of this pleading the bank desisted from its action against Lamoureux and obtained leave to amend its declaration on alleging that the note sued on had been signed by Dame Huberdault doing business under said name, but she was not made a party:—Held, that under these circumstances, the amendment related back to the date of the institution of the action and prescription had not been acquired.

Brossard v. Banque du Peuple, Q.R. 13 K.B. 148.

—Possession of movables for purposes of prescription.]—1. Even if family portraits passed under a donation, for the use of respondent's wife, of furniture, pictures, paintings, engravings, etc., yet this donation, having effect only during her lifetime, lapsed at her death, and the appellant, as the special legatee of the portraits under the will of the donor, became entitled thereto. 2. The respondent, as one of the executors of the donor's will, having knowledge of the fact that the portraits were bequeathed to the appellant, had no possession which could serve for purposes of prescription.

Hart v. Hart, 12 Que. K.B. 508.

—Indenture—Instrument under seal—Prescription.]—A private writing, described by the parties thereto as an "indenture," and executed under seal, containing an acknowledgment of a personal debt, with hypothec on real property to secure the payment of such debt, is not a promissory note, and the prescription of five years does not apply.

Zampino v. Blancheri, 24 Que. S.C. 265 (C.R.).

Possession — Prescription — Interruptive acknowledgment — Evidence.] — The company claimed prescriptive title to a part of the bed of a small river on which D., the respondents' auteur, had been a riparian owner. D. had leased lands on the banks of the river to the company which, it was alleged, included the property in dispute. The only evidence as to interruption of prescription consisted of a letter by the company to D. enclosing a cheque in payment for "use of your interest in Cap Rouge River this year," with an indorsement by D. acknowledging receipt of the funds "with the understanding that the navigation of the river is not to be prevented":—Held, reversing the judgment appealed from (13 Ex. C.R. 116), Girouard and Idington, JJ., dissenting, that the memorandum was too vague to serve as an interruptive acknowledgment sufficient to defeat the title claimed by the company.

Cap Rouge Pier, Wharf and Dock Co. v. Duchesnay, 44 Can. S.C.R. 130.

— Prescription — Special assessment — Contestation — Interruption of prescription.] — Held (affirming the judgment of the Superior Court, Doherty, J., 23 Que. S. C., p. 461):—1. Under the former charter of the city of Montreal (52 Vict. c. 79), the contestation of a special assessment roll, by a person assessed therein, had not the effect of interrupting prescription as regards other persons subject to such assessment. 2. The fact that the person contesting the roll obtained a temporary order enjoining the city against making any collection under the roll attacked, did not constitute an interruption of prescription as regards other persons assessed by the same roll, where such order was made without objection on the part of the city, and no steps were subsequently taken by the city to obtain the rescission of the order.

City of Montreal v. Land and Loan Company, 13 Que. K.B. 74.

—Prescription—Waiver—Condition.] — A note made by defendant in favour of the plaintiff had been prescribed since 1897. In 1902 the defendant wrote to plaintiff as follows: "You ask for money; at present I have none. I have bought some land which has taken all I had; but I am about to sell the land I am living on and will pay you soon." Plaintiff, claiming that this letter amounted to a waiver of the acquired prescription, brought an action for the amount of the note and interest, without waiting for the defendant to sell his lands:—Held, that the letter did not constitute a waiver of acquired rights, but only contained a conditional offer to waive the prescription, and, therefore, the creditor, to be entitled anew to the right of action which he had lost, would have to wait for the fulfilment of the condition.

Perrier v. Perrier, Q.R. 25 S.C. 183 (Ct. Rev.).

Possession by two or more successive possessors as basis of prescription.]—A party who claims a title to immovable property by thirty years' prescription must establish either his own possession for the while period, or that of himself and of predecessors who are connected with him by a chain of valid titles to the ownership of the property. 2. Any part of land granted by the Crown for a town site, that becomes unfit or useless for the purpose of the grant (v.g., by submersion), reverts to the Crown.

Price v. Chicoutimi Pulp Co., 19 Que. (P.C.) K.B. 227, affirming 16 Que. K.B. 142.

—Prescription — Fraudulent deeds.]—The prescription established by Art. 1040 C.C., applies only to deeds made in fraud of creditors and not to those attacked by creditors as being simulated.

Simpson v. Gagnon, 6 Que. P.R. 436 (Sup Ct.).

—Husband and wife — Interest.] — Notwithstanding the provisions of Art. 2233 C.C., the prescription of five years (Arts. 2250 and 2267 C.C.) applies in the case of interest on a debt between husband and wife.

Picard v. The General Hospital, Q.R. 26 S.C. 159 (Sup. Ct.).

—Demand note—Prescription — Act required to interrupt.]—1. Prescription of five years and not thirty, applies to a note, notwithstanding that part thereof was for money loaned and for securing which hypothec was given. 2. Interest on a demand note runs from the date thereof. 3. Prescription begins to run from date thereof and not from date of demand of payment. 4. Acknowledgment made by one party to a note, interrupts prescription as to the others. 5. Acknowledgment can be proved by the oath of one of the parties defendant. 6. A transfer of property by one defendant to the plaintiff, though signed by defendant before consideration was filled in, and imperfect in form, when coupled with the admission of said defendant, that the consideration, whatever it was, was to be placed to the credit of the said note, is a "reconnaissance par écrit" at the date of the transfer and sufficient to interrupt prescription. 7. The oath alone of one defendant is in itself enough to interrupt prescription. 8. While it requires a new promise to pay, clearly expressed to renounce a prescription acquired, the sole acknowledgment of a debt is sufficient to interrupt prescription, while running.

Bank of Ottawa v. McLean, 26 Que. S.C. 27 (Rochon, J.).

—Continuing nuisance.]—

Montreal Street Railway v Boudreau, 36 Can. S.C.R. 329.

—Taxes—Special assessment — Montreal charter.]—

See ASSESSMENT.

— Taxes — Action to recover assessed amounts—Assessment due on filing of the roll—Prescription.]—Under s. 251 of the City of Montreal Charter, 1889 (52 Vict. c. 79), the amount of an assessment becomes due and recoverable on the filing of the roll of assessment in the office of the city treasurer. In an action by the city to recover after the period of prescription enacted by s. 120, calculated from the date of filing, had elapsed, it appeared that the respondent's predecessor had been a party to proceedings had for its annulment:—Held, (1) That the period was not interrupted thereby within the meaning of Art. 2227 of the Civil Code, for there had been no acknowledgment of liability. (2) That there had been no impossibility to sue within the meaning of Art. 2232, for the right of action was not by the above Act suspended during the proceedings. (3) That the debt in suit was not dependent on a condition within the meaning of Art. 2236, though s. 144 of the Act limited the time within which the roll might be annulled, it did not make the date of its coming into force conditional on the roll not being either attacked or annulled.

City of Montreal v. Cantin, [1906] A.C. 241.

—Prescription — Interruption — Evidence — Application of payments.]—Every arrangement importing the acknowledgment of or promise to pay a debt so as to take it out of the operation of the law respecting limitations of actions must be in writing and cannot be proved otherwise. And (reversing Pelletier, J.) (2) That a payment made before any of the items of a current account had been prescribed must be imputed upon the oldest debt, i.e., the first item of the account, provided that all the items therein constitute debts of the same kind and equally onerous, none of them being overdue nor bearing interest.

Beaudoin v. Fecteau, Q.R., 14 K.B. 27.

— Prescription — Interruption — Curator paying dividend—Art. 2224 C.C.]—The payment of a dividend upon a claim by the curator to an assignment for the benefit of creditors has not the effect of interrupting prescription.

Desrosiers v. Burdon, 7 Que. P.R. 395 (Fortin, J.).

—Value of services—Prescription.]—The defendant who presents a reconventional demand for the value of services performed for the plaintiff can also set up the same claim against the principal demand by way of compensation (set-off). Compensation can only take place between claims for damages liquidated or capable of being

liquidated promptly. A claim for the value of numerous acts, proceedings, journeys, etc., in negotiating the purchase of a railway is not of this nature, and therefore cannot be tendered in compensation. The services above mentioned are of the kind aimed at in par. 6 of Art. 2260 C.C., and the action to recover their value is prescribed by five years. Short prescriptions, being a bar to the right of action, may be set up by inscription en droit.

Bank of St. Hyacinthe v. Bernier, Q.R. 37 S.C. 481 (Sup. Ct.).

— **Donation — Revocation — Ingratitude —Time for bringing action.**]—The year in which the action to revoke a donation on the ground of ingratitude, to be reckoned from the date of the offence imputed to the donee is a peremptory bar to the action, and, under Art. 2188 C.C., the Court is obliged, e propria motu, to take judicial notice of the limitation of the action where the defence is not invoked by the defendant.

Farand v. Paulos, Q.R. 28 S.C. 200 (Sup. Ct.).

--**Donation — Sale of land — Revocation— Resolutory condition.**]—The ten years limited for bringing the action for resiliation of deeds of sale or donation in virtue of a resolutory condition, under Arts. 816 and 1537 of the Civil Code, is an absolute limitation which runs from the date of the deed, notwithstanding the stipulation of a term for payment of the price or execution of the obligation.

Galarneau v. Lefebvre, Q.R. 27 S.C. 466 (Sup. Ct.).

—**Interruption of prescription—Damages— Offences and quasi-offences—Agreement to pay indemnity — Evidence — Parol testimony.**]—Interruption of the short prescription of actions for damages resulting from offences and quasi-offences cannot be proved by parol testimony, nor an agreement for the payment of an indemnity over $50.

McLennon v. McKinnon, Q.R. 28 S.C 536 (Ct. Rev.).

—**Invalid tax deed—Prescription.**]—

See ASSESSMENT.

Cameron v. Lee, 27 Que. S.C. 535.

—**Commercial debt—Novation—Giving hypothec as security.**]—The acknowledgment of a debt subject to prescription by the lapse of five years in an authentic deed constituting a hypothec as security for the payment thereof, is not a novation of the debt. Consequently extinctive prescription of the debt may be acquired by the lapse of a further period of five years from the date of the execution of the deed.

Rioux v. Bouliane, Q.R. 29 S.C. 448.

—**Commercial partnership—Notary and advocate—Stock transactions.**]—The partnership formed between a notary and an advocate to operate on the bourse in the purchase of securities for profit is a commercial partnership. Therefore the mutual claims of the partners are prescribed by five years to be computed from their becoming due, that is, from the moment when the partnership is at an end.

Myler v. Huot, Q.R. 30 S.C. 483 (Ct. Rev.).

—**Short extinctive prescription of promissory notes—Interruption—Payments by a curator to abandonment of property.**]—The extinctive prescription by lapse of five years of promissory notes is not interrupted by payments made by the curator to an abandonment of property of the debtor.

Hochelaga Bank v. Derome, 33 Que. S.C. 383.

—**Action for damages—Prescription.**]—The limitation of the right of action for compensation for injury to land from the injurious effect of chemical agents used in a neighbouring factory begins to run from the time such right of action accrues which is at the moment the damage manifests itself in an appreciable manner.

L'Hussier v. Brousseau, Q.R. 33 S.C. 345 (Ct. Rev.).

—**Action for damages—Railway company— Fire caused by employees.**]—An action for damages from fire caused by the employees of a railway company is prescribed by two years after which the claim of the person injured is absolutely barred.

Villani v. North Colonization Railway Co., 9 Que. P.R. 204 (Sup. Ct.).

—**Dividend from insolvent estate—Interruption of prescription—Quebec Civil Code.**]—

See BANKRUPTCY.

Caverhill v. Prevost, 32 Que. S.C. 81.

—**Prescription—Injury to workmen.**]—It is by one year under Art. 2622, 2 C.C. and not by two years under Art. 2261, par. 2 C.C. that the action is prescribed of a workman against his employer for recovery of damages on account of bodily injury received in the course of his employment.

Versailles v. Dominion Cotton Co., Q.R. 32 S.C. 281 (Sup. Ct.).

—**Prescription—Possessory action—Possession solo animo.**]—The possession for a year giving the person disturbed the recourse of an action en complainte is useful, continuous, public possession, unequivocal and with claim of title whereby prescription accrues. An acquired possession cannot be held solo animo in face of an adverse right openly manifested; and even

material acts will, under such conditions, only result in a joint possession. In either case there can be no right of action.

Raymond v. Conway, Q.R. 32 S.C. 310.

—**Prescription—Money paid by mistake.**]—Where, by mistake, the person who in discharging a commercial debt pays more than he owes, the obligation on the recipient to pay back the excess creates a commercial debt, and, therefore, the action to recover it back is prescribed by five years.

St. Maurice Lumber Co. v. Scott, Q.R. 33 S.C. 532.

—**Title to land—Adverse possession—Community—Universal legatee.**]—The universal legatee of one member of a community who registers the declaration of transmission describing the immovable possessed by the community as her title and who, from that date, acts as sole owner of such immovable for twelve years, receives the revenues and pays the charges and expenses, sells the wood cut thereon and even a part of the unmovable itself, acquires, by such acts which are opposed to the rights of the original members of the community and effect an inversion of their title, the exclusive and effective possession of the land and can maintain an action against those who disturb her in such possession.

Danis v. Thibault, Q.R. 36 S.C. 213.

—**Negative prescription—Interruption — Judicial demand—Service by publication in newspapers of order to appear.**]—Interruption of negative prescription takes place by a judicial demand in proper form duly served upon the debtor. If, by reason of his absence, service is made by two insertions in newspapers of an order to appear, as provided in Art. 136 C.P., it is only complete and effectual to interrupt, by the second insertion. Hence, if the term of prescription expires between the first and second, there is no interruption.

Gauthier v. Charlebois, 35 Que. S.C. 104.

—**Prescription—Agreement for conditional sale.**]—One who takes possession of movable effects under a deed described as a lease but containing a provision that he will become owner on performance of the conditions imposed and payment of the rent reserved in which case the lessor will execute a deed of sale in his favour, having entered into possession for another person is afterwards presumed to possess by the same title and, therefore, cannot, even at the expiration of ten years, set up an acquisitive prescription of the effects unless he proves that there was, during this interval, a change in the title by which he held possession.

MacFarlane v. Irwin, Q.R. 35 S.C. 82 (Ct. Rev.).

—**Interruption of prescription—Formâ pauperis.**]—The service of a petition for leave to sue in formâ pauperis does not interrupt the prescription of the action under s. 356 of the charter of Montreal which provides that an action for damages against the city must be brought within six months from the date of the accident.

Savard v. City of Montreal, 10 Que. P.R. 333.

—**Prescription—Insolvent estate—Payment of dividend—Evidence.**]—The payment of a dividend by the curator to an insolvent estate on a debt evidenced by negotiable promissory notes interrupts prescription. To prove such payment a writing signed by the debtor is not necessary but it can be done by the production of extracts from the curator's books the procedure being judicial and authentic.

La Banque d'Hochelaga v Richard, Q.R. 18 K.B. 252.

Eastern Provinces.

—**Municipal corporation—Damages—Continuing trespass.**]—In an action brought by plaintiff against defendant for entering upon his land and cutting a drain or trench through the same, etc., the jury found, in answer to a question submitted, that the town constructed the drain in 1886 "by virtue of the streets commissioner's power of office." It appeared that plaintiff knew of the drain at the time but made no objection, until the latter part of 1896, when the land caved in and repair work was undertaken, and plaintiff demanded compensation:—Held, that the clear meaning of the words "by virtue of the streets commissioner's powers of office" was that the town constructed the drain in question by their agent, the streets commissioner, one of whose duties it was to construct drains. Held, that the trespass, being a continuing one, was not barred by the Towns' Incorporation Act of 1895, Acts of 1895, c. 4, s. 295, which provides that "no action ex delicto shall be brought against any town incorporated under the act . . . unless within twelve months next after the cause of action shall have accrued" except as to damage suffered more than one year before action brought

Archibald v. Town of Truro, 33 N.S.R. 401, affirmed 31 Can. S.C.R. 380, sub nom. Truro v. Archibald.

—**Tenants in common—Death of co-tenant—Exclusive adverse possession of land by survivor.**]—Land was conveyed in fee to two brothers as tenants in common. One brother died on May 9th, 1876, intestate, leaving him surviving his co-tenant, his mother, and three sisters, of whom the plaintiff is one. The mother died September 5th, 1876. The surviving brother had

from the time of his brother's death until his own death on November 8th, 1896, exclusive possession and use of the land and the receipt of the rents and profits therefrom, without accounting. He and his sisters lived together on premises situated elsewhere until his marriage in 1890. He always contributed to their support, but the contributions were not meant, and were not understood, to be a share by the sisters in the rents and profits of the land. In a suit commenced September 21st, 1899, by the plaintiff for the partition of the land:—Held, that the plaintiff's title was extinguished by c. 84, s. 13, C.S. N.B.

Ramsay v. Ramsay, 2 N.B. Eq. 179.

— Title by possession — Mother and children living together — Daughter claiming title — Landlord and tenant — Tenant disputing landlord's alleged possessory title.]—

Chisholm v. Noxwood, 2 E.L.R. 149 (N.B.).

—Landlord and tenant—Payment of civic taxes — Occupant paying taxes on land for the owner by agreement—Payments construed as rent—Tenancy at will.]—

Sullivan v. Sweeney, 4 E.L.R. 492 (P.E.I.).

— Adverse possession.]—

Boudrot v. Morrison, 7 E.L.R. 477 (N.S.).

—Registry of judgment in Nova Scotia.]— In an action brought by plaintiffs, trustees under the last will of D., to recover possession of a lot of land bought by plaintiffs at sheriff's sale under execution on a judgment recovered by D. against M., defendant relied, among other defences, upon the ground that, at the time of the sale by the sheriff, he was in adverse possession of the land:—Held, that a sheriff selling under execution is not within the class of cases which apply to a person selling land held adversely by another. Held, per McDonald, C.J., that the registry of the judgment obtained by D. had the same effect, so far as his title was concerned, as if he held a mortgage. Held, also, the judgment being registered, and securing the title, that the statute of limitations would not begin to run until after the date of the recovery of the judgment.

Doull v. Keefe, 34 N.S.R. 15.

—Statute of Limitations—Evidence to take case out of—Mortgagor and mortgagee—Payments on account of principal—Entries in books of solicitor.]—A mortgage made by G. to C., after providing for payment of premiums of insurance by the mortgagor, G., continued: "And in default thereof, the said C. . . . shall and may, as required, effect, renew, etc., such insurance, and charge all payments made for or in respect thereof, with interest, after the rate aforesaid, upon the said mortgaged premises":—Held (affirming the judgment of the trial Judge), that an amount paid for premium of insurance by the authorized agent of C., was, by the terms of the mortgage, without further act, made part of the principal on which interest was payable and that the subsequent repayment of this amount by G. was a payment on account of principal which would take the case out of the Statute of Limitations, and entitle plaintiff to an order of foreclosure and sale. Held, that the plaintiff was entitled to recover on the bond as well as on the mortgage.

Cogswell v. Grant, 34 N.S.R. 340.

—Twenty years' possession—Decree of foreclosure—Effect of as against third party in possession.]—In an action claiming possession of land, plaintiff's title was derived under a sheriff's deed made under direction of the Court in foreclosure proceedings, and dated July 23rd, 1896. Defendant relied upon the Statute of Limitations, and gave evidence of more than twenty years' possession of the land in dispute without payment of rent or acknowledgment of title. It appearing that defendant went into possession at a date subsequent to the date of the mortgage under which plaintiff claimed:—Held, dismissing defendant's appeal with costs, and affirming the judgment of the trial Judge, that defendant could not acquire title by possession against the mortgagee so long as the mortgage was kept alive. It is enacted by the Statute of Limitation of Actions, R.S.N.S. (1900), c. 167, s. 23, that "any person entitled to or claiming under a mortgage of land may make an entry or bring an action to recover such land at any time within twenty years next after the last payment of the principal money or interest secured by such mortgage, although more than twenty years have elapsed since the time at which the right to make such entry or bring such action first accrued." Held, that the granting of the decree of foreclosure, was an adjudication that, at that date, the mortgage was in force, and that, therefore, plaintiff's title came under the provisions of the section quoted. Held, also, that a third party could not, by a possession of twenty years, acquire title, notwithstanding the provisions of the statute, and that plaintiff's title could not be defeated by defendant's possession, even though it were shown to be of a more definite kind than was disclosed by the evidence.

Archibald v. Lawlor, 35 N.S.R. 48.

—Payment by surety after running of statutory period.]—The makers of a joint and several promissory note are joint contractors within the meaning of the Statute of Limitations, R.S. 1900, c. 165, s. 5, and Lord Tenterden's Act, and where such a note was entered into by plaintiff and defen-

dant as sureties for C., the principal maker, and the note was dishonoured by C. and was paid by plaintiff after the Statute of Limitations had run as against the payee in favour of plaintiff and his co-surety:—Held, that such payment was voluntary on the part of plaintiff, and that he could not, by waiving in his own favour the defence of the Statute, establish a claim against his co-surety for contribution.

Patterson v. Campbell, 44 N.S.R. 214.

—Against railway company.]—

See RAILWAY.

—Statute of Limitations—Amount credited by sheriff on execution—Payment by or on behalf of the debtor.]—At a sale of lands under execution, the lands sold were bid in by the judgment creditor, and the amount of the bid credited on the execution by the sheriff on account of the judgment debt:—Held, that this was not a payment by or on behalf of the debtor to take the case out of the Statute of Limitations. Held, further, that an order for the issue of a writ of execution, made by a Judge of the Court, ex parte, during the currency of the period of twenty years from the recovery of the judgment, the judgment debtor having died out of the province intestate, and no administrators having been appointed, conferred no new right upon defendant sufficient to keep the judgment alive, and unbarred by the statute. Held, that to obtain a new right against anyone, by reason of such an order defendant must have given notice, which he could have done, either by applying as a creditor to have administrators appointed, or by notifying the heirs.

Lefurgey v. Harrington, 36 N.S.R. 88.

—Partition—Defence of Statute of Limitations—Person acting in fiduciary capacity—Acquiescence.]—An action for partition of land was resisted by the heirs, etc., of D., on the ground that she had acquired title by exclusive possession against the other tenants in common. The trial Judge found, and the evidence supported such finding, that D. acted throughout in a fiduciary capacity, as administratrix for the benefit of her father's estate, and those interested in it:—Held, that it was not open to a person in the position of D. to avail herself of the Statute of Limitations. Als., that as plaintiffs believed that D. was acting within her rights as administratrix, there was nothing in their conduct that would operate as a bar to the relief sought on the ground of acquiescence. Also, that the acts of D., leasing the property, collecting rents, etc., which were relied upon as giving her an exclusive title, were perfectly consistent with the rights of plaintiffs as tenants in common.

Brown v. Dooley, 36 N.S.R. 56.

—Assignment of debt—Invalid sale by sheriff—Statute of Limitations—Payment—Ratification.]—In Nova Scotia book debts cannot be sold under execution and the act of the judgment debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser. The purchaser received payment on account of a debt so sold which, in a subsequent action by the creditor and others, was relied on to prevent the operation of the Statute of Limitations:—Held, affirming 37 N.S.R. 161, that though the creditor might be unable to deny the validity of the payment he could not adopt it so as to obtain a right of action thereon and the payment having been made to a third party who was not his agent did not interrupt the prescription. Keighley, Maxtead & Co. v. Durant, [1901] A.C. 240, followed. Plaintiff's appeal dismissed.

Moore v. Roper, 35 Can. S.C.R. 533.

—Trustee—Technical breach—Relief.]—

See TRUSTS.

Cairns v. Murray, 37 N.S.R. 451.

— Acknowledgment of debt.] — Action brought by the plaintiff as assignee of one T. against the defendants, alleging indebtedness of the defendants' testator to T. on the common counts and alleging an assignment of the indebtedness from T. to the plaintiff and notice thereof to the defendants. The defendants denied the claim and alleged, first, that no sufficient notice under the statute was ever given of the assignment from T. to the plaintiff, and that the action was barred by the Statute of Limitations:—Held, affirming the judgment of the Supreme Court of Nova Scotia, that the notice of the assignment given was a sufficient compliance with the statute (R.S.N.S., (4 ser.), c. 94, s. 357), and that the letters written by the defendants' testator to the assignor of the plaintiff were a clear acknowledgment of the debt and sufficient to take it out of the provisions of the Statute of Limitations.

Grant v. Cameron, (1891), 1 S.C. Cas. 239.

—Mortgage—Executors and administrators—Action to recover possession of land.]—property for a period of twenty-five years In 1862 J. M. conveyed land to W. by a deed which, although absolute in form, was intended to operate by way of mortgage, as security for a debt due from the grantor to the grantee. The last will of W., made seventeen years after the date of the deed, directed that the land in question should not be sold during the lifetime of M. M., the wife of J. M., and that if, at any time before the death of M. M., the grantor, J. M., should repay the amount of his indebtedness with interest, then the property should be reconveyed, etc. W. died in July, 1881, and M. M. died in February, 1903, having continued in possession of

the land down to the time of her death:—Held, notwithstanding the clause in the will of W. restraining his executors from selling the land, that an action brought by the executors, after the death of M. M., to recover possession of the land, was barred by the Statute of Limitations.

Whitman v. Hiltz, 39 N.S.R. 230.

—Entry by deceased person—Oral admission of tenancy—Tenant under an agreement to purchase—Vendor—Right of entry.]—Payment of part of the purchase money by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will, and the Statute of Limitations begins to run from such payment. Entries in the handwriting of a deceased person in his books of account, made in the ordinary course of his business, as follows: Balance due Robert Anderson, $41.25; July 15, 1892, by cash on due-bill for Thompson farm, $41.25; settled, $00.00; 1886, May 23, balance due R. H. Anderson, $35.63; by cash to self, $10.00; by balance due R. And., $25.63; Credit on due-bill settled in full, $25.63, are admissible under s. 38, c. 127, Con. Stat. 1903, and the first entry being admitted to be a payment on account of a land purchase, the second is evidence of a payment on the same account on the 23rd of May, 1886. Where an entry in the handwriting of a deceased person is prima facie against interest it is admissible for all purposes, irrespective of its effect or value when received. A verbal admission by a person holding under an agreement to purchase, that he is holding as tenant at will to the vendor, will not prevent the statute running against such vendor. As between the vendor and a vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee entitled to the rights and privileges secured to a mortgagee under s. 30 of c. 130 of Con. Stat. 1903, and is also as a mortgage within the exception provided by s. 8 of the statute, and the right of entry of the vendor and his representatives would not be extinguished for twenty years after the last payment of principal or interest.

Anderson v. Anderson, 37 N.B.R. 432.

—Crown land in New Brunswick—Adverse possession for less than sixty years—Grant by the Crown during adverse possession valid—Rights of grantee.]—In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of fifty-six years down to a date about seven years prior to date of action:—Held, that judgment was rightly entered for defendant. Occupation against the Crown for any period less than the sixty years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against the grantee in actual possession. The Act, 21 Jac. I. c. 14, only regulates procedure, and its effect is that if any information of intrusion is filed and the Crown has been out of possession for twenty years, the defendant is allowed to retain possession till the Crown has established its title. Where no information has been filed there is nothing to prevent the Crown or its grantee from making a peaceable entry and then holding possession by virtue of title. Decisions by the Courts of New Brunswick and Nova Scotia, to the effect that when the Crown has been out of actual possession for twenty years it could not make a grant until it had first established its title by information of intrusion, overruled. Decision in Maddison v. Emmerson, 34 Can. S. C.R. 533, affirmed.

Emmerson v. Maddison, [1906] A.C. 569.

—Possession of land—Constructive possession—Colourable title.]—McI., by his will devised sixty acres of land to his son charged with the maintenance of his widow and daughter. Shortly afterwards the son with the widow and other heirs conveyed away four of the sixty acres and nearly thirty years later they were deeded to McD. Under a judgment against the executors of McI. the sixty acres were sold by the sheriff and fifty including the said four were conveyed by the purchaser to McI.'s son. The sheriff's sale was illegal under the Nova Scotia law. The son lived on the fifty acres for a time and then went to the United States, leaving his mother and sister in occupation until he returned twenty years later. During this time he occasionally cut hay on the four acres, which was only partly enclosed, and let his cattle pasture on it. In an action for a declaration of title to the four acres:—Held, that the occupation by the son under colour of title of the fifty acres was not constructive possession of the four which he had conveyed away and his alleged acts of ownership over which were merely intermittent acts of trespass. McDonald v. McIsaac, 38 N.S.R. 163, affirmed.

McIsaac v. McDonald, 37 Can. S.C.R. 157.

—Against trustees—Technical breach of trust—Nova Scotia Trustee Act.]—

See TRUSTS.

Cairns v. Murray, 37 Can. S.C.R. 163.

—Mortgagor and trustee—Possession—Tenant at will.]—J. purchased and went into possession of the property in dispute in 1878; in 1879 he mortgaged it, and in 1880 conveyed the equity of redemption to B. without consideration. In 1887 (within 20 years of the commencement of this action), at the request of, and for the benefit of, J., the plaintiff paid and took an assign-

ment of the mortgage, and B., also at the request of J., conveyed the equity of redemption to the plaintiff J., and the defendant continued in possession down to the bringing of the action, and never paid any rent or anything on account of the mortgage:—Held, in an action of ejectment against the defendant, the successor in title of J., that the action was not barred by the Statute of Limitations, and plaintiff was entitled to recover.

Stevens v. Jeffers, 38 N.B.R. 233.

—Gift of land accompanied by possession—Exclusive occupation.]—A gift of land by a father to his son accompanied by actual delivery of possession and followed by a continuous and exclusive possession by the son extending over a period of twenty years, confers a title upon the son under the Statute of Limitations which will be bound by a judgment recovered against him, and will pass to the purchaser at a sheriff's sale. The operation of the statute will not be suspended by acts by the father, such as the pasturing of sheep and the occasional cutting of fire wood, where the acts are done with the assent of the son and not with the intention of interfering with the possession, or in the way of rental for the property.

Kaulbach v. Cook, 39 N.S.R. 500.

—Judgment—Barred after 20 years—Acknowledgment.]—The Statute of Limitations, R.S. (1900) c. 167, s. 22, provides that no action or other proceeding shall be brought to recover any sum of money secured by any—judgment—but within 20 years after the present right to receive the same has accrued—unless in the meantime some part of the principal money or some interest thereon has been paid, or some knowledgement of the right thereto has been given, etc.:—Held, that the mere issue of a writ of execution and the placing of the same in the hands of the sheriff, without any further action being taken thereon to enforce the payment, was not sufficient to bring the judgment within the saving clause of the statute so as to keep it in force, and that the judgment being dead the execution fell with it. Also, that the section refers to judgments generally. Also, that the issuing of a summons under the Judgment Debtors' Act, calling upon the debtor to appear for examination, is not such an acknowledgment as to take the case out of the statute.

Boak v. Flemming, 43 N.S.R. 360.

—Statute of Limitations—Agency—Receipt of rents—Right to an account.]—Where defendant received the rents of a plaintiff, it was held that the right to an account was not barred by the lapse of time, defendant having taken possession of the property under an agreement with plaintiff, which had never been terminated, to hold the property for him and to account to him for it.

Pick v. Edwards, 3 N.B. Eq. 410.

—Trespass to lands—Tenancy in common—Exclusive possession—Burden of showing—Statute of Limitations.]—In an action by plaintiffs claiming damages for trespass to lands defendant justified under his wife, who was alleged to be a tenant in common with plaintiffs of the locus. The land in question was originally granted to A. B., through whom both parties claimed. It was agreed that the only issue for trial was whether the title of defendant's wife, as tenant in common, was barred by the Statute of Limitations:—Held, that the burden was on plaintiffs of establishing exclusive possession of the common lands for a period of twenty years, and that in the absence of such evidence defendants must succeed. Where defendant, by the erection of a house in the lands held in common, exceeded his rights, taking possession of a piece of the lands to the exclusion of plaintiffs and other tenants in common, but no claim as to this was set up in the pleadings or on the trial. Held, that the defendant's possession could not be adjudicated upon in the action, but must be raised in partition proceedings when defendant could be protected as to his occupation and improvements.

Boudroit v. Sampson, 41 N.S.R. 490.

—Title by adverse possession—Payment of fire insurance premium.]—Plaintiff claimed a house and lot of land as devisee of S. M., who had occupied and used the property as his own for a period of upwards of thirty years. Defendant set up title under the will of M. M., to whom the property was mortgaged by G., the original owner, to secure repayment of the sum of $240, and to whom it was subsequently conveyed by G., by deed expressed to be made for the same consideration. The house on the property had been insured in the name of M. M., but there was evidence of admission that his claim to the property was not as owner but for advances made by him: Held, that under the circumstances stated, and in the absence of evidence of any obligation on the part of S. M., to insure for the benefit of M. M., the payment of S. M., at one time during his occupancy, of a renewal insurance premium, whether to insure his house in his own name or that of M. M., was not an act inconsistent with his ownership, or with his right to insist that any claim of M. M., as mortgagee was barred. Cogswell v. Grant, 34 N.S.R. 340, distinguished.

Matheson v. McPhee, 42 N.S.R. 220.

—Title by possession—Declarations of, by occupant on premises.]—The declarations of one in adverse possession made on the premises while in occupation, importing a

claim of a statutory title in himself are admissible in an action of ejectment against his representative to support the presumption of title from possession whether they are against interest or not and whether made before or after the statutory title accrued..

Rundle v. McNeil, 38 N.B.R. 406.

Western Provinces.

—Small debt procedure (N.W.T.)—Writ of summons—Failure to serve—Expiry—Alias writ.]—A writ of summons (under the small debt procedure) had been issued in an action on a debt before the period after which it would become barred by the Limitations Ordinance had expired; it was, however, never served; but after the expiry of the period fixed by the Ordinance an alias writ of summons was issued:—Held, in view of the provisions of Rule 542 of the Judicature Ordinance (C.O. 1898, c. 21), the issue of the alias writ of summons prevented the operation of the Limitations Ordinance, and that, therefore, the Ordinance afforded no defence to the action.

Curry v. Brotman, 4 Terr. L.R. 369.

—Ancient lights—Right to—How acquired—Unity of possession—Prescription Act.]—A right to the access and use of light to a house cannot be acquired under the Prescription Act by the lapse of time, during which the owner of the house or his occupying tenant is also occupier of the land over which the right would extend. In an action to establish a right to ancient lights, the burden of proof in the first place is on the plaintiff to show uninterrupted use for twenty years, and then the burden is shifted to the defendant, to show such facts as negative the presumption of ancient lights.

Freigenbaum v. Jackson and McDonell, 8 B.C.R. 417.

—Acknowledgment.]—A promise to "fix it up all right" in a week or two, in a letter written by the debtor in reply to a written demand for payment of the debt, is a sufficient, acknowledgment to take the case out of the Statute of Limitations and start it running anew. A promise to pay the debt as soon as the debtor could get the money is conditional only and, without evidence that the debtor had got the money, would not be a sufficient acknowledgment to prevent the statute running.

Eyre v. McFarlane, 19 Man. R. 645.

—Mortgage covenant—Foreign judgment.]—The action was begun in the North-West Territories in 1904 to recover the amount of two promissory notes made by the defendant in 1890, and payable in 1890 and 1891, with a claim also upon a covenant in a mortgage bearing the same date for payment at the same time as the notes, the mortgage being of land situated in South Dakota, and also upon a judgment recovered in South Dakota. The right of recovery upon the notes was unquestionably barred:—Held, that the right of action upon the covenant was also barred by s. 8 of the Real Property Limitation Act, 1874 (Imp.), which is in force in the Territories by virtue of s. 2 of c. 31 of the Consolidated Ordinances. Under the law of South Dakota the Statute of Limitations bars the right of action upon a covenant only after the expiration of 20 years, but it was held that the South Dakota law did not apply. The period of limitation under the Imperial Act is 12 years. But held, that the claim upon the foreign judgment was not barred. The defendant was born in the United States, but came to the Territories in or about 1891, and had not since been absent therefrom. He was personally served therein with the summons in the foreign action, according to the practice of the foreign Court:—Held, that the defendant was by natural allegiance a subject of the United States, and that it was not established that he had ever been naturalized in Canada, and this was sufficient to determine the jurisdiction of the Dakota Court although the defendant had not submitted to it by appearing.

Dakota Lumber Co. v. Rinderknecht, 1 W.L.R. 481 (Wetmore, J.).

—Money lent—Date fixed for repayment—Statute of Limitations.]—In an action for money lent, it appeared that the defendant in August or September, 1903, borrowed £20 from the plaintiff. On the 3rd August, 1903, the defendant wrote to the plaintiff: "Would you lend me £20 for say two years at most? I will honestly repay you." On the 23rd October, 1903, the defendant wrote to the plaintiff: "I scarcely know how to thank you for your very kind letter and for the draft duly received":—Held, that the time for payment was in September, 1905, and the action was not (in 1910) barred by the Statute of Limitations. Held, also, that the plaintiff was entitled to interest at 5 per cent. upon the amount lent, there being a written contract for payment of money on a certain day to be spelled out of the two letters, the request and the acknowledgment.

Adlard v. Greensill, 14 W.L.R. 536 (Sask.).

—Conveyance to secure debt—Constructive possession — Acknowledgment to prevent statutory bar.]—

See MORTGAGE.

Rutherford v. Mitchell, 15 Man. R. 390.

—Action for breach of covenant in agreement for sale of land—Measure of damages.]—(1) A claim for damages for

breach of a covenant against incumbrances on land is not a claim "to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent," within the meaning of s. 24 of the Real Property Limitation Act, R.S.M. 1902, c. 100, and an action to recover such damages is therefore not barred under that section by the lapse of ten years. (2) Where the covenant for the breach of which an action is brought is one against incumbrances, the plaintiff is not entitled to recover as damages the amount of all incumbrances, but only such as have been actually enforced, though it would be otherwise if the covenant had been that the land was free from incumbrances. The defendant covenanted that he would give the plaintiff a deed clear of all incumbrances except a mortgage of $1,000:—Held, that the plaintiff's damages should be limited to the excess of the mortgagee's claim over $1,000, notwithstanding there were at the time registered judgments against the land for further sums of money.

Wilson v. Graham, 16 Man. R. 101.

—Private and public acts, construction of.] —Deceased, a workman employed by the defendant Cook on a contract work for the defendant company, was instantly killed by coming in contact with a live wire. The accident occurred on the 6th of August, 1904, and the writ in the action, brought under the provisions of Lord Campbell's Act, was issued on the 15th of July, 1905. Defendant company set up, as a bar to the action as against them, s. 60 of their Act of incorporation, which limits the time to six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway, or works or operations of the company:—Held, on appeal, affirming the decision of Morrison, J., that Lord Campbell's Act is a special Act; creating a special cause of action; and this special cause of action, so specially provided for, does not come within the scope of a general limitation clause in a private Act, passed for the benefit of a private corporation. Effect of the Public Authorities Protection Act, 1893 (Imperial), discussed.

Green v. British Columbia Electric Railway Company, 12 B.C.R. 199.

—Cause of action—Foreign judgment—Absence of debtor.]—Under the provisions of the Yukon Ordinance, c. 31 of 1890, the right to recover simple contract debts in the Territorial Court of Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose notwithstanding that the debtor has not been for that period resident within the jurisdiction of the Court.

Rutledge v. United States Savings and Loan Company, 37 Can. S.C.R. 546.

—Fraudulent conveyance—Statute of Limitations—Cause of action barred.]—(1) An instrument in the form usually called a lien note is not a negotiable promissory note: Bank of Hamilton v. Gillies (1899), 12 M.R. 495, and the right of action upon it is barred by the Statute of Limitations in six years from the due date of it without adding any days of grace. (2) A voluntary conveyance of land cannot be successfully attacked under the statute 13 Eliz. c. 5, on the basis of a debt due at the time of the conveyance but barred by lapse of time before the commencement of the action to attack. Struthers v. Glennie (1888), 14 O.R. 726, followed. (3) A voluntary conveyance of land, if meant to be absolute as between the parties, so that the grantee holds it free of trust for the grantor, leaves no interest in him which can be affected by the registration of a certificate of a subsequently recovered County Court judgment against the grantor. A debt of the grantor, though owing at the time of the making of such voluntary conveyance, became afterwards barred by the Statute of Limitations before the creditor sued the grantor upon it. The grantor neglected to plead that statute and judgment was recovered against him:—Held, that, as against the grantee, such judgment does not relate back to the original debt so as to form the basis for an action under 13 Eliz. c. 5. The grantee having once gained the right to plead the Statute of Limitations in such last-named action, cannot be deprived of that right by the act or omission of the grantor.

Keddy v. Morden, 15 Man. R. 629 (Richards, J.).

—Statute of Limitations — Payment on account — Appropriation of fund.]—A debt collector having accounts placed in his hands by both plaintiffs and defendant for collection, applied to the defendant for payment of his account which was statute-barred. Defendant stated that plaintiffs would never press him for payment, but on the collector insisting, defendant instructed him to hand over to plaintiffs some of the money collected for defendant. The collector accordingly paid in $11.65:—Held, affirming the judgment of Lampman, Co. J., at the trial, that from the instructions of defendant to the collector to pay to plaintiffs some of the moneys collected for him (defendant) could be inferred a promise to pay sufficient to take the debt out of the statute, and was not an appropriation of a particular fund.

Goodacre v. Simpson, 15 B.C.R. 492.

— Injury from electric light wires of company — Six months' limitation clause in Act of incorporation — By reason of the

tramway or railway or the works or operations of the company.]—

Compton v. British Columbia Electric Ry. Co., 10 W.L.R. 377 (B.C.).

— Real Property Limitations Act — Mortgage — Sale by mortgagees under power — Action by mortgagor to redeem — Possession — Legal estate.]—

Campbell v. Imperial Loan Co., 6 W.L.R. 481 (Man.).

— Claim on promissory note — Commencement of statutory period — Return of defendant from beyond seas.]—

Plano Manufacturing Co. v. Peterson, 3 W.L.R. 565 (Terr.).

— Promissory notes — Lien on land—Right to redeem.]—

Re Hardaker, 1 W.L.R. 161 (N.W.T.).

—Injury to passenger—Limitation clause —"By reason of the railway"—"Works or operations of the company."]—Plaintiff, on the 26th of December, 1903, was injured on defendants' tramway in Vancouver, in stepping off a movable platform provided by defendants for the accommodation of passengers transferring at one of the junctions. The platform was necessary to enable passengers to alight, owing to the height of the car steps above the surface of the street, and was so placed that there was very close to it, and not easily observable by passengers leaving the car, a large hole, into which plaintiff stepped, severely injurying her knee. On the 24th of December, 1904, she brought an action to recover damage for her injuries. Defendant company set up, inter alia, s. 60 of their Act of Incorporation, c. 55 of the Statutes of British Columbia, 1896, which enacted that "all actions or suits for indemnity sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage was sustained":—Held (affirming the decision of Duff, J.). that the words "by reason of the tramway or railway or the works or operations of the company," should be read separatim, as describing different branches of the company's undertaking, and that the section does not apply to a case like that at bar, which was based on the defendant company's duty to carry the plaintiff safely.

Sayers v. British Columbia Electric Railway Company, Limited, 12 B.C.R. 102.

—Part payment—Re-sale of goods the subject of conditional sale—Credit of proceeds.]—Plaintiff sued for the balance due upon two lien notes which were more than six years overdue at the time of suit. He had retaken possession of the goods for which the notes were given, and had resold them, crediting defendant with the amount obtained:—Held, not to be a payment by the party chargeable or his agent, sufficient to take the case out of the Statute of Limitations.

Massey-Harris v. Smith, 6 Terr. L.R. 50.

—Sale of land for taxes—Right of municipality to sell after ten years.]—1. Statute of Limitations apply to municipal and other corporations as well as to persons. 2. Section 24 of the Real Property Limitation Act, R.S.M. 1902, c. 100, applies to proceedings taken by a municipality to sell lands for taxes which are a lien or charge on the land, and the municipality will be restrained by injunction from taking such proceedings after the lapse of ten years from the time when the taxes fell due. 3. The plaintiff is also entitled, under s. 17 of the Act, to a declaration that neither the levy of taxes nor the rate remains any longer a lien or charge on the land.

Royce v. Macdonald, 19 Man. R. 191.

—Possession of land—Occasional hay cuttings.]—

See MORTGAGE.

British Canadian v. Farmer, 15 Man. R. 593.

—Evidence required to prove adverse possession—Claim set up by wife living with husband.]—(1) A party asserting a title to land by adverse possession should prove it most clearly and, although there is no statutory requirement that the evidence of such party and members of his family must be corroborated, it would be unsafe, unless such evidence appears to be correct beyond reasonable doubt, to hold that a title by possession has been gained in the absence of strong additional evidence by disinterested witnesses. (2) When a husband and wife are living together, the possession of any property on which they are living or which is occupied by them must ordinarily be attributed to the husband as the head of the family, and the wife cannot acquire title to the property for herself by length of possession under the Real Property Limitation Act, R.S.M. 1902, c. 100. (3) Permission should not be given, even if the Judge has power to allow it, to amend an issue under the Real Property Act, R.S.M. 1902, c. 148, between a married woman claiming by such possession and the holder of the paper title, by setting up that her husband had acquired such title and given the plaintiff a quit claim deed of the property, for no one claiming a title by length of adverse possession is entitled to any such indulgence from the Court. Sanders v. Sanders (1881), 19 Ch.D. 373, distinguished.

Callaway v. Platt, 17 Man. R. 485.

—Promissory note—Statute of Limitations —Acknowledgment.]—Held, that in order

to take a case out of the Statute of Limitations there must be an acknowledgment or promise to pay, and where there is a clear acknowledgment a promise to pay will be inferred, but if such acknowledgment is coupled with words which prevent the possibility of the implication of the promise to pay arising, the acknowledgment is not sufficiently clear to take the case out of the statute.

Deering Harvester Co. v. Black, 1 Sask. R. 123.

LINE FENCES.

See BOUNDARY.

LIQUIDATION.

See BANKRUPTCY; COMPANY III.

LIQUOR LAWS.

Ontario.

—Local option by-law — Voting — Voters' list.]—The certified list of voters used at the voting upon a local option by-law, being the list in fact certified by the Judge of the County Court, was held, the proper list, within the meaning of the Votors' Lists Act, notwithstanding that the Judge might have omitted to comply with the requirements of sub-sec. 4 of s. 17, as to the publication of notice of the sittings of the Court for the revision of the list, and that the only person who made a complaint was a person not entitled under the Act to be a complainant. The last de facto certified voters' list filed in the office of the clerk of the peace is all that the clerk of the municipality is to concern himself with; and where an election has been held at which such a list has been used, it is not open to attack because of some informality or omission on the part of the Judge or of any of the officers intrusted with duties in connection with the list in the performance of their duties under the Act in accordance with its provisions.

Re Ryan and Town of Alliston, 21 O.L.R. 582.

—Township by-law limiting number of licenses—Time for going into operation.]—On the 11th January, 1909, a township council passed a by-law enacting "that the number of licenses for the sale of intoxicating liquors be limited to three." This action was brought in April, 1910, to obtain a declaration that the by-law was void and of no effect:—Held, that the words "for any future license year," in the Liquor License Act, R.S.O. 1897, c. 245, s. 20, mean "for any year future as regards the date of the by-law." This interpretation allows the council, if they are dealing with their own year, to deal at the same time with all succeeding years, without depriving the future councils of their power to deal with their years by altering or repealing the by-law. This by-law, being general, applied to the immediately succeeding license year, and to all future years until altered or repealed; and it was not necessary that it should state that it came into operation at the beginning of the then ensuing license year. Re Wilson and Town of Ingersoll (1894), 25 O.R. 439, disapproved. Re Brewer and City of Toronto (1909), 19 O.L.R. 411, followed. 2. That, although the kind of license was not specified, it should be read as applying to tavern licenses only, there being no shop licenses in the township. 3. That the previously existing by-law, restricting the number of licenses to seven, was repealed by this by-law, being inconsistent with it, though words of repeal were not used. Semble, that such a declaration as sought should not, in any event, be made, as before the time came for the issue of another set of licenses, a perfect by-law could be passed by the council.

Bourgon v. Township of Cumberland, 22 O.L.R. 256.

—Conviction for second offence in absence of accused—Inquiry as to first offence.]—The defendant was charged with a second offence against the Ontario Liquor License Act, and was, in his absence, though duly summoned, convicted thereof before a magistrate, and sentenced to be imprisoned. Section 101 of the Act, as found in R.S.O. 1897, c. 145, provides that in such a case the magistrate shall in the first instance inquire concerning the subsequent offence only, and, if the accused be found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted; but, if he denies or does not answer, the magistrate shall then inquire concerning the previous conviction. The words "and not before" were struck out by the amending Act 9 Edw. VII. c. 82, s. 20. By s 718 of the Criminal Code, when the defendant has been duly summoned, if he fail to appear, the magistrate may proceed with the trial ex parte or may issue his warrant and adjourn the trial until the defendant is apprehended. S. 721 provides that, if the defendant is personally present, he shall be asked to plead. These sections are made applicable to offences against Ontario Statutes by the Summary Convictions Act, R.S.O. 1897, c. 90, s. 2, unless in any Act "hereafter passed it is otherwise declared:"—Held, reversing the order of Middleton, J., discharging the defendant upon habeas corpus, that the magistrate had jurisdiction to convict the defendant in his absence; the two provisions were neither repugnant nor inconsistent, and should be read together. Per Meredith, J.A., that,

since the amendment striking out the words "and not before," the provision of s. 101, as to asking the defendant whether he was previously convicted, must be regarded as directory only. Per Magee, J.A., that the provision is peremptory; but (with some doubt) the section may be construed, in connection with other sections, so as to authorize proceeding in the defendant's absence, if he chooses to absent himself altogether.

Rex v. Coote, 22 O.L.R. 269.

—**Sale of more than quart—Hotel limit.**]—Where the employee of the licensee refused to sell the applicant more than the statutory limit but told him he could go outside and return and then make another purchase, which he did, the total of both being in excess of the legal limit, and the magistrate convicted, the order of a county Judge setting aside the conviction was affirmed on appeal.

Rex v. Trainor, 2 O.W.N. 398.

—**Imprisonment in default of paying fine—Thirty days or one month.**]—1. Where a statute limits the period of imprisonment in default of paying a fine to one month, and, the conviction awards thirty days, the Court will not on certiorari quash the conviction on the ground that the thirty days may exceed one month but will amend the conviction to one month under Cr. Code, s. 889. 2. S. 101, s.-s. 5 of the Ontario Liquor License Act, applies to authorize the re-summoning of the offender and revision of the penalty in respect of a subsequent conviction in any case where the prior conviction has been set aside.

The King v. Rudolph, 1 O.W.N. 1057.

—**License reduction—By-law limiting licenses to one—Monopoly.**]—Although passed in good faith, a by-law limiting to one the number of licenses to be granted in a municipality was set aside on the ground that such limitation was in effect to create a monopoly.

Re McCracken & Sherborne, 1 O.W.N. 1091, 16 O.W.R. 733.

—**By-law restricting number of licenses—Next ensuing year.**]—A by-law restricting the number of liquor licenses to three was attacked on the grounds that no time was mentioned when it should come into force, and that it was vague because it did not specify that it applied to taverns only or to taverns in particular. Evidence showed that there were no shop licenses in the township. Boyd, C., held, that the by-law was valid; that it came into operation on 1st May next ensuing after its passage.

Bourgon v. Township of Cumberland, 1 O.W.N. 1012, 16 O.W.R. 582.

—**Informant not resident of county.**]—It is not necessary that the informant should be a resident of the county wherein the offence was committed.

Rex v. Dunkley, 16 O.W.R. 263.

—**"Club."**]—Eight men contributed $1 each, which was handed to defendant. He rented a room for an unstated period, paying $4 for one month's rent, and with the balance purchased two eight gallon kegs of lager beer. He borrowed a beer pump and procured some glasses which were all taken to the room, where a P. C. found these men drinking beer. Defendant was charged with a violation of s. 50 of the Liquor License Act. The police magistrate dismissed the information. The Crown appealed. Widdifield, Co. C.J., held, that there was a club or association within the meaning of s. 53, and allowed the appeal. Defendant fined $20 and costs.

Rex. v. Cahoon, 17 O.W.R. 467.
17 Can. Cr. Cas. 65.

—**Infractions of Liquor License Act—Last day for laying information—Information laid by telephone—New territorial division.**]—Informations were laid before a police magistrate for Algoma, charging defendants with infractions of the Liquor License Act, in the District of Sudbury. The informations were laid by telephone on the last day allowed by statute and were forwarded by mail:—Held, that this was not a compliance with the Liquor License Act, s. 95. Held, further, that the Algoma magistrate had no jurisdiction to receive informations relating to offences committed in the District of Sudbury. Charges dismissed with costs.

Rex v. Harrington, 16 O.W.R. 169.
17 Can. Cr. Cas. 62.

—**Local option—By-law submitted to electors—Voting—Scrutiny.**]—A County Court Judge holding, under secs. 369 and 371 of the Consolidated Municipal Act, 1903, a scrutiny of the ballot papers deposited at the voting upon a by-law submitted to the electors, has no authority to require any person who voted to state for whom he voted. Upon such a scrutiny the Judge has, however, jurisdiction to enter upon an inquiry as to the right to vote of the persons who have voted; but that inquiry is limited, in view of the provisions for finality of s. 24 of the Voters' Lists Act, 1907, as regards the right to vote of any person whose name is entered on the voters' list upon which the voting took place, to an inquiry as to whether, subsequently to the list being certified, he has become by change of residence, disentitled to vote. In re Local Option By-law of the Township of Saltfleet (1908), 16 O.L.R. 293, followed:—Semble, that, the jurisdiction of the County Court Judge being purely statutory, he has not the power to deduct the bad votes from the number cast in favour of the by-law,

but his proper course is to certify the facts to the council.

Re Orangeville Local Option By-law, 20 O.L.R. 476.

—Local option by-law—Posting copies of by-law—Publication.]—A local option by-law was submitted to the electors and approved by a vote of 481 in favour of the by-law out of a total vote of 781, the statutory minimum being thus exceeded by 12:—Held, that the least number of votes which would require to be struck off to destroy the majority was 32; and therefore it was not necessary, upon a motion to quash the by-law, to consider the objection that 20 persons voted who had no right to vote. 2. Upon the evidence, s. 338 (2) of the Municipal Act, 1903, had not been complied with, copies of the by-law not having been put up at four of the most public places in the municipality; and s. 204 of the Act did not apply to heal this defect, the onus of proving that the omission had not affected the result being upon the municipality, and not having been met; and upon this ground the by-law should be quashed. 3. The by-law was published in a newspaper issued outside the municipality in a certain village, without the authority of a resolution by the council, as required by s. 338 (2). The clerk said, "We always get our printing done there." Held, following In re Salter and Township of Beckwith (1902), 4 O.L.R. 51, that an objection to the by-law based on this irregular publication was not tenable.

Re Begg and Township of Dunwich, 21 O.L.R. 94.

—Local option by-law—Voting—Declaration by clerk—Scrutiny—Illiterate voters.]—The result of the voting upon a local option by-law, as declared by the clerk, was that 571 votes were for the by-law and 232 against, i.e., a total of 603 votes, of which more than three-fifths were for the by-law. Upon a scrutiny before a County Court Judge one vote which had been wrongly counted for the by-law was transferred to the other side, two ballots were rejected for defect of form, and 10 votes were struck off the winning side, because, as the Judge found, 10 persons had voted who had no right to do so. According to this result, the total of the votes was 591, 358 of which were cast for the by-law, being more than three-fifths. The Judge certified, under s. 371 of the Municipal Act, 1903, that the by-law had received the approval of more than three-fifths of the electors voting thereon. Upon a motion to quash the by-law:—Quære, whether there is any necessity for a summing up or declaration by the clerk; but held, upon the evidence, that the declaration required by the Act was made by the clerk. The by-law being now attacked on the ground that it had not in fact received the approval of three-fifths of the electors voting thereon:—Held, that it lay upon the applicant to show that a sufficient number of votes must be struck off to establish that upon the declaration by the clerk, with the proper changes, the requisite majority was not in fact obtained. The Court should start with the result declared by the clerk, not that found by the County Court Judge; upon motions of this kind the Court may go behind the findings of the County Court Judge—his judgment in disallowing as well as in allowing votes may be attacked. Of the 371 votes counted in the declaration of the clerk for the by-law, it was admitted that one was counted by mistake for, instead of against; this left 370 for and 233 against. Held, that it would be necessary to strike 21 votes off the 370 to reduce the majority vote below the statutory minimum. Process of arriving at this figure explained. The votes of a number of persons, illiterates and others, whose ballots were marked for them by the deputy returning officers were objected to, on the ground that these persons had not been required to take declarations, and that the marking had not been done in the presence of the agents, as required by s. 171 of the Municipal Act. Held, in the case of one of these, a blind voter, that no declaration was needed; and as to the irregularity of marking his ballot in his presence alone, and not in the presence of the agents, that his vote could not be struck off on that ground, for the right to vote could not be considered to depend upon the manner of voting. Two very old women, who stated that they were unable to mark their ballots, were each accompanied into the voting compartment by a relative, with the permission of the deputy returning officer, upon the consent of the agents, including the person moving to quash the by-law, without any declaration of physical incapacity being made. Held, that these votes could not be struck off; it was not the right to vote, but the manner of voting, that was objected to. At one of the polling subdivisions there were 6 unmarked or spoiled ballots in the box. There was evidence that one of the voters at this place threw down the ballot upon the table, after having taken it into the voting compartment and returned with it, saying that she would have nothing to do with it. Being examined as a witness upon the motion, she refused to say whether she had made any marks upon the ballot. The ballot was placed in the box. It was contended that her vote should not have been counted. Held, that the Court, upon these facts, was not bound to find that this ballot was marked at all. It was sworn that one voter was allowed to mark her ballot in public and without retiring into the compartment. This was not specifically denied Held, taking the incident as sworn to, that the vote was not invalidated by an irregularity in voting. Of the 10 persons found by the County Court Judge to have voted, not having the right to vote, by reason of change of residence,

5 were persons whose places of residence had not been changed since the certification of the voters' list used as the voting. Held, that the judgment in In re Local Option By-law of the Township of Saltfleet (1908), 16 O.L.R. 293, 302, did not apply; and the Act prevented an inquiry by the County Court Judge, or by the Court upon this motion, into the right of these 5 persons to vote. The name of a married woman was entered on the list as "widow." It was shewn that she owned the property assessed to her as "widow," and was the person intended by the description. Held, that her name was on the list, and she had a right to vote. In one of the polling subdivisions 220 ballots were handed out, 220 voters were entered as voting, but 221 ballots were taken out and counted. Held, that, upon this state of facts, a vote should not be struck off the winning side. After the close of the poll in one subdivision the ballots were thrown loosely into a basket, after they had been regularly counted and certified, and were left exposed after the general public were admitted, so that they would have access to them, before they were replaced in the ballot box. Held, that this did not affect the result, and at the worst was an irregularity after the taking of the vote. The clerk of the municipality acted not only as returning officer, but also as deputy returning officer in one of the polling subdivisions. Held, following Re Pickett and Township of Wainfleet (1897), 28 O.R. 464, 467, that this was an irregularity; but it was only an irregularity. Objections to 16 other votes were not considered, as, if they were all allowed, the result would not be affected. And held, that all the irregularities were covered by sec. 204 of the Act. It was considered that the applicant, who was an agent at one of the polling subdivisions, was estopped by his acquiescence; but semble, that in a public matter such as this the doctrine of estoppel has no place.

Re Ellis and Town of Renfrew, 21 O.L.R. 74.

—Notice not to supply intoxicating liquor to named person—Information by person not within statute—Defamation.]—The defendant, the license inspector for a county, upon the application to him of McK., who was married to the sister of the plaintiff's first wife, knowing that fact, and believing that McK. was the brother-in-law of the plaintiff, issued a notice, under s. 125 (1) of the Liquor License Act (6 Edw. VII. c. 7, s. 33), to the hotel-keepers of the county, forbidding them to deliver liquor to the plaintiff. The section says that, among other persons, "the parent, brother or sister, of the husband or wife" of any person who has the habit of drinking liquor to excess, may require the inspector to give the notice. The defendant acted in good faith and without improper motive:—Held, that McK. did not come within the statute, and had no more authority to intervene than a stranger; the effect of the unauthorized notice was to promulgate a libel, to injure the plaintiff's business, and to expose him to various disabilities and interfere with his freedom of action; the plaintiff was, therefore, entitled to recover damages from the defendant. Held, also, that the defendant, as a public officer, was entitled, under R.S.O. 1897, c. 88, to notice of action; but, as he acted without jurisdiction or exceeded his jurisdiction, it was not necessary under s. 2, which was the section applicable, that the notice should contain a charge of malice and absence of reasonable and probable cause; it was sufficient to state, as was stated in the notice served, that the act was done unlawfully. Moriarity v. Harris (1905), 10 O.L.R. 610, and Roberts v. Climie (1881), 46 U.C.R. 264, specially referred to.

Piggott v. French, 21 O.L.R. 87.

—Conviction for second offence—Amendment of statute—First conviction—Change in penalty.]—Notwithstanding the provisions of secs. 1 and 6 of R.S.O. 1897, c. 83, and of the Liquor License Act, R.S.O. 1897, c. 245, s. 121, there is a right of appeal to a Divisional Court of the High Court from an order of a Judge of the High Court, made on the return of a habeas corpus and certiorari in aid, refusing to discharge a prisoner confined under a conviction as for a second offence of selling liquor without a license, contrary to the Liquor License Act. The prisoner was first convicted on the 28th July, 1908. In 1909, by s. 12 of 9 Edw. VII. c. 82, s. 72 of the Liquor License Act was amended by increasing the penalty for a first offence. The conviction for the second offence was made after the amendment:—Held, by Clute, J., and by a Divisional Court on appeal, that, having regard to the Interpretation Act, 7 Edw. VII. c. 2, s. 7, clause 46 (d), the offence for which the prisoner was convicted was a second offence within the statute, notwithstanding the amendment. But held, by the Divisional Court, that the convicting magistrate, in inquiring as to the previous conviction, had not followed the procedure indicated by s. 101 of the Liquor License Act; and the prisoner must be discharged.

Rex v. Teasdale, 20 O.L.R. 382.
16 Can. Cr. Cas. 53.

—Local option by-law—Method of taking vote—Votes of illiterate persons.]—Upon an application to quash a local option by-law, upon the ground that the by-law, upon being submitted to the electors, did not receive the necessary majority of votes, it appeared that ten of the persons who voted were unable to read or write or were otherwise incapacitated from marking their ballot papers, and that the deputy returning officers marked ballot papers for them, without requiring them to make declarations of inability to read or physical incapacity,

and in the absence of the agents appointed for and against the by-law, and without making the proper entries in the poll-books; in these respects failing to comply with the provisions of s. 171 of the Municipal Act, 1903:—Held, that the vote of one of these persons should be disallowed, because it was clear upon the evidence that the deputy returning officer marked the ballot as he (the officer) pleased, the voter giving no direction. As to three of the votes, they should not, upon the evidence, be disallowed. As to the six remaining, it appeared that each of the voters had a full and fair opportunity to cast his ballot; that the six ballots were marked by the deputy returning officers in good faith and in accordance with the directions of the voters; that no objection was taken by the agents to the method adopted of taking the votes, but that that method was acquiesced in by every one present. Held, that the non-compliance with the provisions of the Act in regard to these six votes should not invalidate the by-law, the voting having been conducted in accordance with the principles of the Act, and the non-compliance not affecting the result: Municipal Act, s. 204. In the case of one of the ten voters a person accompanied her and was present with her in the polling-booth in circumstances which enabled that person to ascertain how the voter's ballot was being marked. Held, that that fact did not, in the circumstances, affect the result. The motion to quash the by-law was dismissed without costs, the irregularities of the deputy returning officers, the appointees of the municipality, being such as to provoke suspicion and warrant the motion.

Re Prangley and Strathroy, 21 O.L.R. 54.

—Jurisdiction of justices—Request of police magistrate not appearing—Habeas corpus.]—The defendant was convicted by two justices of the peace of an offence against the Liquor License Act. The initiatory proceedings were taken before a police magistrate, and it did not appear upon the face of the conviction (though it was the fact) that the justices were acting at the request of the police magistrate:—Held, upon motion to discharge the prisoner from custody under a warrant of commitment based upon the conviction, that, having regard to the provisions of R.S.O. 1897, c. 87, s. 22, the conviction was bad because it did not show the jurisdiction of the Justices; but the Court ordered that the prisoner should be further detained and the conviction amended under the Liquor License Act s. 105. Held, also, that it was not a ground for discharge that the warrant of commitment did not conform to the conviction, in that the conviction did not state the costs and charges of conveying the defendant to gaol; the statement of the costs in the warrant was sufficient. Held, also, upon an objection that the proper distribution of the penalty was not determinable upon the face of the proceedings, that it was sufficient that it appeared from the information that the informant was a license inspector, and that the conviction declared that the fine imposed should be paid and applied according to law. Objections that the justices, having drawn up and returned to the clerk of the peace an order for the payment of money, could not afterwards file any conviction with him, that no minute of such order was made before commitment, and that an amended conviction could not be put in after the enforcement of the fine and costs by imprisonment, were also overruled.

Rex v. Ackers, 21 O.L.R. 187, 16 Can. Cr. Cas. 222.

—Magistrate's conviction for selling liquor to minor—Appeal to County Court Judge—Trial de novo.]—The defendant, a licensed hotel-keeper, was convicted by a police magistrate, under 7 Edw. VII. c. 46, s. 8, introducing a new provision for s. 78 of the Liquor License Act, R.S.O. 1897, c. 245, for unlawfully giving, selling, or supplying intoxicating liquor to a youth who was apparently or to the knowledge of the defendant under the age of twenty-one years. The youth was before the magistrate, and testified that he was under twenty-one; there was no other evidence as to his age, and no evidence as to the knowledge of the defendant. Under s. 118 of the Act, the defendant appealed to a County Court Judge, who made an order, quashing the conviction. No fresh evidence was taken before the Judge; the written depositions taken by the magistrate were (by agreement) put in; and the Judge had not the supposed minor before him:—Held, by a Divisional Court, upon a further appeal, by leave of the Attorney-General, under s. 120 of the Act, that the conviction was properly quashed, there being no evidence before the Judge that the defendant knew that the youth was under twenty-one and none that he was apparently under twenty-one. The appeal to the Judge under s. 118 is in effect a trial upon the merits, the burden of proof is not upon the appellant, and the findings of the magistrate are irrelevant. Semble, per Riddell, J., that the age of the supposed minor could not be proved by his own testimony; and also that the whole effect of disbelieving evidence is to wipe out the evidence; and, although the magistrate might disbelieve the evidence of the defendant that he thought the youth was twenty-one years old in appearance, he could not find that this evidence proved the opposite.

Rex v. Farrell, 21 O.L.R. 540, 16 Can. Cr. Cas. 419.

—Local option by-law — Voting — Special meeting of council—Good Friday—Printing done by clerk—Disqualification.]—Upon a

motion to quash a local option by-law:—Held, having regard to the amendment of s. 351 of the Municipal Act by 9 Edw. VII. c. 73, s. 9, that the clerk of a municipality can vote upon the submission of such a by-law to the electors. 2. That the action of the council, unanimous and without objection, in finally passing the by-law at a meeting held on Good Friday, was valid. Foster v. Toronto R.W. Co. (1899), 31 O.R. 1, referred to. 3. That, a special meeting of the council having been held on the 21st March for the purpose of finally passing the by-law and having been adjourned until the 28th March, it was not illegal to pass the by-law at another special meeting called for the 25th March; sec. 270 (1) of the Municipal Act. 4. That the clerk of the municipality was not disqualified by reason of his having published the by-law and done the printing in connection with it, nor because he had printed for pay certain literature in regard to the contest over the by-law for the organized class of electors who were advocating the adoption of it. 5. That the appointment of D. to act as scrutineer in polling subdivision No. 1, the certificate of the clerk that he was entitled to vote in No. 1, and the delivery of both to the deputy returning officer for No. 1, was sufficiently proved; and the clerk's certificate, that D., as scrutineer in polling subdivision No. 1, was qualified to vote in polling subdivision No. 2, on lot 16 West Main, and that this certificate entitled him to vote in polling subdivision No. 1, contained all that the Act required—the words "for or against the by-law" not being necessary. 6. That N., the deputy returning officer in No. 2, whose certificate read, "is a duly qualified tenant in polling subdivision No. 1, and is, therefore, entitled to vote in No. 2, was properly allowed to vote in No. 2, being "a person claiming to vote as a tenant:" s. 113. 7. That the real qualification of a voter whose name was on the list for No. 2 and who voted in No. 2, could not be inquired into: 7 Edw. VII c. 4, s. 24. 8. That persons "named" in the voters' list, even if their qualifications were not stated or were not sufficiently stated, were entitled to vote: 7 Edw. VII. c. 4, s. 24. In re McGrath and Town of Durham (1908), 17 O.L.R. 514, followed. 9. That Arthur S. Bashford was entitled to vote, as "the person . . . intended to be named" in the voters' list, the name in the list being "Bashford, Geo. S.:" Municipal Act, s. 112. In re Armour and Township of Onondaga (1907), 14 O.L.R. 606, 608, followed. 10. That persons whose names appeared on the list as "Morgan, Dr.," "Nichols, Mrs." were entitled to vote—there was no necessity for having the full name. 11. That the objection that a number of persons voted openly without having previously made declarations of secrecy, and voted in the presence of unauthorized electors and persons, should not be given effect to in determining the number of votes for a by-law; the objection does not go to the right to vote. 12. That the entering in the poll books before the day of polling of the names of the persons on the voters' list was irregular, but it could not affect the result, nor the right of any voter to vote. 13. That the fact (if it was a fact) that, although sec. 341 of the Municipal Act was complied with by the council fixing a time and place for the appointment of persons to attend at the various polling places, s. 342 was not complied with because the head of the municipality did not appoint at the time fixed, was not fatal to the by-law; s. 342 is a provision "as to the taking of the poll," and so covered by s. 204, which should be applied. Re Bell and Corporation of Elma (1906), 13 O.L.R. 80, and Re Kerr and Town of Thornbury (1906), 8 O.W.R. 451, explained. 14. That, notwithstanding several irregularities, the by-law was saved by s. 204.

Re Schumacher and Town of Chesley, 21 O.L.R. 522 (D.C.).

—Appeal to Court of Appeal—Option of Attorney-General—Warrant of commitment—Conviction for second offence—Proof of prior conviction.]—The defendant, being imprisoned under a conviction for an offence against the Ontario Liquor License Act, obtained a writ of habeas corpus (with certiorari in aid) and moved for an order for his discharge, which was refused by a Judge in Chambers:—Held, Britton, J., dissenting, that a Divisional Court of the High Court had no jurisdiction to entertain an appeal from the Judge's order. Re Harper (1892), 23 O.R. 63, followed. Rex v. Teasdale (1910), 20 O.L.R. 382, not followed. Held, also, per Riddell, J., that the Divisional Court could not entertain a substantive application for a writ of habeas corpus; the matter being res adjudicata unless and until the decision of the Judge in Chambers was got rid off; and the Divisional Court as a Divisional Court having no jurisdiction. Rex v. Miller (No. 2) (1909), 19 O.L.R. 288, followed. Held, also, per Riddell, J., that, though a person is limited, by reason of the appeal to the Court of Appeal given by the Habeas Corpus Act, to one habeas corpus, the common law right to go from Judge to Judge until either a writ is obtained or every Judge has refused, still remains. Taylor v. Scott (1899), 30 O.R. 475, and Rex v. Akers (1910), 1 O.W.N. 672, explained. Held, also, per Riddell, J., that the proceeding begun by the writ of habeas corpus was not an "action," within the meaning of the Consolidated Rules. Held, also, per Riddell, J., that the fact that in this particular case (the conviction being under the Liquor License Act) the right of appeal was not or might not be absolute, but only at the option of the Attorney-General, did not affect the rule in Taylor v. Scott, supra.

Notwithstanding the objection to the jurisdiction of the Divisional Court, Riddell, J., considered the points raised by the appeal, and stated his opinion thereon, as follows:—1. While it is the general rule that an appellant is not allowed to raise in the appellate Court anything which has not been raised below, the rule is not applied in cases affecting the liberty of the subject. 2. That the warrant of commitment was not bad because the word "liquor" was interlined in the recital of the conviction of the defendant for having "unlawfully sold liquor without the license," etc. 3. That the warrant of commitment sufficiently showed the authority of the magistrate alleged to have previously convicted the defendant (the conviction under which he was imprisoned being for a second offence). 4. That, while in the conviction the magistrate was described as "the undersigned William Lawson, police magistrate in and for the said county of Frontenac, and one of His Majesty's justices of the peace for the said county of Frontenac," but, in speaking of the prior conviction the words were "before me, the said William Lawson," it was to be taken that the prior conviction was made by Lawson, not as a justice of the peace, but as police magistrate, in which latter capacity only he would have jurisdiction. Hunt qui tam v. Shaver (1895), 22 A.R. 202, followed. 5. That the objection that the warrant did not state the place at which the conviction for the second offence took place was answered by saying that the form in schedule L. to the Liquor License Act had been followed. 6. That, although the warrant of commitment, in describing the offence in the recital of the conviction, omitted the word "unlawfully," while otherwise following the form in schedule F.(3), it was sufficient having regard to s. 72 of the Liquor License Act. 7. That the warrant (in the form in schedule L.) was sufficiently addressed to the keeper of the common gaol, by the description of his official character, though not by his name as an individual, to justify him in detaining the prisoner; the warrant was produced by the keeper, and the Court was not concerned about the description of the constables. 8. That the conviction was not invalidated by reason of interlineations and erasures in material parts; the conviction must be read with the interlineations and erasures as they appeared. 9. That the provision in the conviction, after the adjudication of imprisonment for three months for the offence, that the defendant should pay the costs of the complainant, and, if not paid, that the costs should be levied by distress, and, in default of sufficient distress, that the defendant should be imprisoned for fifteen days, unless the said costs and the charges conveying the defendant to gaol were sooner paid, was warranted by the Criminal Code, except as regards the charges of conveying the defendant to gaol; as to which charges s. 739 of the Criminal Code (as amended by 8 and 9 Edw. VII. c. 9) did not apply, nor s. 89 of the Liquor License Act, nor R.S.O. 1897, c. 90; nor could the conviction be amended under s. 105 of the Liquor License Act (distinguishing Rex v. Degan (1908), 17 O.L.R. 366); but, if the conviction was in other respects good, the Court should (if it had jurisdiction) exercise the power given by secs. 1124 and 754 of the Criminal Code, and make a proper conviction. 10. That the effect of the amendment, by 9 Edw. VII. c. 82, s. 209, of s. 101(1) of the Liquor License Act, striking out the words "and not before," is to make the provision directory, instead of imperative and peremptory. 11. That the prosecutor, though interested, was not an incompetent witness: Canada Evidence Act, R.S.C. 1906, c. 145, s. 3; R.S.O. 1897, c. 73, s. 2. 12. That the prior conviction could not be proved by persons present in Court when the alleged conviction took place; the prior conviction not being proved, the conviction for a second offence could not stand; Britton, J., agreeing in this. 13. That the case could not be remitted under s. 105 (3) of the Liquor License Act (9 Edw. VII. c. 82, s. 32), which only applies where evidence has been rejected; nor could proceedings be taken under s. 101(5), the previous conviction not having been set aside; but the Court might (if it had jurisdiction) proceed under s. 1124 of the Code, and make use of the power given under s. 754, to make a conviction as for a first offence.

Rex v. Graves, 21 O.L.R. 329.
16 Can. Cr. Cas. 150, 318.

—Local option by-law—Voting—Form of ballot.]—By 8 Edw. VII. c. 54, s. 10, the Ontario Liquor License Act, s. 141, is amended by adding thereto a sub-section providing that the form of the ballot paper to be used for voting on a by-law prohibiting the sale by retail in a municipality of intoxicating liquors shall be, "For Local Option"—"Against Local Option." After the passing of the amending Act, a by-law was submitted to the electors of a town, and the form of ballot paper used was not that perscribed by the amendment, but "For the by-law"—"Against the by-law:"—Held, Middleton, J., dubitante, that the defect in form was cured by the Interpretation Act, 7 Edw. VII. c. 2, s. 7(35); that the mistake was not such as was calculated to mislead the voters; and (per Britton, J.) that, upon the material before the Court, the voting was, apart from this mistake, conducted according to the principles of the Act, and the result was not affected by the mistake; and, therefore, s. 204, of the Municipal Act could be applied. Order of Meredith, C.J.C.P., 1 O.W.N. 698, affirmed by Divisional Court.

Re Giles and Town of Almonte, 21 O.L.R. 362.

—**Transfer of license—Premises to be made "suitable"—Powers of license commissioners — Ratepayers' petition.**]—License commissioners appointed under the Ontario Liquor License Act have no power to say to an applicant for a transfer of a license that, if he will put certain premises into a suitable state for compliance with the law in the future, they will transfer a license to such premises; they are entitled to act under the statute only with regard to the existing state of facts, not to make promises as to the future, in such cases. O'C. having no interest in the premises proposed to be licensed, and having no valid license at all, presented a petition to the commissioners for the transfer to these premises of a license standing in his name for other premises in which he had no longer any real interest. He supported this by the statutory ratepayers' petition, which stated that the new premises were suitable for a tavern, whereas they admittedly did not possess the required accommodation, and that he was a proper person to become licensee of them. The commissioners heard petitions and counter-petitions upon the matter, and decided that they would allow the transfer of O'C.'s license to the new premises when they should be made suitable; but before that time arrived O'C., whose fitness for the transfer was one of the subjects of the petition, had ceased to have any interest in the matter, and was allowed to make over his right to K., who in this way escaped the necessity of obtaining the certificate of the ratepayers as to his fitness: —Held, that this was illegal, and if the plaintiff had asked promptly for an injunction to prevent O'C., when he had no valid license and no interest in the new premises, from obtaining rights by asserting that he had, he might possibly have obtained some relief; but at the trial it was too late to interfere, for K. had obtained rights which could not be interfered with in his absence, and the license commissioners whose conduct was in question had ceased to hold office. Held, also, that an offer made by the defendants to submit the question of the costs of the action to be disposed of in Chambers should have been accepted by the plaintiff, and, as it was not, the plaintiff was not entitled to costs against O'C.; and, as the unauthorized action of the license commissioners had caused the trouble, they should not have costs against the plaintiff.

East v. O'Connor, 2 O.L.R. 355.

—**Unincorporated club—Intoxicating liquors for use of members only—Proof of consumption of liquor on club premises—Meaning of "conclusive" evidence.**]—(1) An unlicensed person, who, as a member of an unincorporated club, purchases, with the funds of the club, a supply of intoxicating liquors for the use of the members, each of whom, although at liberty to help himself, was to contribute to the keeping up of the fund in proportion to what he used of the supply, is guilty under the Ontario Liquor License Act of the offence of unlawfully keeping liquor for sale. (2) Proof of the consumption of liquor in the premises occupied by a society, association or club within the provisions of s. 53 of the Ontario Liquor License Act, by any member thereof, constitutes incontrovertible evidence of the sale or keeping for sale of such liquor, and the effect of s. 53, sub-s. 3, which declares that such proof shall be "conclusive evidence" of sale, and that "any member of the club, etc., shall be taken conclusively to be the person who keeps such liquors for sale," is to debar any member of the club against whom the charge is laid, from showing the contrary. (3) Such enactment is intra vires of the Provincial Legislature.

R. v. Lightburne, 4 Can. Cr. Cas. 358. (Benson, Co. J.).

—**Seizure under execution—Covenant to assign license—Covenant running with the land—Interpleader—R.S.O. 1897, c. 245, s. 37.**]—A license under the Liquor License Act cannot be seized by a sheriff under a fieri facias against goods. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into a license. The right to sell liquor at a particular place under such a license is a personal one, and is not assignable by the holder of it except under the conditions imposed by s. 37 of the Liquor License Act, R.S.O. 1897, c. 245. Semble, a covenant in the lease of an hotel by the lessee that he will from time to time apply for a license and at the expiration of the lease assign to the lessor the license, if any, then held by him, is not a covenant binding on the assignee of the term as such, being merely personal and having nothing to do with the land or its tenure.

Walsh v. Walper, 3 O.L.R. 158.

—**Devise of hotel premises to widow for life—Transfer by license commissioners of license to widow—Absolute right of widow thereto.**]—A testator by his will devised certain real estate consisting of hotel premises to his wife during widowhood for the benefit of herself and four children, the income to be applied for their support and maintenance until the children became of age, and in case of daughters until marriage. On the widow marrying the property was to go to the children, the widow being paid $1,000. On the testator's death in 1896, the widow applied to the License Commissioners and obtained a transfer of the license to her for the remainder of the

year, and for the subsequent years until 1900 the license was granted to her, she carrying on the business and maintaining herself and children thereout, no money of the estate going into the business:—Held, that after the testator's death the license and goodwill of the hotel business belonged to the widow personally, and formed no part of the estate; and apart therefrom the income was divisible amongst the widow and children as directed in Allen v. Furness (1892), 20 A.R. 34. Held, also, that creditors of the widow were entitled to attach the widow's interest in the property which could be reached by the appointment of a receiver.

Taylor v. Macfarlane, 4 O.L.R. 239 (Falconbridge, C.J.K.B.).

—Intoxicating liquors—Local Option By-law—Directions to voters—Motion to quash—Electors' status to oppose.]—A local option by-law named as one of the polling places a small unincorporated village; without specifying any house, hall or place in the village. Polling had taken place at this village year after year at municipal elections, and any house or place in it could be easily found:—Held, following In re Huson and South Norwich (1892), 19 A.R. 343, that the polling place was sufficiently defined. But, held also, that as directions to voters had not been, as required by the Municipal Act, ss. 142 and 352, furnished to the deputy returning officers, and as there was not clear evidence of the posting up under the direction of the council of the by-law at four or more public places, the by-law must be quashed, these not being irregularities cured by s. 204, and the fact that no harm had, as far as shown, resulted, being no answer. The municipal council having decided not to oppose the motion to quash the by-law, certain electors were allowed, at their individual risk as to costs, to oppose it in the council's name. Re Mace and Frontenac (1877), 42 U.C.R. 76, followed.

In re Salter and Township of Beckwith, 4 O.L.R. 51 (Britton, J.).

Tavern licenses — Township by-law limiting to one — Monopoly.] — The effect of s. 20 of the Liquor License Act, when read with s. 330 of the Consolidated Municipal Act, is that no township can pass a by-law providing that the number of licenses shall be limited to one; the result of the by-law is in effect to create a monopoly. By-law quashed with costs. In re Barclay and Township of Darlington, 12 U.C.R. 86, and In re Greystock and Township of Otonabee, ib. 458, followed.

Re McCracken and Township of Sherborne, 1 O.W.N. 1091.

— Local option by-law — Repealing by-law — Voting on — Form of ballot.]—A local option by-law was passed by the defendants' council in January, 1906. In December, 1908, a repealing by-law was introduced and given two readings, and submitted to the electors in January, 1909. The form of ballot used was that prescribed by 8 Edw. VII. c. 54, s. 10, amending s. 141 of the Liquor License Act. This amendment changed the ballot from "For the By-law" or "Against the By-law" to "For Local Option" or "Against Local Option." The directions for the guidance of voters were changed to meet the requirements of the new form of ballot, though this was not in terms provided for by the amending enactment:—Held, that the change made in the directions was lawful. Held, also, that the plaintiff could not, upon the facts, maintain this action, which was brought to have it declared that the repealing by-law had not been properly voted upon, and so to clear the way for the passing of another repealing by-law (this one having been defeated at the polls by a majority "for local option"); for it was not shown that any ratepayer desired to have another by-law submitted, or that the council desired or intended to submit one. Held, also, that a change in the territorial limits of the municipality by county by-laws did not affect the voting upon the repealing by-law.

Ward v. Town of Owen Sound, 1 O.W.N. 512 (D.C.).

— Convictions for first and second offences —Quashing the first — Amendment of second — Term of imprisonment — "Thirty days" — "One month" — Amendment.] — The defendant was convicted of a first offence of selling liquor without a license, and also of a second offence. The first conviction was quashed for illegality, and that left the other conviction in effect one for a first offence:—Held, that, under s. 101 (5) of the Liquor License Act, R.S.O. 1897, c. 245, the second conviction could be amended so as to make it appropriate to a first offence; that sub-section is not limited to cases where the quashed conviction has been made by a County Court Judge on appeal; the language is wide enough to cover every case where a first conviction has been legally avoided. Held, also, on a motion to quash the second conviction as amended, that the manner of making the amendment was only a matter of form, and it was no objection that the magistrates had drawn up a new conviction, instead of amending the old one, both being returned. Held, also, that, it was no objection that the magistrates had imposed a penalty of $45 and costs, though that was the same penalty as for the assumed second conviction. By s. 86, the penalty for a first offence is not less than $20 "besides costs," and not more than $50 "besides costs." By that costs are accessory to the penalty, and the power to give costs is not withheld, though s. 101 (5) speaks only of "penalty or pun-

ishment." It could not be said that $45 was not an appropriate penalty for the offence; and by the Criminal Code, s. 735, the magistrates, in their discretion, had power to order the payment of costs. Held, also, that it was no objection that the information was laid by the license inspector for a district other than that in which the sale was made; by s. 94 of the Act, any person may be the prosecutor. Held, also, that the imposition of "thirty days" imprisonment in case of default in payment of fine and costs, instead of one month, as provided by s. 86, was not fatal to the conviction, the error being amendable under 2 Edw. VII. c. 12, s. 15 (O.), introducing the provisions of the Criminal Code, 1892, s. 889 of which is applicable to an excess in punishment. Regina v. Spooner, 32 O.R. 451, referred to. Regina v. Gavin, 30 N.S.R. 162, distinguished.

Rex v. Rudolph, 1 O.W.N. 1057 (Boyd, C.).

—Powers of license commissioners—Resolution prohibiting games of chance on licensed premises—"Euchre"—Knowledge of licensee.]—A board of license commissioners, under the authority of the Liquor License Act, R.S.O. 1897, c. 245, s. 4, ss. 4, passed a resolution "that no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . or on the premises": —Held, MacMahon, J., dissenting, that the powers of the commissioners, under s. 4, were not restricted by s. 81, and that the resolution was within their powers. Four persons played "euchre" for amusement in a room behind the bar of the defendant's hotel, the cards used being the property of one of the players, a boarder in the hotel:—Held, that "euchre" is a game of chance, and that the defendant was properly convicted of an infraction of the resolution by reason of the game having been played in his premises, though without his knowledge. Held, also, that s. 100 of the Act should be read into the resolution providing for the recovery of the fine imposed upon a conviction, and that the direction of the conviction for recovery by distress, and, in default of distress, imprisonment, was authorized. Held, also, that where the license inspector attends Court as prosecutor he is to be allowed certain expenses by way of costs, as provided in s. 117, and there was nothing wrong in the amount ($4.20) allowed for costs in this case. If it were wrong, it was severable, and could not affect the conviction.

Rex. v. Laird, 6 O.L.R. 180 (D.C.).

—Cross-examination of accused as to previous offences.]—1. A conviction for a third offence under the Ontario Liquor License Act will be quashed if it appears that the only evidence of the previous convictions was the admission of the accused upon his cross-examination upon the principal charge. 2. It is not permissible to interrogate the accused as to the previous convictions until after the adjudication of the principal charge, and s. 101 of the Liquor License Act is imperative in that respect.

The King v. Dealtry, 7 Can. Cr. Cas. 443, 40 C.L.J. 38.

—Local option by-law—Second reading without formal motion—Approval by vote of ratepayers.]—A local option by-law was introduced in a town council on the 5th October, 1903 and a motion that it be read a first time was carried, after discussion, on a division of eight to two. On the 17th November a motion that the second reading should be deferred till January was lost on a division of three to seven. The council then went into committee of the whole and reported the by-law, which was then "read and passed as having had its second reading," but without any motion that it be read a second time. The by-law was then submitted to the electors, as provided by the Liquor License Act and the Municipal Act, and was approved by a vote of 869 to 679. On the 11th January, 1904, the by-law was, on motion, read a third time in the council, and also on motion, adopted as final. On the 23rd April, 1904, a motion to quash the by-law, on the ground that there was no motion for a second reading, was launched. The procedure by-law of the council contained a provision that in proceedings of the council the law of Parliament should be followed in cases not provided for. The procedure followed in this case was, however, the usual procedure of the council:—Held, that the matter was one of internal regulation, of which the mayor was the judge, subject to the appellate jurisdiction of the council; that, even if there was an irregularity, a by-law passed pursuant to a statute and adopted by vote of the people should not be quashed by reason thereof; and further, that as a matter of discretion, and in view of the delay in moving, a motion should be refused.

Re Kelly and Town of Toronto Junction, 8 O.L.R. 162 (Falconbridge, C.J.K.B.).

—Conviction—Third offence—Evidence of previous convictions—Improper reception—Subsequent deletion.]—A conviction of the defendant for a third offence against the Liquor License Act, R.S.O. 1897, c. 245, was quashed on the ground that the convicting magistrate had improperly admitted evidence of previous convictions before the determination of the defendant's guilt upon the charge against him of a third offence, contrary to s. 101 of the Act. Regina v. Edgar (1887), 15 O.R. 142, approved and followed. Dictum of Armour, C.J., in Regina v. Brown (1888), 16 O.R.

41, 48, disapproved. Held, also, that the jurisdiction of the magistrate was gone when he admitted the improper evidence, and his competence was not restored by its deletion.

Rex. v. Nurse, 7 O.L.R. 418, 8 Can. Cr. Cas. 173 (D.C.).

—Local option—Voting on by-law—Irregularities.]—Upon an application to quash a local option by-law of a village, approved by the electors by a vote of 124 to 117, it was alleged that in taking the vote the requirements of the Municipal Act had not been complied with, in that: (1) no newspaper was designated by the council wherein the by-law should be published; (2) one person was not appointed to attend the polling on behalf of those interested on each side; (3) persons were allowed to vote who were not so entitled; (4) no compartment was provided wherein a voter could mark his ballot screened from observation; (5) other persons were present in the compartment with the voter; (6) other persons were allowed to be in a position to see how the voter marked his ballot; (7) persons were allowed to be in the polling place who were not entitled to be there; (8) the returning officer did not perform various duties required of him at and after the close of the poll. Some of the allegations were disproved in fact. As to matters which were proved:—Held, that they were irregularities which did not affect the result, the voting having been conducted in accordance with the principles laid down in the Act, within the meaning of s. 204; and the motion was refused.

Re Dillon and Village of Cardinal, 10 O.L.R. 371.

—Selling liquor without a license—Second offence—Form of conviction—Arrest under warrant not backed.]—On a conviction for a second offence, for selling liquor without a license, on which imprisonment was directed, a warrant of commitment was issued, directed to the peace officers of the county in which the conviction was made, upon which the defendant was arrested in another county and conveyed to gaol, without the warrant being backed by a justice of that county. A writ of habeas corpus having been issued on the defendant's behalf, the gaoler returned the warrant as the cause of the detention, and the conviction and amended conviction were returned under a writ of certiorari issued in aid:—Held, that the amended conviction being before the Court, and sufficient grounds appearing therefrom for the detention, enquiry would not be made as to the regularity of the caption of the defendant, nor would any enquiry be made if there had been nothing before the Court but a regular warrant of commitment to the gaol of the proper county. Regina v. Jones (1888), 8 C.L.T. 333, not followed. Where, in a conviction for such second offence, the prior conviction was referred to as if being then adjudicated upon, instead of its being stated as a fact found on enquiry, after the finding of the charge then before the magistrates, but which fact, the evidence disclosed, had been so found, the court refused to interfere, intimating that, if necessary, the conviction could be amended. Judgment of Anglin, J., affirmed.

Rex. v. Whiteside, 8 O.L.R. 622, C.A.

—Recovery of payment for liquor illegally sold—Holding license as trustee—Ontario Liquor License Act.]—The defendants, having become possessed of the good will of a liquor business theretofore carried on by an insolvent, who was indebted to them, and of the chattel property on the premises whereon the business had been carried on, sold them to the plaintiff for $1,200, it being agreed that the license should be taken out in the name of the defendant's manager, as was in fact done, to be held and controlled by him for the purpose of securing the purchase money. The defendants also obtained a lease of the premises and supplied the plaintiff with liquor to carry on, and which he resold in the course of his business, they debiting him with the price of the liquor and with the rent. Held, that the plaintiff was entitled to recover monies paid by him to the defendants for liquor so supplied, under s. 126 of the Liquor License Act, R.S.O. 1897, c. 245, as furnished in contravention of that Act, and especially of s. 64 (1), prohibiting such sales to unlicensed persons for the purpose of the latter re-selling, and this though the defendants were brewers duly licensed by the Government of Canada for the manufacture of liquor and also held a Provincial brewer's license. The granting of a license to one who has no interest in the business, and is not an occupant of the premises in which it is carried on, in trust for another who is the true owner of the business, and the occupant of the premises, is not a thing permissible under the Act. Held, also, that the defendants were not entitled to recover, by way of counterclaim, on notes given by the plaintiff for liquor supplied under the above circumstances, but that there being no scheme of any kind to evade the Act in the arrangement made, the defendants were entitled to recover the rent of the premises and money paid for plaintiff. Waugh v. Morris (1875), L.R. 8 Q.B. 202, specially referred to. Held, further, that the liability invoked by the plaintiff was not a penalty imposed upon the defendants within the meaning of R.S.O. 1897, c. 108, and could not be relieved against under that Act.

Boucher v. Capital Brewing Company, 9 O.L.R. 266, D.C.

—**By-law limiting number of tavern licenses and prescribing accommodation—"License year."**]—A by-law passed by the council of a town before 1st March, 1905, limiting the number of tavern licenses, prescribing the accommodation to be possessed by taverns, and fixing the amount of license duties, was held not to be invalid because it omitted the words "beginning on the first day of May," after the words "license year," in prescribing the number of tavern licenses for the "ensuing license year." In prescribing the accommodation for taverns the by-law did not limit its provisions to the ensuing license year, but was so general that it might apply to all future years:—Held, that the scope of the by-law being limited on its face to the license year 1905-1906, the general words of the clause dealing with accommodation were limited to that year. Sections 20 and 29 of the Liquor License Act, R.S.O. 1897, c. 245, considered. Objections to the procedure of the council in relation to the passing of the by-law were over-ruled, the by-law being valid on its face, none of the objections having been raised by any member of the council, and the matters objected to being matters of internal regulation.

Re Caldwell and Town of Galt, 10 O.L.R. 618 (Teetzel, J.).

—**By-law—Local option in intoxicating liquors—Right of council to pass upon by-law approved by electors.**]—A local option by-law of a township was voted upon and approved by the electors on the 2nd January, 1905, and was finally passed by the unanimous vote of the council at a special meeting held on the 21st January, 1905. It was objected that the council had no power to pass the by-law on that day, because at a meeting of the council on the 9th January, when only four or five members were present, a motion for the final passing was negatived as the result of two voting for the motion and two against:—Held, that it was competent for the council at a special meeting of the 21st January to reconsider their action, to reverse it, and, without again introducing and submitting the by-law to the vote of the electors, to pass it. Re Wilson and Town of Ingersoll (1894), 25 O.R. 439, commented upon. Per Anglin, J.:—The first sentence of s. 373 of the Municipal Act, 3 Edw. VII. c. 19 (O.), is not imperative; notwithstanding the approval of the electors, the council may still reject the by-law, and are not bound to pass it. Decision of Britton, J., affirmed.

Re Dewar and Township of East Williams, 10 O.L.R. 463, D.C.

—**Searching for liquor—Absence of warrant—Private dwelling house.**]—Defendant, a county constable, appointed by a police magistrate, searched the plaintiff's dwelling house for liquor without a warrant and without any special authority. In an action for trespass the trial Judge held that the defendant was acting in the discharge of his duty, and there being no evidence of malice, that he was entitled to notice of action, and withdrew the case from the jury and directed a non-suit:—Held, that the question as to whether the defendant was acting bona fide in the discharge of his duty as a constable in searching a private house as being a house of public entertainment, for liquor was a question for the jury; and that leave and license, which was argued on the appeal but not pleaded should also, if pleaded, be submitted to the jury, and the judgment dismissing the action was set aside and a new trial ordered with liberty to the defendant to amend by adding a plea of leave and license. Judgment of the County Court of Hastings reversed.

Bell v. Lott, 9 O.L.R. 114, D.C.

—**Appeal to County Court—Justice of the Peace—Police Magistrate.**]—The Liquor License Act, R.S.O. 1897, c. 245, provides by s. 118, ss. 6, that an appeal shall lie to the Judge of the County Court of the county in which an order of dismissal is made . . . where the Attorney-General of the Province so directs, in all cases in which an order has been made by a justice or justices dismissing an information or complaint laid by an inspector:—Held, that the words "Justice or Justices" in the sub-section does not include a police magistrate.

Rex. v. Smith, 11 O.L.R. 279 (Teetzel, J.).

—**Local option by-law—Motion to quash—Publication through mistake of by-law and notice more than five weeks before day of voting—Correction.**]—Where, by the mistake of the township clerk, the first publication of a local option by-law was more than five weeks before the voting day, but very shortly afterwards, on discovering the mistake, he caused such publication to be cancelled, treating it as a nullity, and republished the by-law so as to bring it within the proper time, the notice appended thereto stating it was the first publication, and the result of the voting was apparently in no way affected by the first erroneous publication:—Held, that the publication was sufficient. Re Armstrong and Township of Toronto (1889), 17 O.R. 766, distinguished. The legality of the election of the members of the council who pass such a by-law, they having been returned as duly elected and having taken the oath of office, will not be enquired into on a motion to quash the by-law. The fact that the reeve, who signed the by-law and caused the corporate seal to be attached, having prior thereto purported to resign from the office,

without the consent of the majority of the members present at a meeting of the council, and without his resignation having been entered on the minutes thereof, did not preclude him from afterwards acting as such.

Re Vandyke and the Village of Grimsby, 12 O.L.R. 211 (D.C.).

—**Local option by-law—General bribery.**]—A cattle drover who was not a "temperance man," nor an agent in any way of the "temperance people" who were promoting the passage of a local option by-law, having a grudge against a local hotel keeper, took an active interest in the passing of the by-law by treating freely as he travelled through the township, with a view, as he admitted, of influencing the electors to vote for the by-law. There was no general drunkenness, and it was not proved definitely that any one elector had been treated. The by-law was carried by a majority of 205 in a vote of over 1,200:—Held, in the circumstances, that such treating and conduct were not the means of passing of the by-law in violation of the provisions of secs. 245 and 246 of the Consolidated Municipal Act, 1903.

Re Gerow and Township of Pickering, 12 O.L.R. 545 (D.C.).

—**Selling liquor on vessel—Territorial limits of province—Offence committed on great lakes—Jurisdiction.**]—The Province of Ontario extends to the middle line of Lake Huron as defined in the treaties of Paris and Ghent; and the British North America Act, in fixing the electoral divisions of the Province, recognizes the territorial sub-divisions provided for by the statute which is now R.S.O. 1897, c. 3, by which the limits of the counties and townships bordering on Lake Huron extend to the boundary of the Province; within the territorial limits of the Province, as to the subjects of legislation assigned by the British North America Act to the Provinces, the legislative authority of the Province is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow; the regulation of the traffic in intoxicating liquors within the limits of the Provinces by a license law is one of the subjects assigned by the British North America Act to the Provincial Legislatures; and therefore the Ontario Legislature had authority to enact s. 10 of the Liquor License Act, which provides that no license shall be issued for the sale of liquor nor shall any liquor be sold or kept for sale in any room or place on any vessel navigating any of the great lakes, etc.; notwithstanding the contention that the only jurisdiction over the great lakes is in the Admiralty Courts. Regina v. Keyn (1876), 13 Cox C.C. 403, and Regina v. Sharp (1860), 5 P.R. 135, distinguished. The defendant, the master of the steamer "Greyhound," was convicted before a police magistrate having jurisdiction over the whole County of Huron, for that he (the defendant), on Canadian waters adjacent to the harbour of the Town of Goderich, in the said County of Huron, did "unlawfully allow liquors to be sold" on the steamer "Greyhound," of the City of Detroit, in the State of Michigan, "without a license therefor by law required":—Held, upon the evidence, that the vessel, although a foreign vessel, was not when the offence was committed proceeding from one foreign port to another, but was being used for an excursion which went out from the port of Goderich for a few miles and returned to that port, and therefore the rule of international law forbidding interference with persons on board a foreign vessel navigating the high seas or the great lakes was not applicable. Semble, that where it is plain that the Legislature has intended to disregard or interfere with a rule of international law, the Courts are bound to give effect to its enactments. Held, that the conviction was not invalid merely because the place in the county where the offence was committed was not stated with more particularity than as above recited. Held, that the conviction disclosed no offence, unlawfully allowing liquor to be sold not being an offence created by the Liquor License Act; but the conviction should be amended so as to make it for an offence under sub-section 1 of section 49 of the Act, viz., the selling or bartering of liquors without the license required by law; Meredith, C.J., doubting whether the defendant was an "occupant" within the meaning of section 111, whether the words "house, shop, room, or other place," included a vessel, and whether the offence of selling liquor without a license was of the nature of the offence alleged in the conviction; Criminal Code, s. 889.

Rex. v. Meikleham, 11 O.L.R. 366 (D.C.).

—**Contract by correspondence—Knowledge of seller that illicit re-sale intended.**]—See SALE OF GOODS.

—**Local option by-law—Adoption by electors—Three-fifths majority—Computation—Rejected or uncounted ballots.**]—In computing the three-fifths majority of voters required for a local option by-law by 6 Edw. VII. c. 47, s. 24, sub-s. 4 (O.), rejected or uncounted ballots are not to be considered. Upon a motion to quash such a by-law the applicant may go behind the voters' lists, and show that illegal votes were cast; if he succeeds in showing that, the illegal votes must be deducted from those favorable to the by-law; and if the result be that the majority is not sufficient, the by-law will be quashed.

Re Cleary and Township of Nepean, 14

O.L.R. 392. (Not followed in re Mitchell and Campbellford, 16 O.L.R. 578).

—Expropriation—Hotel property — Goodwill—License, value of—Interest.]—Where the land taken on a railway expropriation consisted of an hotel property, an allowance was properly made for the loss sustained by the owner for the disturbance of his business and anticipated profits by reason of the expropriation, notwithstanding by the fencing off of the railway property therefrom, which the company had the right to do, the hotel property might have been rendered valueless as such, but which right the company had never attempted to exercise and presumably never would have exercised. The value of the license of an hotel is also a proper subject of allowance, though merely a personal right, and the renewal thereof, though reasonably probable, is not absolutely certain. Interest on the amount of compensation awarded is properly allowable from the date of the taking of the land, which in this case was the filing of the plan showing the land expropriated, and the order of the Railway Commission authorizing the taking.

Re Cavanagh and Canada Atlantic Railway Company, 14 O.L.R. 523, 6 Can. Ry. Cas. 395.

—Vote on by-law—Local option—Division into wards—Single or multiple voting.]—Section 355 of the Ontario Municipal Act, 3 Edw. VII. c. 19, providing that "when a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law" does not apply to the vote on a local option by-law required by s. 141 of the Liquor License Act, R.S.O. (1897), c. 245. Judgment of the Court of Appeal, 13 Ont. L.R. 447, affirming that of the Divisional Court, 12 Ont. L.R. 488, affirmed.

Sinclair v. Town of Owen Sound, 39 Can. S.C.R. 236.

—Local option by-law—Omission of essential part—Quashing.]—The omission in a local option by-law of the time and place where the votes are to be summed up, as provided by sections 341 and 342 of the Con. Mun. Act, 1903 (O.), is the omission of an essential part of and makes the by-law invalid, and s. 204 of the Act does not apply to cure the defect, as such omission is more than an irregularity.

Re Bell and Township of Elma, 13 O.L.R. 80 (D.C.).

—Conviction for second offence—Imprisonment—Police magistrate—Territorial jurisdiction—Proof of previous conviction—Affidavit of magistrate.]—On a motion upon habeas corpus for the discharge of a person imprisoned under a conviction regular on its face, the Court will not rehear the case or weigh the evidence or sit in appeal, but will examine the depositions returned upon certiorari granted in aid of the habeas corpus, to see if there is any evidence to sustain the conviction, and, if none is found, will discharge the prisoner; this is required by the language of R.S.O. 1897, c. 83, s. 5. (2) The police magistrate for the town of Brampton has jurisdiction, at the request of the police magistrate for the township of Toronto, to try a person accused of an offence committed in the township. (3) A prisoner will not be discharged because the warrant of commitment returned, by a clerical error, bears a date before that of the conviction upon which it is founded. (4) The conviction of the prisoner returned purported to be for a second offence of selling intoxicating liquor without a license, contrary to the Ontario Liquor License Act, and the sentence was four months' imprisonment as for a second offence. By s. 99 of the Act the magistrate is required to reduce to writing the evidence of the witnesses, which is to be read over to and signed by them. The depositions returned failed to show any proof of a previous conviction:—Held, that the magistrate's affidavit that proof of the previous conviction was in fact properly given could not be accepted on the motion for discharge of the prisoner, and no evidence being returned to warrant the conviction for a second offence, which was essential to support the adjudication of imprisonment for four months, the prisoner was entitled to his discharge. (5) The prisoner was also entitled to his discharge on the ground that he was not allowed fair or reasonable opportunity to make his defence; he was served with a summons to appear the next day after service to answer the charge; he did so; the information was then amended so as to charge an offence upon a day other than either of those mentioned in the summons; and he was refused an adjournment; all of which, as well as other things in the proceedings before the magistrate, was contrary to natural justice.

Rex v. Farrell, 15 O.L.R. 100.

—Local option by-law—Mode of computing three-fifths majority — Qualification of voters—Irregularities in meetings of council.]—The proper mode of dealing with votes improperly cast on the submission of a local option by-law under 6 Edw. VII. c. 47 (O.), is to deduct them from the total number cast, and take three-fifths of the remainder. The Court will not, under s. 89 of 3 Edw. VII. c. 19 (O.), inquire into the qualification of those entered on the voters' list. Regina, ex rel. McKenzie v. Martin (1897), 28 O.R. 523, followed. Objections to the following votes by reason of what had taken place after the final revision of the roll were over-ruled, and the

votes held good:—(1) Where two farmer's sons were assessed as owners, the father being the owner of the farm, the subsequent death of the father and the devise of the farm to one of the sons; (2) Where a farmer's son was assessed as owner, the father being the owner of the farm, the subsequent sale of the farm by the father, but who acquired another farm before the voting. The following votes were also held good: (1) Where the son, the voter, lived with his mother, who had a life estate in the property, with a power of appointment amongst a class which included the son; (2) a farmer's son, assessed as owner and living with his father, the owner of the farm, but who subsequently became the tenant; (3) a farmer's son, assessed as owner, living with his father, the owner, but carrying on a blacksmith business off the property; (4) an infant who became of age before the voting took place; (5) a farmer's son, the father and another being tenants in common of the farm; (6) where the property had been acquired after the roll had been made up, but before the final revision thereof; (7) where the property had been sold after the final revision, but another had been acquired before the date of the election. Deputy returning officers are not entitled to vote on such a by-law; it is not necessary that they should be selected before the publication of the by-law, and their names mentioned therein, nor is it necessary to name a day for the final passing of the by-law, these being cured by 4 Edw. VII. c. 22, s. 8 (O.). An Indian reserve, within the territorial limits of a township, but over which the municipal council has no jurisdiction, need not be specifically excepted in the by-law, for the municipal council must be assumed to have dealt only with the territory within their jurisdiction. In construing the word "week" in dealing with the required three weeks' publication of the by-law, it must be taken in its ordinary acceptance, which would include Sundays and holidays, and, therefore, not necessarily seven days, exclusive thereof. Irregularities in the meeting of the township council, or illegality in the election of the members, cannot be raised in a proceeding of this character.

It need not appear on the face of the by-law that scrutiny has taken place.

In re Armour and Township of Onondaga, 14 O.L.R. 606 (Riddell, J.).

—Local option by-law — Publication — "Three successive weeks."]—The publication of a proposed by-law in a newspaper "each week for three successive weeks," as required by sub-sec. 2 of s. 338 of the Consolidated Municipal Act, 1903, means a publication once in each of three successive periods of seven days, beginning on the first day of actual publication. Where a by-law was published in a newspaper on Friday the 14th, Tuesday the 18th, and Tuesday the 25th, of a certain month:—Held, that there had been two publications in the first week or seven-day period, one in the second, and none in the third, and that the statute had not been complied with. Held, also, that non-compliance with the provisions of s. 338 could not be treated as a mere irregularity curable under s. 204. Re Robinson and Village of Beamsville (1906), 8 O.W.R. 689, and (1907), 9 O.W.R. 273, distinguished. Cartwright v. The Municipal Corporation of the Town of Napanee, 9 O.L.R. 69, at p. 71, followed.

Re Rickey and Township of Marlborough, 14 O.L.R. 587.

—Jurisdiction—Delay in issuing summons.]—By s. 95 of the Liquor License Act, R.S.O. 1897, c. 245, an information for an offence must be laid within thirty days of the commission thereof, and by s. 559 of the Criminal Code, the justice upon receiving any complaint or information "shall hear and consider the allegations of the complainant, and, if of opinion that a case for so doing is made out, shall issue a summons" the form of summons given in the schedule referring to the offender as having "this day" been charged. The offence was committed on the 21st, and the information laid on the 24th of October, but the summons though dated the 24th of October, was not issued until the 14th of January following. After notice of motion for prohibition had been served on the magistrate, he made his conviction, and on the return of the motion it was agreed that the motion should be deemed as asking in the alternative for a writ of certiorari. Anglin, J., refused to grant prohibition, and a Divisional Court affirmed his judgment, but directed a writ of certiorari to issue. Subsequently the order nisi granted on the return of the certiorari was discharged.

Rex v. Hudgins, 14 O.L.R. 139 (D.C.), 12 Can. Cr. Cas. 223.

—Police magistrate—Offence committed in county outside the city limits—Jurisdiction.]—Motion to quash a conviction made by a police magistrate of a city, appointed under R.S.O. 1877, c. 72, and afterwards appointed police magistrate for the county in which the city was situate, under 41 Vict. c. 4, s. 9 (O.), for an offence committed in the county outside the city limits. A salaried police magistrate was subsequently appointed for the county under 48 Vict. c. 17, s. 1 (O.); R.S.O. 1887, c. 72, s. 8:—Held, that the conviction was good, as the later appointment was not "in the place and stead" of the first, and that the convicting magistrate had jurisdiction in both city and county. Per Britton, J. The city police magistrate is ex officio a justice of the peace for the county, and could as police magistrate, sitting

alone, do anything that two justices of the peace sitting together could do.

Rex v. Spellman, 13 O.L.R. 43 (D.C.), 12 Can. Cr. Cas. 99.

—Municipal by-law—Power to prohibit sale in shops only—Discrimination.]—A municipal council under the powers conferred by s. 141, sub-s. 1 of the Liquor License Act may pass a by-law prohibiting the sale of liquors except by wholesale in shops without at the same time prohibiting the sale in taverns.

Re Frawley and Orillia, 14 O.L.R. 99.

—Imprisonment under several warrants—Consecutive terms of imprisonment.]—Section 72 of the Liquor License Act, R.S.O. 1897, c. 245, enacts that, in the event of the imprisonment of any person under several warrants of commitment under different convictions in pursuance of this Act, the terms of imprisonment under such warrants shall be consecutive and not concurrent:—Held, that in such case, upon the fine imposed on the first conviction being paid, the imprisonment commences under the second; and if the fine be not paid, the second term commences at the end of the first; and in the meanwhile the prisoner is held under both warrants. Under the power to amend the conviction, warrant, process or proceeding given by s. 105 of the Liquor License Act, the Court has power to amend by striking out references to the costs of conveying to prison when the same are not properly indicated in the commitments or sufficiently identified by endorsement. Held, also, that on proceedings before a magistrate on a charge of selling liquor contrary to the said Act, counsel for the defendant, in the absence of the latter, had authority to bind him by an agreement that the shorthand reporter's notes should have the same force and effect as if taken down by the magistrate, and read over to and signed by each witness.

Rex v. Degan, 17 O.L.R. 366.

—Sale of liquor near public works.]—In areas wherein R.S.O. 1897, c. 39, an Act respecting the sale of intoxicating liquors near public works, is in force, a person who sells liquor without license may be proceeded against either under that Act or under the general Liquor License Act, R.S.O. 1897, c. 245. It is optional to proceed under either one Act or the other, with this proviso, that the offender shall not be punished twice for the same illegal sale. The fact that a man is a police magistrate does not debar him from calling in another justice of the peace to sit with him, and there is nothing to oust the general jurisdiction of justices in the fact that a stipendiary magistrate has been appointed for the district. The omission to ascertain the costs and insert the amount in a conviction under the Liquor License Act, R.S.O. 1897, c. 245, s. 49, is only an irregularity and not a fatal defect, and may be afterwards rectified by the same justices if it is sought to enforce payment of the costs:—Semble, that under the proper construction of s. 49 of the Liquor License Act, it is not necessary to negative the excepted cases in a conviction under that section. Semble, that reducing the evidence of witnesses to writing and tendering the same to them to be signed by them, though details which it is better not to disregard, are not essential to the validity of a conviction under the Liquor License Act.

Rex v. Irwin, 16 O.L.R. 454.

—Local option by-law—Irregularities in conduct of election—Provisions as to secrecy.]—On a motion to quash a local option by-law passed by the municipal council of a town after an election at which five more than the requisite three-fifths of the electors voting thereon were in favor of the by-law, the applicant established many important violations fully set out in the judgment of Riddell, J., of the statutory provisions relating to the taking of the poll, more especially of those which are intended to secure the secrecy of the ballot which were in effect disregarded:—Held, that the election was invalid and the by-law must be quashed, inasmuch as the irregularities proved were of such a nature as to cause an interference with the polling of a full, fair, and untrammelled vote of the electorate, and that such irregularities were not cured by s. 204 of the Municipal Act.

Re Hickey and Town of Orillia, 17 O.L.R. 317.

—Sale to person who had no license—Re-sale.]—A purchaser who was not himself licensed to sell intoxicating liquors went to a brewery and ordered five dozen pints. He said he was "ordering it for the campers." The vendors did not ask who the campers were, or what he meant by that phrase:—Held, that there was nothing in the reply to give the vendors reason to believe that the purchaser did not buy to re-sell within the meaning of sub-s. 2 of s 64 of the Liquor License Act, R.S.O. 1897, c. 245, and that, therefore, the vendor was rightly convicted under that section.

Rex v. Calcutt Brewing Co., 17 O.L.R. 363.

—Local option by-law—Deputy returning officer and poll clerks—Right to vote and take oath—By-law passed before expiration of two weeks for scrutiny.]—By virtue of the Liquor License Act, R.S.O. 1897, c. 245, s. 141 of which provides that the council of every township may pass a prohibitory by-law, known as a local option by-law,

provided that before the final passing thereof it had been duly approved of by the electors in the manner provided by the electors in the manner provided by the section in that behalf of the Municipal Act. The fact that such a by-law was read a third time before the expiration of two weeks allowed for a scrutiny is immaterial, where, after such two weeks, and within the time limited for its passing, the by-law is read and finally passed. Deputy returning officers and poll clerks are entitled to vote on such by-laws, under s. 347 of the Municipal Act, and can properly take the oath, which may be required to be taken by persons claiming to vote thereon. Re Local Option By-law of Township of Saltfleet, 16 O.L.R. 293, followed. Re Armour and Township of Onondaga, 14 O.L.R. 606, not followed.

In re Joyce and Township of Pittsburg, 16 O.L.R. 380.

—Evidence taken in shorthand—Consent.] —Upon a prosecution for a second offence of selling intoxicating liquor without a license, contrary to the Liquor License Act, R.S.O. 1897, c. 245, the evidence was taken in shorthand, with the express consent of the accused, and was not read over to or signed by the witnesses, as required by s. 99. The accused was convicted and sentenced to imprisonment. Upon the return to a habeas corpus:—Held, following The King v. Janneau (1907), 12 Can. Crim. Cas. 360, that the consent amounted to a legal waiver of a requirement affecting procedure only; and the prisoner was not entitled to be discharged. Semble, that, apart from any consent on the part of the accused, the effect of secs. 683, 711, 721 of the Criminal Code, warranted the course taken.

Rex v. Warilow, 17 O.L.R. 284, 14 Can. Cr. Cas. 117.

—Local option by-law—Motion to quash—Adoption by electors—Voters' lists—Finality of—Meaning of "scrutiny."]—In voting on a local option by-law, under the Liquor License Act, which requires the assent of the electors before the final passing thereof, the voters' lists, when revised and certified by the Judge, under the Ontario Voters' Lists Act, 7 Edw. VII. c. 4, s 24, are (with certain exceptions specified in said section) final and conclusive evidence that all persons named therein, and no others, are qualified to vote on the by-law. Voting on such a by-law is an "election," and a motion to quash the by-law is a "scrutiny," within the meaning of the said 24th section. Re Cleary and the Township of Nepean (1907), 14 O.L.R. 392, not followed.

Re Mitchell and Corporation of Campbellford, 16 O.L.R. 578.

—By-law to reduce number of licenses—Unauthorized limitation — Meaning of "year."]—By sub-s. 1 of s. 20 of the Liquor License Act, R.S.O. 1897, c. 245, the council of every city is authorized by by-law passed before the 1st of March in any year to limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by the Act. Under the authority of this sub-section, the municipal council of the city of Toronto, on February 22nd, 1904, passed a by-law, the second section of which provided that "the number of tavern licenses to be issued shall not exceed the number of one hundred and fifty in any one year." On January 27th, 1908, the council passed a by-law, intituled "A by-law to reduce the number of tavern licenses to 110," the effect of which was to amend the second section of the first by-law, so that it would read: "The number of tavern licenses to be issued shall not exceed the number of 110 in any one year." The number of licenses issued by the License Commissioners for the license year commencing on May 1st, 1907, was 144, but under s. 8, sub-s. 3, of the Act, they had authority, if special grounds were shown, to issue the six unissued licenses at any time before 1st of May, 1908:—Held, that the council by the by-law of 27th January, 1908, had, in effect, assumed to limit the number of licenses which the License Commissioners had authority to issue for the license year beginning on the 1st May, 1907, and that the by-law was therefore ultra vires, and should be quashed.

Re Hassard and City of Toronto, 16 O.L.R. 500.

—Local option by-law—Municipal corporations—Requisite three-fifths majority obtained—Two weeks allowed for scrutiny—Final passing by council before expiry thereof—Irregularities.] — By sub-s. (1) of s. 141 of the Liquor License Act, R.S.O. 1897, c. 245, the municipal council may pass a local option by-law provided that before the final passing thereof it has been approved by the electors "in the manner provided by the sections in that behalf of the Municipal Act"; but by s. 24 of 6 Edw. VII. c. 47 (O.), if three-fifths of the electors voting on the by-law approve of it, the council shall within six weeks thereafter finally pass it, and that the duty so imposed may be enforced by mandamus or otherwise. A local option by-law was submitted to the electors of the town of Midland, and, on the day following the voting, the clerk of the council declared the result of the voting, which was in its favour by the requisite majority. A week after, the council purported to finally

pass the by-law. Per Osler and Garrow, JJ.A., in the Court of Appeal.—The provisions of the Municipal Act, as contained in secs. 369-374 as to the ascertainment by the clerk of the result of the voting and as to the right to a scrutiny apply to a by-law of this kind; and, therefore, the by-law should not be finally passed by the council until the expiration of the two weeks next after the clerk has declared the result of the voting, but there being here the requisite two-thirds majority, and no attempt made to obtain a scrutiny, the only objection made being as to the faulty third reading, the passing of the by-law being a purely formal and ministerial act only, which the council could be compelled to do, nothing would be gained by quashing it. Per Maclennan and Meredith, JJ.A. —The by-law could properly be passed by the council at any time within the six weeks, notwithstanding the non-expiry of the two weeks allowed for the scrutiny, so long as there was the three-fifths majority, there being nothing to prevent a scrutiny being had afterwards. Moss, C.J.O., agreed in the result. Judgment of the Divisional Court affirmed:—Held, by the Divisional Court:—(1) No proceedings after the polling, such as summing up the votes, or a declaration by the clerk of the result of the voting are necessary. (2) Where a voter, instead of handing the ballot paper to the deputy returning officer, puts it into the box himself, but with the officer's approval, the vote is not invalidated. (3) In computing the three weeks required for the publication of the by-law, the word "week" is used in its ordinary signification, and includes Sundays and holidays. (4) The question whether the council, when it passed the by-law, was properly constituted or not, will not be considered on a motion to quash. (5) Knowledge by the council, when finally passing the by-law, that the three-fifths majority had been obtained, is not essential. (6) The ballot-boxes used for voting on the by-law can properly be used for concurrent voting for other objects, the Act in no way restricting their use to voting on the by-law only. (7) Objections, that the voters' lists were not properly prepared; that the list for one of the polling divisions contained more than the requisite number of voters; and that certain deputy returning officers and poll clerks were not properly appointed, were over-ruled. (8) The declaration of inability to read or physical incapacity to mark the ballot is a pre-requisite to open voting, and its absence invalidates the vote, even though it is done with the consent of the scrutineers for and against the by-law; but the defect was immaterial, for, even if struck off, the result would not be affected. (9) A voter is not to be deprived of his vote by reason of the submission to him by the deputy returning officer of a useless form of oath. (10) The fact that a public harbour, which is subject to the legislative authority of the Dominion, was within the territorial limits of the township does not necessarily raise the presumption that the council intended the by-law to apply thereto, even assuming that the council had not power to do so. (11) The copy of the by-law as advertised was: "In every tavern, inn or other house of public entertainment," omitting the words "or place" between the words "other house" and "public entertainment," which were contained in the original by-law:—Held, that the phrases "tavern, inn or house or place of public entertainment" and houses of entertainment were equivalent terms, and an objection that the copy published was not a true copy was overruled.

Re Duncan and Town of Midland, 16 O.L.R. 132 (C.A.).

—Hotel keeper—Sale of three gallon keg of beer—Pretended sale of one quart at a time.]—A person brought a three gallon keg to the defendant's hotel to be filled with beer, and was informed by the defendant who held a "tavern license" that he could not sell more than a quart at a time. The keg was taken into a room adjoining the bar-room and a little less than a quart of beer drawn off and poured into the keg, and this was repeated until the keg was filled:—Held, that this was a sale by the defendant of three gallons and not of a quart at a time as authorized by his license; and that the offence came within s. 49 of the Liquor License Act, R.S.O. 1897, c. 249, namely for selling otherwise than as permitted by his license. Order of the county Judge quashing a conviction by a police magistrate set aside and conviction restored.

Rex v. Lamphier, 17 O.L.R. 244.

—Second offence—Admission of previous offence—Record — Magistrate's minute—Uncertainty—Discharge of prisoner—Excessive penalty—Power to amend.]—The defendant was convicted on the 15th September, 1908, for selling liquor without a license; the conviction recited that the defendant had been convicted on the 17th October, 1907, of having unlawfully sold liquor without a license; and the punishment adjudged was imprisonment for four months without hard labour—the statutory penalty for a second offence. The only record in the proceedings in respect to any previous conviction was contained in an indorsement upon the information in the handwriting of the magistrate, as follows: "The defendant makes a statement that he was convicted of selling between 4 Oct. and 14 Oct., 1907, and I find the within charge a second offence for selling. I commit the defendant to the county gaol for four months without hard labour:—Held, that sub-sec. 6 of s. 101 of the Liquor License

Act, R.S.O. 1897, c. 245, requires that the subsequent offence and the earlier offence shall each be an offence in contravention of one of the sections numbered 49, 50, 51, 52 or 72 or an offence against some other section for which no penalty is provided except by s. 86. The admission as recorded might mean that the defendant had previously been convicted of an offence against s. 78 (2) or against s. 124 (1), or of selling on licensed premises in prohibited hours; proof or the admission of a former conviction for any of these offences would not warrant a later conviction under s. 72 being treated as a second offence under sub-sec. 6 of s. 101; and this fact sufficed to render the admission of the accused as recorded by the magistrate so uncertain that it was inadequate to sustain his conviction as for a second offence, and he should be discharged from custody under the commitment. Semble, that the Court had no power to amend the conviction by substituting the maximum penalty prescribed by s. 72 for a first offence.

Rex v. Simmons, 17 O.L.R. 239, 14 Can. Cr. Cas. 5.

—Selling liquor without a license—Evidence in writing.]—The taking down of the evidence under the Liquor License Act, R.S.O. 1897, c. 245, is not only for the protection of the magistrates, but as a record of the material on which a conviction is founded in case of ulterior proceedings in respect of it, the Court being bound by such evidence, without any power to remit the case back to the magistrates to take further evidence. Where, therefore, a defendant was convicted and imprisoned for the sale of liquor without a license, but the evidence returned in response to certiorari, issued in aid of a writ of habeas corpus, while disclosing a sale on the premises, failed to show a sale by the defendant himself, the conviction and imprisonment of the defendant were held to be illegal, and an order was made for his discharge from custody.

Rex v. Brisbois, 15 O.L.R. 264, 13 Can. Cr. Cas. 96.

—Local option by-law—Scrutiny of ballots—Finality of voters' list—Right of deputy returning officers and poll clerks to vote.]—Under s. 24 of the Ontario Voters' List Act, 7 Edw. VII. c. 4, the voters' lists finally settled by the Judge, are, upon a scrutiny, conclusive evidence that all persons named therein, and none others, are qualified to vote on a local option by-law, under the Liquor License Act, R.S.O. 1897, c. 245, as amended by 6 Edw. VII. c. 47 (O.), except as therein mentioned, and therefore no evidence can be then given, touching alienage, or minority of any voters named therein, or as to whether the name of a married woman is properly on the list or not. Deputy returning officers and poll clerks are entitled, if qualified otherwise, to vote on such a by-law, if their names appear on the voters' list certified by the Judge and transmitted to the clerk of the peace. They may vote at the place where they act, though it be not their proper polling division. In re Armour and Township of Onondaga (1907), 14 O.L.R. 606, 610, not followed. As the law now stands under the present Voters' List Act, 7 Edw. VII. c. 4 (O), "scrutiny" of ballots cast on such a proposed by-law, within the meaning of s. 369 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), is something different and more comprehensive than a simple recount. The extent of it is to be measured by what can be done on inspection of the ballot papers and the ascertainment of what votes are void ex facie, and the scope of investigation contemplated by the exceptions to the finality of the voters' list in 7 Edw. VII. c. 4, s. 24 (O.). A person who is a resident in the municipality in which a local option by-law is proposed and an elector therein has a locus standi to move for a prohibition to the County Court Judge in respect to a scrutiny of the ballots at the voting. The certifying of the result of such a scrutiny under s. 371 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), is a judicial and not a merely ministerial act, and the Judge may be prohibited from allowing his certificate of the result to be affected by any matter which he should not have considered in arriving at the result, to this extent that if he was not justified in arriving at the result, in entering into the consideration of the qualifications of the voters he may be prohibited from allowing these matters to affect his certificate.

Re Local Option By-law of the Township of Saltfleet, 16 O.L.R. 293 (D.C.).

—By-law increasing license fees—Effect of—Prohibition or monopoly.]—Under 6 Edw. VII. c. 47, s. 10 (O.), amending the Liquor License Act, R.S.O. 1897, c. 245, the license duties were increased, the duties imposed being, in cities of a population of over 100,000, $1,200 for a tavern and $1,000 for a shop license; in cities of a population of 10,000 only, and towns of over 5,000 and not more than 10,000, $450 for a tavern and shop license respectively. By s. 11, the council of any municipality, with the approval of the electors, could increase the above amounts; but by sub-sec. 5, where in cities there had been an increase made by the Act, no further increase should be made. In a town with a population of about 7,000, the council, with the electors' approval, passed a by-law increasing the amount to be paid for a tavern license to $2,500:—Held, by Britton, J., that the validity of the by-law was dependent on the good faith of the council in passing it, and it being apparent that

the object was not with regard to the continuance of the business, but either to altogether prohibit it, or to so restrict it as to create a monopoly, the by-law was bad, and must be quashed.

Rowland v. Town of Collingwood, 16 O.L.R. 272.

—Sale of liquor during prohibited hours—Conviction of two persons for same offence—Requisition for medical purposes—Exception not negatived by information.]—B., a hotel-keeper, and O., his bartender, were convicted by a magistrate upon informations charging them with the illegal sale of liquor during prohibited hours, both informations, however, referring to the same sale. Both convictions were quashed by the district Court Judge as being in contravention of the Liquor License Act, s. 112, sub-sec. 2, which provides that in such a case both the accused parties shall not be convicted of the same offence. On appeal to the Divisional Court:—Held, that as to O. the Judge's order was right on the ground taken by him, but as to B., who was convicted before O. was tried, the subsequent conviction of O. could not affect the validity of the conviction against B. (2) As, however, the information did not negative the exception of s. 54 of the Act protecting sales to vendees holding requisitions for the purchase of liquor for medicinal purposes, the prosecutor was bound to adduce evidence that the sale was not within that exception, and as there was no evidence before the magistrate on that point, the order quashing B.'s conviction must be upheld. (3) Although the magistrate might have amended the information at the trial, subject to s. 104 of the Act, by adding a clause negativing the exception, no such amendment could now be made. Regina v. White (1871), 21 U.C.C.P. 354, followed.

Rex v. Boomer, 15 O.L.R. 321, 13 Can. Cr. Cas. 98.

—By-law of city council limiting number of tavern licenses—Annexation of town to city—Repeal of town by-law.]—A by-law passed by the council of the city of Toronto, on the 15th February, 1909, providing that the number of tavern licenses to be issued in the city "for the ensuing license year beginning on the 1st day of May, 1909, and for each subsequent license year until this by-law is altered or repealed, shall be limited to one hundred and ten":—Held, within the powers conferred upon councils by s. 20 (1) of the Liquor License Act, R.S.O. 1897, c. 245, to "limit the number of tavern licenses . . . . for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed." On the 9th February, 1908, the town of East Toronto passed a by-law limiting to five the number of licenses that might be issued in that town; on the 15th December, 1908, the town became annexed to and part of the municipality of the city of Toronto; and thereafter the city council passed the by-law in question. It was argued that there were two by-laws in force dealing with the same matter, but unequal in their effect. Held, that the city by-law applied to the whole territory embraced within the city limits, and in effect repealed any by-laws inconsistent with it. It was also objected that after the first reading of the city by-law some other outlying territory became annexed to the city, and that the by-law should have been re-introduced before being finally passed. Held, that, the by-law being legal on its face and nothing fraudulent or improper being shown, the Court should, in its discretion, decline to quash the by-law on this ground. Re Secord and County of Lincoln (1865), 24 U.C.R. 142, followed. Order of Meredith, C.J.C.P., refusing to quash the by-law, affirmed by a Divisional Court holding as above; and leave to appeal refused by the Court of Appeal. Per Osler, J.A., delivering the judgment of the Court of Appeal, refusing leave to appeal:—The plain object and intent of s. 20 (1) of the Liquor License Act is to enable the council to do one of two things: (1) to pass a by-law limited in its operation to the then ensuing license year, which will come to an end, ex vi termini, at the end of that year, leaving the next succeeding license year to be provided for, if at all, by a new by-law to be passed before the 1st day of March next before its commencement; or (2) to pass a general by-law applicable to any future license year, commencing with the 1st day of May after its passage. The expression "any future license year" means "all" future license years. The omission of the council to re-introduce the by-law and to read it a first and second time after the annexation of additional territory was merely a matter of the internal regulation of their business, which, in the absence of statutory obligation, they were at liberty to alter or suspend at their discretion.

Re Brewer and City of Toronto, 19 O.L.R. 411.

—Interdiction — Summary conviction — Proof of excessive drinking by interdict.]—(1) On a charge against a license-holder for supplying liquor to a person interdicted by the license inspector as an habitual inebriate under the Liquor License Act (Ont.) the prosecutor must not only prove the notice of interdiction but also that the interdict was in the habit of drinking to excess. (2) Where a summary conviction was made without evidence that the interdict was an habitual inebriate, the prosecutor will not be allowed on the defend-

ant's appeal from the conviction, to supplement his case by producing such evidence on the appeal and the conviction will be quashed.

The King v. Morrison, 15 Can. Cr. Cas. 215.

—Second offence—Accused a witness on his own behalf—Cross-examination as to credit—Question as to any previous convictions.]—(1) Under the Ontario Liquor License Act, s. 101 (similar to s. 143 of the Canada Temperance Act), the magistrate trying a charge of a second or subsequent offence is prohibited from taking evidence as to the prior conviction until after his adjudication of guilty in respect of the subsequent offence, and non-compliance with the statute deprives the magistrate of jurisdiction. (2) Where the defendant gives evidence on his own behalf, a question on cross-examination as to previous convictions of the accused for any offence and which would necessarily involve an answer as to the prior conviction charged, is within the prohibition of the statute although asked for the purpose of discrediting the testimony of the accused.

The King v. VanZyl, 15 Can. Cr. Cas. 212.

--Railway employees—Selling liquor to—Offence created by both provincial and Dominion Acts.]—Where Acts have been passed by the Dominion Parliament and Provincial Legislature prohibiting an act, and an information is laid charging as an offence the commission of the prohibited act "contrary to the statute in such case made and provided," such information must be held, in the absence of a specific reference to the particular statute, to have been laid under that statute whose words are used to describe the elements of the offence. An information charged that the defendant at, etc., did sell, give or barter spirituous or intoxicating liquors to a conductor and engineer on the Grand Trunk Railway, while actually employed in the course of their duty in connection with the operation of a train; and that such liquor was supplied by the defendant's barkeeper contrary to the form of the statute, following the wording of the Ontario Railway Act, 6 Edw. VII. c. 30:—Held, that the offence must be deemed to be one under the Ontario Act, and not under s. 414 of the Dominion Railway Act; and as by s. 3 of the Ontario Act such Act is restricted to railways within the jurisdiction of the Ontario Legislature, and the Grand Trunk Railway being under the jurisdiction of the Dominion Parliament, a conviction of the defendants for the alleged offence could not be supported. Semble, the fact of the men not being in uniform, and not known to the barkeeper to be railway employees, would not exculpate the defendant.

The King v. Treanor, 18 O.L.R. 194.

—Seizure of medicinal preparations containing alcohol—Order for destruction.]—(1) An order for destruction of liquors seized and adjudged to have been illegally kept for sale contrary to the Ontario Liquor License Act, is valid as an authorization to the officer directed to superintend the destruction although not reduced to writing (2) The formal order for destruction may be made either separately from the conviction or it may be embodied in the formal conviction. (3) The formal order or conviction, as the case may be, may be made up at any time before the return to a certiorari, and this notwithstanding that the order had already been executed.

Ing Kon v. Archibald, 14 Can. Cr. Cas. 201.

--Selling liquor without a license—Second offence—Adjournments.]—The conviction of the defendant for a second offence under the Liquor License Act, R.S.O. 1897, c. 245, was alleged to be illegal, by reason of the invalidity of certain adjournments made during the progress of the case, namely: (1) adjournments made by the justice before whom the information was laid, prior to the trial before the police magistrate; and (2) adjournments made after the trial had been entered upon, by a justice who had been appointed high constable of the county, and who, moreover, had no connection with the case:—Held, that the adjournments first referred to were valid under s. 702 of the Criminal Code—made applicable by R.S.O. 1897, c. 90—which empowers the justice who took the information to do "all other acts and matters necessary preliminary to the hearing," for the hearing must be deemed to refer to the actual hearing or trial of the case; but as to the adjournments secondly referred to it was doubtful whether the justice could legally act as such, and, even if he could, he had no jurisdiction to intervene in the case and grant adjournments. In any event, however, the alleged defects were merely irregularities, which were waived by the defendant appearing before the police magistrate at the trial, stating his readiness to proceed, and submitting evidence on his own behalf. An appeal from an order in Chambers refusing to discharge the defendant on habeas corpus, was dismissed; and costs of it were allowed to the Crown against the defendant. Quære, whether an appeal lay to a Divisional Court; or whether the appeal might be referred to the Court of Appeal, the Attorney-General having refused a certificate under s. 121 of R.S.O. 1897, c. 245; or whether, in any event, the Divisional Court was bound, at the de-

fendant's request, to direct the issue of a new writ of habeas corpus.

Rex v. Miller, 19 O.L.R. 125, 15 Can. Cr. Cas. 87.

—Certiorari—Right taken away—Ontario Summary Convictions Act — Adequate remedy.]—The right to take the new procedure for the quashing of convictions, etc., substituted by 8 Edw. VII. c. 34 (O.), for certiorari and proceedings founded thereon, must be confined to cases in which, prior to that Act, the defendant would have been entitled to a writ of certiorari; and where the right to certiorari is taken away the new procedure is not applicable. A motion made under the new procedure to quash a magistrate's conviction for an offence against the Ontario Liquor License Act was dismissed, except as to one ground, it being considered that the other objections to the conviction were not such as, if substantiated, would oust the jurisdiction of the magistrate, and also, that in respect of them the defendant would have an adequate remedy by the appeal given him by s. 118 of the Liquor License Act; and, in these circumstances, the right to certiorari, and therefore the right to move under the new procedure, was taken away by s. 7, sub-s. 2, of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. c. 12, s. 14, amended by 4 Edw. VII. c. 10, s. 23. It cannot be said that, because defects in the proceedings before the magistrate may be cured by the appellate tribunal, therefore an appeal does not afford an adequate remedy.

Rex v. Cook, 18 O.L.R. 415, 14 Can. Cr. Cas. 495.

—Convictions for second offences—Alleged convictions for first offences on same informations.]—Upon an application by the defendant to quash two convictions made by a justice of the peace for offences against the Liquor License Act, the defendant stated that, having been summoned to appear before the justice at one p.m. on a certain day to answer two charges of selling liquor during prohibited hours, the offences charged not being alleged to be second offences, he went to the justice in the forenoon of the day for which he was summoned, acknowledged his guilt, was found guilty and fined, and paid his fines and subsequently on the same day, the informations having been in the meantime amended by charging the offences as second offences, he was again convicted and fined for the same offences:—Held, that the principal objection, viz., that the alleged first convictions were bad because the penalties imposed exceeded those authorized for first offences, and that the alleged second convictions were bad because of the existence of the alleged first convictions, failed on the evidence, there having been in fact no conviction at the earlier hour, and therefore no payment of fines, but at most a deposit with the justice of the amount of the fines and costs which would be imposed when the complaints should be formally heard. The other objections related to the provision as to the recovery of penalties by distress, which was found in the convictions but not in the minute of adjudication, and the term of imprisonment imposed in default of payment of the fines and costs, the former being, it was urged, wholly unauthorized, and the latter in excess of what is authorized by the Act:—Held, that, assuming both to be valid objections, not to be got rid of by amendment in the present proceedings, they did not entitle the applicant to invoke the aid of the Court to quash the convictions, because by the provisions of sub-s. 2 of s. 7 of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. c. 12, s. 14 (amended by 4 Edw. VII. c. 10, s. 23), the right to certiorari is taken away, and therefore the right to apply under the new procedure to quash the convictions, except in cases where there is no adequate remedy by appeal; and the objections were not such as affected the jurisdiction or the justice in such a way as to make the provisions of the sub-section inapplicable. Rex v. Cook (1908), 18 O.L.R. 415, followed.

Rex v. Renaud, 18 O.L.R. 420, 15 Can. Cr. Cas. 246.

—Unlicensed hotel—Permitting liquor to be consumed—Occupant.]—The defendant was the owner of an unlicensed public house or hotel, which he had leased to his son; the defendant lived in the hotel as a boarder:—Held, that he was not an "occupant" within the meaning of that portion of s. 50 of the Liquor License Act which provides that the occupant of an unlicensed house shall not "permit any liquor, whether sold by him or not, to be consumed upon the premises." Held, also, that the word "permit" indicates authorization, either expressly or tacitly, proceeding from the occupant personally, and involves a mens rea; and, there being no evidence that the defendant knew or in any way authorized or connived at the drinking on the premises for "permitting" which he was convicted, that even if he were an occupant, the conviction could not be sustained.

Rex v. Irish, 18 O.L.R. 351, 14 Can. Cr. Cas. 458.

—Selling liquor without license—Cross-examination to credit—Discretion of magistrate.]—On a charge of selling intoxicating liquor without a license on a certain afternoon, there being another charge pending against the accused for doing the same during the forenoon, and similar charges against other hotelkeepers for doing the same during the forenoon and afternoon

of the same day:—Held, that the magistrate had a discretion as to allowing counsel for the accused to ask witnesses on cross-examination whether they had been seen in the defendant's hotel during the forenoon, and whether they had been in one of the other hotels that forenoon and afternoon, notwithstanding s. 786 of the Criminal Code, R.S.C. 1906, c. 146. Held, also, that on a motion to quash the conviction there could be no review of the finding of the magistrate that there was a sale of intoxicating liquor.

Rex v. Butterfield, 18 O.L.R. 347, 15 Can. Cr. Cas. 101.

—Invalid warrant—Amendment.]—

See HABEAS CORPUS.

Rex v. Nelson, 18 O.L.R. 484.

—Appointment of police magistrate—Jurisdiction before issue of commission.] —Under the Police Magistrates Act, R. S. O. 1897, c. 87, s. 6, conferring power on the Lieutenant-Governor in Council to appoint police magistrates, the effective act of appointment is the Order in Council, and police magistrates so appointed have jurisdiction to act as such before their commissions are issued. Under s. 6 of the said Act, by which "the Lieutenant-Governor in Council may at all times, notwithstanding anything in this Act contained, appoint a police magistrate without salary for any town," such appointment may be made for a town made such by proclamation, with less than 5,000 inhabitants, in an unorganized district before a council has been elected for it, notwithstanding that by s. 3 (2) no salaried police magistrate shall be appointed for a town with less than 5,000 inhabitants until resolution of the council affirming the expediency thereof is passed by a vote of two-thirds of the members of the council. Such magistrate has jurisdiction to act, notwithstanding that there may be another police magistrate appointed for the part of the unorganized district in which the town to which he has been appointed is situate, and this, though he is ex officio a justice of the peace, since jurisdiction of a justice of the peace in such a district to adjudicate upon or otherwise act, until after judgment in any case, is excluded (by s. 22) if the initiatory proceedings have been taken by or before the police magistrate for the district or part of the district. On motion to quash a conviction for unlawfully keeping liquor for purposes of sale without a license therefor:—Held, that the magistrate making such conviction, being a police magistrate for the town of Cobalt, correctly described himself as making the conviction as such police magistrate, although, in making it, he was acting in his capacity as ex officio justice of the peace for the district of Nipissing. Held, also, that in this case the conviction must be quashed on the ground that no offence was disclosed upon the evidence, and Regina v. McGregor (1895), 26 O.L.R. 114, distinguished in that regard.

Rex v. Reedy, 18 O.L.R. 1, 14 Can. Cr. Cas. 256.

—Local option by-law—Repeal—Submission of new by-law—Time limit.]—A village council passed a local option by-law in 1906; a petition for its repeal was presented in 1908; and proceedings were taken for the submission of a repealing by-law to the electors in 1909. The electors voted upon the by-law, but the number in favour of it was insufficient to authorize the council to pass it. The proceedings were in fact invalid because the voting took place more than five weeks after the first publication of the by-law:—Held, that the ineffective proceedings taken in respect of this repealing by-law were not a bar to the submission of another repealing by-law before the year 1912, notwithstanding the provisions of 6 Edw. VII. c. 47, s. 24 (sub-s. 6 of s. 141 of R.S.O. 1897, c. 245), that "in case such repealing by-law is not so approved, no other repealing by-law shall be submitted to the electors until the polling at the third annual municipal election thereafter."

Re Vandyke and Village of Grimsby, 19 O.L.R. 402.

—Second offence—Conviction by same magistrates—Certificate of first conviction.]—The defendant was convicted of a second offence against the Liquor License Act by the same justices who had made the former conviction, as in the case of Rex v. Reid, 17 O.L.R., p. 578, and it further appeared that among the papers returned upon the certiorari was a certificate of the fact of the previous conviction, signed by the justices, but it did not appear that any use was made of the certificate at the trial:—Held that the conviction was valid.

Rex v. Wellman, 17 O.L.R. 583, 14 Can. Cr. Cas. 335.

—Second offence——Conviction by same magistrates — Evidence of previous conviction.]—The defendant was convicted of a second offence against the Liquor License Act, R.S.O. 1897, c. 245, by the same magistrates who had tried and convicted him of the first offence. The magistrates, however, followed accurately the directions of s. 101 of the Act, first inquiring concerning the subsequent offence only, of which the defendant was found guilty, and then, and not before, asking him whether he had been previously convicted, to which he answered that he had been:——Held, that the conviction was valid. Rex v. Nurse (1904), 8 Can. Cr. Cas. 173, 7 O.L.R. 418, distinguished. Held, also, that an appeal lies at the instance of the Crown, under s. 121 of the Liquor License Act, against

the decision of a Judge discharging a prisoner from custody upon an application made under the Habeas Corpus Act, and that to such a case the provisions of s. 6 of that Act do not apply.

Rex v. Reid, 17 O.L.R. 578, 14 Can. Cr. Cas. 329.

—Local option by-law—Scrutiny—Finality of voters' list.]—S. 24 of the Voters' List Act, 7 Edw. VII. c. 4 (O.), provides that "the certified list" made under that Act "shall upon a scrutiny under the Ontario Elections Act," meaning the "Ontario Controverted Elections Act," or the Municipal Act, be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election, at which such list was, or was the proper list, to be used at the elections, except persons (1) guilty of corrupt practices at the elections, etc., (2) becoming non-resident, etc., (3) persons disqualified under s. 47 of the Ontario Elections Act, namely, Judges, clerks of the peace, etc., prisoners, lunatics, or persons in charitable institutions:—Held, that the section applied to the proceedings on a motion to quash a local option by-law, so that the list was final and conclusive as to the right of the persons named in such list, and not within the exceptions mentioned, to vote on such by-law.

Re McGrath and Town of Durham, 17 O.L.R. 514.

—Destruction order—Proprietary medicines—Oral direction of magistrate.]—The plaintiffs were on the 9th July, 1906, convicted by a magistrate of keeping intoxicating liquors for sale without license, contrary to the Liquor License Act. The conviction was not formally drawn up and signed until the 25th October, 1906, when it was made part of the return to a writ of certiorari. The conviction as returned contained a declaration that a large quantity of liquor found on the plaintiffs' premises, including portions alleged by the plaintiffs to be proprietary medicines, should be forfeited, and an order and direction to the defendants, who were police officers, to destroy the liquor and the vessels containing it. This direction was given orally at the time of the conviction, and was acted upon by the defendants about three weeks later. On the 10th December, 1906, the order for the destruction of the portions of the liquor alleged to be medicines was quashed by an order of the High Court of Justice. In an action for damages for the destruction of those portions:—Held, (1) Upon the evidence, that the liquors in question came within the protection of ss. 2 and 3 of 61 Vict. c. 30 (O.), as proprietary medicines or medicine wines. (2) That in destroying the liquors in question the defendants in good faith believed they had the right to do so in their capacity as police officers, and it was their duty to obey the direction, though merely oral, of the police magistrate. (3) That the goods being in the custody of the law, and under the jurisdiction of the magistrate, and the destruction being a ministerial act, there was no necessity, in the absence of statutory requirement or other authority, for the direction to the police officers to be in writing. (4) That the defendants had reasonable and probable cause to believe that they had the right to destroy the liquors in question, and no malice on their part was shown. (5) That the notice of action was sufficient, as the defendants, according to their own evidence, understood the nature of the complaint and when and where the act complained of happened. (6) That, in view of the provisions of R.S.O. 1897, c. 88, s. 22, the successful defendants could not be deprived of their costs of the action, and were entitled thereunder to costs as between solicitor and client. Arscott v. Lilley (1887), 14 A.R. 283, followed.

Ing Kon v. Archibald, 17 O.L.R. 484, 14 Can. Cr. Cas. 201.

—Sale to minors—Amending informations—Lapse of 30 days.]—Upon the hearing of complaints upon two informations for breach of s. 78 of the Liquor License Act, as amended by 5 Edw. VII. c. 30, s. 1 (O.), in selling liquor to minors, the justices amended by inserting in the informations the necessary allegation that the parties to whom the liquor was sold were "apparently, or to the knowledge of the defendants, under the age of 21 years":—Held, that under s. 104 of the said Act the justices had power so to amend, notwithstanding that 30 days had elapsed from the date of the commission of the offences charged. Quære, whether in view of s. 95 this would have been permissible if the amendments had substituted other and different offences for those charged in the informations.

Rex v. Ayer, 17 O.L.R. 509, 14 Can. Cr. Cas. 210.

—Local option by-law—Statement in by-law as to time and place of voting—Unqualified voters.]—At the time a local option by-law received its first and second readings it was stated therein that it would be voted on at the same time and place as the municipal elections. Before the first publication of the by-law such time and place were fixed by the council and inserted in the by-law by the clerk. On objection to this:—Held, that s. 338 of the Con. Mun. Act, 1903, 3 Edw. VII. c. 19 (O), was substantially complied with, the act of the clerk having been merely the substitution of one equivalent for another. An objection that a number of unqualified voters were allowed to vote was also over-

ruled, it appearing that even if the votes were struck out there would still be the required three-fifths majority in favour of the by-law. An objection that the by-law was finally passed before the lapse of the two weeks allowed for a scrutiny was also overruled, following Re Duncan and the Town of Midland (1907), 16 O.L.R. 132.

In re Coxworth and Village of Hensall, 17 O.L.R. 431.

—Selling without license—Trial—Evidence taken in shorthand—Prior conviction—Identity—Absence of accused—"Penalty"—Punishment by imprisonment.]—On a trial before a magistrate for selling liquor without a license contrary to the Liquor License Act, the evidence with, and semble, without, the consent of the accused, may be taken down in shorthand, and it is not necessary that it should be read over to and be signed by the accused. In proof of the conviction of a prior offence by the person accused, identity of name in the certificate of conviction is some evidence of the identity of the person, and it is then a question of the weight of evidence for the determination of the magistrate. The existence of a local option by-law in a locality has not the effect, under s. 193 of the Liquor License Act, of depriving the magistrate of the power to direct the imprisonment of the accused, the word "penalty," used in the Act, including imprisonment. When the accused is present at the trial and has due notice of the adjournment of it to another time, the fact of his absenting himself at that time, whether represented by counsel or not, does not deprive the magistrate of authority to hear evidence and convict him of a second offence. The Court, by virtue of the powers conferred by s. 119 of the Ontario Judicature Act, R.S.O. 1897, c. 51, has jurisdiction to award costs against the applicant for discharge upon habeas corpus when the conviction is for a penalty imposed by or for an offence created by provincial legislation, such jurisdiction being in no way interfered with by s. 191.

Rex v. Leach, 17 O.L.R. 643, 14 Can. Cr. Cas. 375.

—Local option by-law—Petition for submission of by-law—Signatures—Detachment from petition.]—Sub-s. 3 of s. 141 of the Liquor License Act, R.S.O. 1897, c. 245, as added by 6 Edw. VII. c. 47, s. 24, and amended by 7 Edw. VII. c. 46, s. 11, provides that "in case a petition in writing signed by at least twenty-five per cent. of the total number of persons . . . . . qualified to vote at municipal elections, is filed with the clerk of the municipality on or before the 1st day of November . . . praying for the submission of such by-law" —a local option by-law—"it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid." Upon a motion for a mandamus to compel the council, after the filing of a petition in due time, to submit a by-law to a vote of the electors:—Held, reversing the decision of Meredith, C.J.C.P., that the document filed, being in the form of a petition, but signed by only two electors, with the signatures of others sufficient to make up the proper number attached thereto, having been previously affixed to, and detached from, other petitions in the same form, was not a "petition in writing signed by at least twenty-five per cent. of the total number of persons qualfied to vote," within the meaning of the statute, notwithstanding that no fraud was alleged. Held, also, that one of the members of the council had a status to maintain an appeal from an order in the nature of a mandamus requiring the council to submit the by-law.

Re Williams and Town of Brampton, 17 O.L.R. 398.

Quebec.

—Quebec license law—Writ of Prohibition—Procedure — Proof — Jurisdiction of license commissioners.]—Held (affirming the judgment of the Superior Court, Davidson, J., 19 Que. S.C. p. 279): 1. License commissioners, although not among the inferior courts mentioned in Arts. 59, 63, 64 and 65 of the Code of Procedure, have duties of a judicial character which, on proper occasion, subject them to the superintending authority of the Superior Court, and the proper remedy is a writ of prohibition. 2. The only proof required, or admissible, on a writ of prohibition against the license commissioners is such as would go to establsh want or excess of jurisdiction. 3. When Art. 836 R.S.Q. may be invoked, the license commissioners can no longer grant a license as a matter of discretion, but their judgment is none the less final as to whether majority oppositions, or two previous oppositions, really exist. 4. The refusal of the commissioners to re-open the enquête after both parties had formally declared their respective enquêtes closed, is not sufficient to support a writ of prohibition. 5. The refusal of the commissioners to count on the opposition signatures of duly qualified electors, for the reason that the same persons had also signed in support of the application, was a decision on an issue within their jurisdiction, and was moreover a proper decision.

Kearney v. Desnoyers, 10 Que. K.B. 436.

—Discretion of commissioners—Personal character—Art. 27 R.S.Q.]—There are objections to the "personal character" of a person under the terms of Art. 27 of the License Law if such person has already been convicted for a violation of such law

and has permitted disorderly scenes in a restaurant kept by her. Proof of such disorderly actions need not be made according to the strict rules of evidence; it is sufficient if the license commissioners are satisfied of their occurrence no matter how the proof is made. The commissioners cannot be compelled to confirm the certificate for a hotel license obtained by a person against whom such facts have been proved to their satisfaction.

Dagenais v. Desnoyers, 18 Que. S.C. 16 (S.C.).

—63 Vict. (Que.), c. 12, ss. 147 & 149—Authorization of married woman—Notice.] —1. A married woman does not need judicial authorization to ester en justice under the provisions of s. 149 of the License Law of Quebec, 63 Vict. c. 12. 2. A notice, not strictly according to the provisions of s. 147 of the same Act, is null and of no effect.

Faulkner v. Faulkner, 4 Que. P.R. 173 (Davidson, J.).

—Sale of liquor by license holders to persons under eighteen years of age.]—Art. 91 of the Quebec License Act must be interpreted strictly. To hold the license holder responsible in law, the sale must be made directly to the person under 18 years of age.

Perkins v. Brais, 20 Que. S.C. 536 (Mulvena, J.P.).

—Sale to persons under eighteen.]—Where the proof showed that a boy under eighteen years of age had been treated by another lad of about twenty years, the sale is not illegal, as it is not made directly to the person under eighteen years.

Perkins v. Choiniere, 20 Que. S.C. 537 (n), (Mulvena, J.P.).

—Quebec License Act—Municipal councils—Discretion.] — The district magistrate's Court is an inferior tribunal within the meaning of Art. 1003, C.P.Q., and the provisions of Art. 50 C.P.Q. which subject all tribunals, etc., except the Court of King's Bench, to the orders and control of the Superior Court, apply to the district magistrate's Court, notwithstanding Art. 1290 C. P.Q., which forbids the proceedings in such Courts to be taken, by certiorari or otherwise, before any other tribunal. The recourse to prohibition to prevent an inferior tribunal from dealing with a cause is open from the time such tribunal is seized of the cause and before judgment. After judgment it only lies when the want of jurisdiction appears on the face of the proceedings. Municipal councils, in the decisions they give, under the License Act, respecting the certificate for hotel licenses (except in the cases provided for by s. 22) exercise a purely discretionary power and such decisions are, therefore, free from censure and control by the judiciary. S. 26 of the License Act applies only to the cities of Montreal and Quebec, but even if extended to rural municipalities it is always discretionary with municipal councils to grant or refuse the preference therein mentioned. Art. 100 M.C. gives the magistrate's Court jurisdiction to quash decisions of municipal councils for illegality only, and the application to quash must state the grounds of illegality before it can be entertained.

Desormeaux v. Parish of Ste. Therese, Q. R. 19 K.B. 481, affg. 34 S.C. 490.

—Taxes on confirmation of license certificates.]—Held, reversing the judgment of Lynch, J., Hall and Wurtele, JJ., dissenting:—That the Act amending the Quebec License Act (54 Vict. c. 13), which provides that "the municipal councils of cities, towns, villages and other authorized local municipalities, cannot levy, by by-law, resolution, or otherwise, any tax or impost or duty exceeding in any year the sum of $50, on any license under this Act, either for confirmation of a certificate to obtain the license or otherwise, for the object for which he holds such license" has not the effect of repealing the provisions of special charters permitting municipal corporations from imposing a higher rate of taxation. Hogan v. City of Montreal, 12 Que. K.B. 245, followed.

Town of Farnham v. Roy, 12 Que. K.B. 237.

—Confirmation of certificate by municipal council—Want of notice—Nullity.]—Held, affirming the judgment of the Court of Review, and reversing that of Choquette, J.:—That the Quebec License Act, requiring previous notice on the part of municipal councils upon the confirmation of license certificates, is an imperative provision in the interest of the public, and want of such notice is justfication for any person interested to require the annulment of the confirmation of such certificate within the time and in the manner indicated in the Municipal Code.

Village of Plessisville v. Moffet, 12 Que. K.B. 418.

—Vote of ratepayers——Invalid by-law.] —A ratepayer interested in the license fee for the sale of intoxicating liquor in the municipality, is competent to demand that a by-law which the ratepayers have been called upon to approve by their votes, and have, in fact, approved, and which has been sent to the collector of revenue for the district in order to prevent the issue of licenses, should be declared never to have been adopted by the municipal council, and, therefore, to be no by-law at all. When several witnesses, equally intelligent and unimpeachable, and who seem to have given their evidence in good

faith, do not agree as to the existence of a certain matter, the Court should accept the view of the majority, rather than that of the minority. Between witnesses equally honest, credence should be given to those who from the circumstances of the case cannot be mistaken, as against those who can. A municipal council has no right to declare that one of its members is disqualified from voting on any question respecting license fees for sale of liquor on the ground that he had been corruptly influenced by a person seeking such a license.

Guay v. Village of La Malbaie, Q.R. 25 S.C. 263 (Sup. Ct.).

—Quebec license law—Sentence suspended —Certiorari.]—A magistrate has no discretion to suspend a sentence on an offence against the Quebec License Law, but must impose the fine therein prescribed; a judgment suspending sentence will be quashed on certiorari.

Lambe v. Lafontaine, 6 Que. P.R. 422 (Curran, J.).

—Confirmation of certificate.]—A municipal council cannot confirm the certificate for a saloon license when there is a protest signed by a majority of the electors on the ground that one of the protesting parties without whom there would not be a majority had himself signed the certificate. This was the law before the Act of 9 Edw. VII. c. 17 was passed. An explanatory Act is a part of the Act explained and applies to prior proceedings, though not in terms retroactive.

Corporation of Maddington Falls v. Fancher, Q.R. 19 K.B. 357.

—Penalty for offence—Condemnation for costs only.]—Under the Quebec License Law a judge has no right to change the punishment provided for the offence of keeping liquor unlawfully to that of a condemnation for costs only and a certiorari will be granted in case of such condemnation.

Lambe v. Desnoyers, 6 Que. P.R. 439 (Sup. Ct.).

—Concurrent legislative power—Temperance Act of 1864—Quebec License Law 1900.]—(1) The legislature of the Province of Quebec has no power to repeal any portion of the Temperance Act of 1864 enacted by the former Province of Canada; and s. 97 of the Quebec License Act of 1870 purporting to repeal certain sections thereof in so far as the same relates to the Province of Quebec and to matters within the control of the provincial legislature, is of no effect. (2) The repeal of ss. 1 to 10 inclusive of the Temperance Act of 1864 by the Canada Temperance Act, 1878, still left in force as provincial legislation the sections of the Quebec License Law of 1870 embodying similar provisions to those contained in the sections so repealed. (3) The Quebec provincial statute, 49 & 50 Vict. c. 3, s. 4 (now s. 68 of the Quebec License Law), declaring that the sale of intoxicating liquors without license in municipalities where the Canada Temperance Act is in operation shall be held to be a contravention of the provincial license law is within the legislative powers of the province. (4) A prosecution for selling liquors without license will lie under the Quebec License Law of 1900, although such sale took place in a district in which the Temperance Act of 1864 is in force and had been so continuously since confederation. (5) The fact that the offence was an infraction of the Temperance Act of 1864 does not prevent its being also an offence under a provincial law and punishable under either or both, the federal and provincial jurisdiction to constitute the sale an offence, being concurrent.

Ex parte O'Neil, 9 Can. Cr. Cas. 141, 28 Que. S.C. 304.

—Quebec License Act—Suspension of judgment.]—In a prosecution under the Quebec License Act, 63 Vict. c. 12, in which the defendant pleaded guilty, a judgment by the magistrate suspending sentence on payment of costs, is illegal and ultra vires.

Lambe v. Lafontaine and Verdon, 26 Que. S.C. 132 (Curran, J.).

—License to sell liquor—Petition against—Question of fact—Signatures to petition.]—The question of whether or not an opposition in writing to confirmation of a certificate for obtaining a license is signed by the majority of the electors required by law is a question of fact of which the municipal councils are the sovereign judges. Therefore, the resolution passed in the negative does not give a right to the action to quash (en cassation) on account of illegality under Art. 23 of the License Act amended by 3 Edw. VII. c. 13, s. 3. A municipal council has the right to strike out en bloc, from the written opposition to these certificates, the signatures of the persons who had previously signed the certificates and is not obliged to make a special elimination for each of the signatures which appear on them and at the same time on the opposition.

Brunelle v. Village of Princeville, Q.R. 30 S.C. 19 (Sup. Ct.).

—Municipal corporation—Annexation to city—License in territory annexed.]—The Act annexing a part of the Parish of St. Laurent to the City of Montreal does not affect the rights or privileges of any person or company by resolution or by-law of the municipality annexed; the collector of the revenue should, therefore, approve the certificate of license granted by said muni-

cipality before the annexation of that part of the parish in which the party demanding said certificate resides.

Cérat v. Boisseau, 8 Que. P.R. 343 (Fortin, J.).

—Municipal council—Resolution.]—A Magistrate's Court has jurisdiction to quash as illegal a resolution of a municipal council respecting a tavern license only when the council confirms a certificate in contravention of s. 22 of 63 Viet. c. 12, in all other cases the decision of the council is final. Therefore, the judgment of the Superior Court refusing to grant a writ of prohibition to prevent the Magistrate's Court from sitting on a case in which said statute was not contravened should be reversed.

Town of Ste. Thérèse v. Magistrate's Court of Terrebonne & Desormeaux, 9 Que. P.R. 408 (Ct. Rev.).

—Municipal by-laws—Sale of liquor.]—Provincial legislatures have power, by virtue of s. 92 B.N.A. Act, 1867, to pass an Act permitting municipalities, by by-law, to require places where intoxicating liquor is sold under license from the government to be closed at certain hours. A by-law passed under this authority is valid although, in its application, it affects only a special class of citizens, for example, restaurant keepers. It is applicable from the time it comes into force even as to persons whose licenses had been issued when it was passed.

De Varennes v. The City of Quebec, Q.R. 31 S.C. 444.

—Municipal by-laws — Liquor sellers—Regulation of trade—Double penalty.]—Provincial legislatures have power, under s. 92 B.N.A. Act, 1867, to authorize municipalities to pass by-laws to compel the closing, at prescribed hours of certain days, or during certain hours of shops for selling liquor under government license. A by-law passed for such purpose is valid although it affects only a special class of citizens, fixes different hours for closing on different days, and may result in the imposition of a double penalty on that account. The license for the sale of liquor granted by the government is subject to the Acts and by-laws in force when it is issued as well as to those passed while it is in operation; it is in no sense a contract which relieves the licensee from such obligation.

De Varennes v. Attorney-General, Q.R. 16 K.B. 571, affirming 31 S.C. 444.

—Quebec License Act—Depositions of witnesses—Attestation — Commitment extending to payment of "subsequent costs."]—1. When depositions of the witnesses present in Court are taken down in writing by leave of the magistrates, under s. 189 of the Quebec License Act, they need not be signed by the witnesses and are sufficiently attested by the signatures of the justices to the minutes of proceedings that declare that each one of the witnesses was sworn and gave the evidence written in the depositions. 2. A commitment, under a condemnation to pay a fine, a specified sum for costs, or, in default, to imprisonment for a stated period, "unless the said several sums of money and costs and charges of arrest, of commitment and of the conveying of the said X. to the common gaol, shall be sooner paid," is not bad under the Quebec License Act, which provides at s. 207 for the payment of such subsequent costs. 3. A conviction, under the Act, of selling liquor without a license on the 24th of February, 1906, and on various occasions, both prior and subsequent to that date, is not bad for vagueness, it being provided in s. 193, that "rigorous precision as to the mention of time in the complaint, is not necessary in the proof, to justify a conviction." 4. No appeal being allowed from a conviction under the Quebec License Act, the Court, on an application for certiorari, will not look into the evidence with a view to revise the decision of the magistrates.

Dubuc v. Maclaren; R. v. Dubuc, 37 Que. S.C. 59.

—Contract—Illegal consideration—Club—Evasion of the law as to licenses.]—Letters patent of incorporation of a so-called club and a license to sell liquor issued to it, as such, when in reality an individual alone is interested in the matter, as lessee of the premises, purchaser of the furniture, fixings and stock, and as sole beneficiary of the profits, the whole as a scheme to evade the law respecting the more expensive license and stricter regulations imposed on tavern-keepers, confer no rights that can be the lawful consideration of a contract. A sale therefore of any such pretended rights cannot be enforced and no action will lie to recover the price thereof. The Courts, in dealing with such cases, will only declare the nullity of the proceedings had in violation of the law and leave each party to pay his costs.

Bernier v. Dequoy, 33 Que. S.C. 237.

—Community of property.]—(1) An action taken by a wife against an hotel-keeper for damages because of liquor sold to her husband is not an exercise of community rights, as the community has no claim against the defendant. (2) A wife commune en biens has an eventual right in the property of the community and thus suffers damage from acts which diminish the community of property.

Duclos v. Murray, 9 Que. P.R. 326.

—Canada Temperance Act.]—See that title.

—Saloon certificate—Opposition—Municipal elector.]—The status of municipal elector which one must have to enable him to take proceedings to quash a resolution confirming a certificate for a saloon license is sufficiently established by his name being inscribed on the roll of electors and is not subject to the condition of payment of his taxes. An opposition in general terms to the confirmation of a certificate for a saloon license in a city ward for a fixed period granted by those authorized by law and in the former prescribed has the same effect as a special opposition to an application to confirm a certificate given by a private person. Hence, a resolution of a municipal council which confirms a certificate for a license in a ward after an actual majority of the electors residing therein have signed and deposited an opposition to the confirmation of any such certificate is void and should be quashed.

Town of Montenaguy v. Bélanger, Q.R. 19 K.B. 256.

—Liquor license—Resolution of council—Future rights.]—Under the Act, 3 Edw. VII. c. 13, s. 3 (Que.) the Circuit Court can try a case for quashing a resolution by a town council for issue of a license for the sale of liquor; such jurisdiction is special and forms an exception to the rules of Art. 47 C.P.Q. An action to quash such an resolution does not affect the future rights of the person to whom the license was granted; the latter cannot, therefore, evoke the cause to the Superior Court.

Picard v. Town of Bordeaux, 11 Que. P.R. 296.

—Minor—Sale of liquor to—Action by father—Damages.]—In an action against a hotel-keeper for injury to his son under age by the sale of liquor the father cannot, in his own name, claim damages personal to the son.

Charbonneau v. Béliveau, 9 Que. P.R. 88 (Sup. Ct.).

—Municipal council—Resolution—Appeal—License certificate.]—The resolution of a municipal council which refuses to confirm a certificate for a hotel license is final and not subject to review. The amending Act 3 Edw. VII. c. 13, s. 3, makes resolutions confirming the certificate alone liable to be quashed. Hence, where the magistrate of the district entertained a petition to quash the resolution refusing to confirm a writ of prohibition to restrain him was granted. Sec. 26 of the License Act which gives a preference to those who have kept hotels during the preceding year and have them fitted up for the purpose has operation only in the cities of Quebec and Montreal.

Town of Ste. Thérèse de Blainville v. Magistrate's Court for County of Terrebonne, Q.R. 34 S.C. 470.

—License—Resolution of municipal council.]—There is a right of appeal to the Court of King's Bench from the judgment of the Superior Court in Review, Q.R. 34 S.C. 470, on the merits of an application for a writ of prohibition to restrain a Magistrate's Court from dealing with a petition to quash a resolution of a municipal council respecting a certificate for a hotel license. Such judgment is not given in a matter respecting municipal corporations and municipal officials but in one concerning the application of the Act respecting licenses 63 Vict. c. 12 (Que.). It therefore falls under the operation of Art. 1006 C.P.Q.

Désormeaux v. Village of Ste. Thérèse de Blainville, Q.R. 18 K.B. 407.

Eastern Provinces.

—Statutory restriction of certiorari proceedings—Affidavit negativing guilt—Jurisdiction of magistrate—Sale of liquor by wholesale.]—The Liquor License Act of Nova Scotia, 1895, s. 117, applies to prohibit the granting of a certiorari in respect of any conviction thereunder, unless the applicant makes an affidavit negativing the charge as laid in the information; and without such affidavit, the court cannot grant the writ, although the sole questions raised are as to the validity of the License Act as regards wholesale transactions, and as to whether the conviction which showed the exact quantity of liquor admittedly sold was not a wholesale transaction.

Bigelow v. The Queen, 4 Can. Cr. Cas. 337, 31 Can. S.C.R. 128, affirming the judgment of the Supreme Court of Nova Scotia in The Queen v. Bigelow (1899), 2 Can. Cr. Cas. 367, 31 N.S.R. 436.

—N. S. Liquor License Act, of 1895—Provision requiring wholesale licenses—Illegal contract—Sale without license.]—In an action to recover the price of a quantity of liquor sold by plaintiff to J., payment for which was guaranteed by the defendant M., it appeared that, at the time of the sale, plaintiff carried on business in Truro where no licenses for the sale of liquor were issued. By the Liquor License Act of 1895, Acts of 1895, c. 2, s. 56, it is enacted that no person shall sell by wholesale or by retail any liquors without having first obtained a license under this Act authorizing him to do so. It was contended on behalf of plaintiff that this section was ultra vires the Provincial Legislature, so far as it related to wholesale licenses:—Held, that the result of the authorities is clear as to the power of the Local Legislature to enact laws requiring dealers in intoxicating liquors, whether wholesale or

retail, to take out licenses, and that this not having been done in the present case, the sale was illegal and plaintiff could not recover.

Brown v. Moore, 33 N.S.R. 381, affirmed 32 Can. S.C.R. 93.

—Liquor License Act, R.S.N.S. c. 100—Third offence—Illegal addition of costs of conveying to gaol.]—The costs of conveying the defendant to gaol cannot be legally awarded against him on a conviction for a third offence under the Nova Scotia Liquor License Act. Where the sum of such costs is stated in the warrant of commitment the improper inclusion of same cannot be treated as surplusage, and will invalidate the warrant.

The Queen v. Doherty (1899), 3 Can. Cr. Cas. 505, distinguished. Re J. W. King, 4 Can. Cr. Cas. 426. Forbes, Co. J.

—Sale of intoxicating liquor by druggist—Certificate — Sale on prescription of veterinary surgeon — By-law of municipality prohibiting sale — Validity — Municipal code, Quebec, Art. 562.]—

Collector of Provincial Revenue v. Brown, 5 E.L.R. 551 (Que.).

—Low grade ale—Percentage of alcohol.]—

Rex v. Wilson, 7 E.L.R. 91 (N.S.).

— Beverage — Whether intoxicating.]—

Rex v. Ryan, 7 E.L.R. 395 (N.S.), and Rex v. Sidowsky, 7 E.L.R. 397 (N.S.).

— Social club — Offence.]—

Rex v. McIsaac, 7 E.L.R. 393 (N.S.).

—Second offence—Conviction — Irregularity.]—

Rex v. Hines, 7 E.L.R. 149 (N.S.).

—Social club — Offence.]—

Rex v. Hiatt, 7 E.L.R. 230 (N.S.).

—Selling liquor without a license—Improper rejection of evidence—Disqualification of magistrate—Application to call magistrate as a witness—Bona fides of—Liquor License Act, 1896, s. 104.]—An order nisi having been obtained to quash a conviction for selling liquor without a license upon the ground, among others, of the improper rejection of evidence tendered on behalf of the defendant:—Held, that this was no ground for certiorari. The defendant applied to call the magistrate as a witness, but, as he declined to state in any other than in a general way what he purposed to prove by him, the magistrate refused to leave the bench to be sworn. In this he was sustained by the court, notwithstanding the defendant swore that the application was made in good faith. The magistrate is not disqualified because of his being a ratepayer in the district where the case was tried. Certiorari is taken away in cases of convictions for selling without license by the Liquor License Act, 1896, s. 104.

Ex parte Hebert, 4 Can. Cr. Cas. 153, 34 N.B.R. 455.

Sale by steward of incorporated club, to members.]—Defendant, the steward of an incorporated club, was charged before the stipendiary magistrate of the city of Halifax with an offence against the Nova Scotia Liquor License Act. It appeared from the evidence that the liquor alleged to have been sold was the property of the club and was sold by defendant in his capacity of steward, at a fixed tariff rate to members only. On a case stated for the opinion of the Court:—Held, distinguishing the case from Graff v. Evans, and other cases of a like character, that the legal entity in this case was distinct from the shareholders, and that the supplying to members at a tariff rate of the goods of the corporation could not properly be said to be a distribution among the shareholders of their own property. Also, that the supplying of the liquor under the circumstances mentioned could not mean any transaction known to the law except that of a sale, and for this reason the conviction should be affirmed.

The King v. Simmonds, 44 N.S.R. 107.

—Liquor License Act (N.S.) 1895—Compelling attendance of witnesses—Tender of fees.]—On a prosecution before the Stipendiary Magistrate of the City of Halifax, for a violation of the Liquor License Act, service was proved of a summons on M., who it was claimed, was a material witness for defendant, but without tendering witness fees, and an application was made to the magistrate for a warrant to compel the attendance of the witness, the fees being at the same time tendered to the magistrate. The application was refused on the sole ground that fees were not tendered in the first instance to the witness, and the trial was proceeded with, and defendant convicted. On application for a writ of habeas corpus:—Held, that the question whether, in a case under the Liquor License Act, the witness could be compelled to attend, or the party was entitled to a warrant, unless the fees had been paid, was open to debate, but that even if the decision of the stipendiary magistrate was erroneous it could not be reviewed upon habeas corpus, and the application must be dismissed. Per Meagher, J.:—Held, (1) That assuming everything in defendant's favour, the magistrate would not lose jurisdiction to convict merely because of his erroneous refusal to grant the warrant applied for. (2) That if any wrong or injustice were done defendant by such refusal, she had a remedy by way of appeal. (3) That the error having occurred in the exercise by the magistrate of his undoubted jurisdic-

tion, the objection went merely to the regularity of the proceedings, and not to the jurisdiction. Per Weatherbe, J., dissenting. Held, that the statute imperatively required the magistrate to issue the warrant, and that, having refused to do so, he had no power to convict, and the conviction must be set aside.

The King v. Clements, 34 N.S.R. 443.

—N.S. Liquor License Act of 1895—Provision requiring wholesale licenses—Illegal contract—Sale without license.]—In an action to recover the price of a quantity of liquor sold by plaintiff to J., payment for which was guaranteed by the defendant M., it appeared that at the time of the sale plaintiff carried on business in Truro, where no licenses for the sale of liquor were issued. By the Liquor License Act of 1895, c. 2, s. 56, it is enacted that no person shall sell by wholesale or by retail any liquors without first having obtained a license under this Act authorizing him to do so:—Held, that the sale was illegal, and plaintiff could not recover.

Brown v. Moore, 32 Can. S.C.R. 93, affirming 33 N.S.R. 381.

—Sale by person "suffered to be or remain on the premises"—Burden of proof—Word "occupant."]—The N.S. Liquor License Act, R.S. (1900), c. 100, s. 111, provides that "the occupant of any house, shop, room, or other place in which any sale has taken place, shall be personally liable to the penalty, notwithstanding such sale was made by some other person who cannot be proved to have so acted under or by direction of such occupant":—Held, that defendant was properly convicted for sales made by his son, who lived with him in a house occupied by defendant and his family. Per Ritchie, J. Held, that the service, upon the person convicted, of an incorrect copy of the minute of conviction, followed by service of a correct one, would not, in any way, invalidate the proceedings, or prevent the magistrate from preparing a conviction in accordance with the original minute made by him, and issuing process to enforce the penalty or imprisonment. Per Graham, E.J. Held, that the son living with his father was a person "suffered to be or remain" on the premises within the meaning of the Act (s. 111, sub-s. 2). Held, also, that the burden was on defendant of proving that the sales were made without his authority. Held, also, that defendant was an "occupant" within the meaning of the Act.

The King v. Conrod, 35 N.S.R. 79, 5 Can. Cr. Cas. 414.

—N.S. Liquor License Act—Witness summoned by prosecution—Prepayment of fees—Conviction for non-attendance set aside.]—Defendant was summoned to appear as a witness on behalf of the prosecution at the trial of a prosecution under the Liquor License Act, R.S.N.S. (1900), c. 100. Defendant did not appear, and, afterwards, a summons was issued requiring him to appear to answer to the charge of refusing or neglecting to attend as a witness. Defendant appeared, and, after hearing evidence in support of the charge, the Justices convicted defendant, and imposed a fine of $5 and costs:—Held, setting aside the conviction, with costs, that defendant could not be made liable for the penalty imposed by the Act, s. 161, sub-s. (2) in the absence of proof that the proper fees were tendered to him before he was required to give evidence.

Rex v. Chisholm, 35 N.S.R. 505; 6 Can. Cr. Cas. 493.

—N.B. Liquor License Act, 1896—Minute of conviction—Variance.]—A conviction will not be quashed because the minute awarded an imprisonment of thirty days, while the section of the Act under which the conviction was made limited the time of imprisonment to one month. Under the Act, 60 Vict. c. 6, s. 12, it is not necessary for the magistrate to specify in his order any particular public hospital to which the proceeds derived from the sale of liquor seized by reason of its being illegally kept for sale are to be paid.

The King v. McQuarrie; Ex parte Rogers, 36 N.B.R. 39, 7 Can. Cr. Cas. 314.

— Liquor License Act—R.S. 1900, c. 100—Incorporated company — Member may be required to give evidence.] — A member of an incorporated company may be compelled to give evidence against the company on a prosecution for a violation of the Liquor License Act.

The King v. The Mayflower Bottling Co., 44 N.S.R. 417.

—Keeping for sale and illegal selling—One charge not considered by magistrate.]—Where charges of selling liquor and of keeping liquor for sale were improperly joined in one information, but the conviction was for keeping only and the charge of selling was not dealt with by the magistrate nor was the information amended, the defendant is not entitled to a certificate under s. 682 of the Code that the charge of selling was dismissed.

The King v. Stevens, 8 Can. Cr. Cas. 76, Wallace, Co. J.

—Keeping liquors for sale—Workmen's club—Purchasing agent.]—Where several persons constituting a workmen's club appoint another to purchase liquor in bulk for them, each member reimbursing him monthly for the cost of liquor consumed, and the person so purchasing for the club acquires the right of property in the stock of liquors and keeps possession of same, such person may be convicted under the Liquor

License statute of Nova Scotia for "keeping for sale" although he made no profit on the transaction.

The King v. Cavicchi, 8 Can. Cr. Cas. 78, Wallace, Co. J.

—**Third offences—Dates of previous informations.**]—1. A conviction as for a "third offence" under the Nova Scotia Liquor License Act is invalid, if the third infraction of the statute preceded the information for the first offence. 2. The statutory forfeiture of license and disqualification of its holder is an increased penalty or punishment for a third offence, within the meaning of s. 95 of the License Act of 1896 (now R.S.N.S. c. 100, s. 134), although it arises ipso facto upon the adjudication and is not part of the magistrate's award.

R. v. Murrans, 7 Can. Cr. Cas. 459.

—**Irregular grant of license—Special meeting.**]—Under the New Brunswick law a wholesale license was revoked which had been granted at a special meeting after its refusal at the prior regular meeting, it appearing that no notice had been published of the holding of the special meeting, and that there had been a refusal by the Commissioners to hear evidence against the grant.

Miles v. Rogers, 36 N.B.R. 345.

—**Intoxicating liquors—Sale to minor—Liability for act of servant.**]—The Nova Scotia Liquor License Act, R.S. 1900, c. 100, s. 62, provides that a licensee shall not give, supply, or furnish, or allow to be given, supplied or furnished, in or upon his licensed premises, any description of liquor to any minor, and every licensee who gives, supplies or furnishes any liquor to any minor in contravention of this section shall be liable, etc. Defendant was convicted by the stipendiary magistrate of a violation of this section of the Act, but the conviction was set aside on appeal to the County Court, on the ground that it appeared from the evidence that the liquor in question was supplied by one of defendant's employees without defendant's knowledge, and contrary to his instructions:—Held, reversing the judgment of the County Court Judge and restoring the conviction, that the section of the Act is an absolute prohibition in the interests of the public, to prevent the sale or supply of liquor to minors, and that the act of the servant being within the scope of his duty, defendant was liable to the penalty provided by the Act, notwithstanding the fact that the servant acted without defendant's knowledge and in violation of his instructions.

The King v. Quirk, 44 N.S.R. 244.

—**Habeas corpus—Review.**]—Where there is conflicting evidence in a case for selling liquor contrary to the Liquor License Act, 1896, the finding of the committing justice on questions of fact cannot be reviewed on an application for an order in the nature of a habeas corpus.

The King v. Wilson; Ex parte Irving, 35 N.B.R. 461.

—**Illegal sale—Order of liquor in bulk—Place of acceptance of order.**]—For the purpose of a prosecution for illegal sale of liquor under a license law, the place of sale is not necessarily the city in which an order for liquors was accepted by the liquor dealer, and a charge of illegal sale at another city in which the liquor was delivered to the buyer out of a stock there kept will be sustained if the appropriation to the buyer of the quantity purchased and its segregation from other articles took place in the latter city.

The King v. Bigelow, 9 Can. Cr. Cas. 322, 36 N.S.R. 559.

—**Witness — Contempt — Committal for refusal to answer.**]—

R. v. Findler, 7 E.L.R. 150 (N.S.).

—**Prohibition Act (P.E.I.)—Druggist—Evidence of clerk.**]—

Re Jenkins, 7 E.L.R. 543 (P.E.I.).

— **Prohibition Act, 1900 — Confiscation of liquors — Notice of action — Search warrant.**]—

Matthews v. Jenkins, 3 E.L.R. 577 (P.E.I.).

— **Sale of liquor — Wholesale license — Validity of sale to private person.**]—

Rex v. Crowson, 6 E.L.R. 558 (N.S.).

—**License granted by city council—Payment of license duty — Refusal of inspector to deliver license — Prosecution for illegal selling — Conviction — Order to quash.**]—

Rex v. McKasey, 6 E.L.R. 330 (N.S.).

—**Offence — Conviction — Liquor sold by third person on premises.**]—

Rex v. Passerini, 6 E.L.R. 541 (N.S.).

—**Prohibition Act — Prosecution for offence —Witness refusing to answer—Committal for contempt.**]—

Re Sims, 3 E.L.R. 157 (P.E.I.).

—**Prohibition Act, 1900—Conviction by stipendiary magistrate — No appeal.**]—

McMurrer v. Jenkins, 3 E.L.R. 149 (P.E.I.).

— **Prohibition Act — Prosecution—Witness refusing to answer on ground that answer might tend to criminate him — Committal for contempt.**]—

In re Hugh Morrison, 3 E.L.R. 154 (P.E.I.).

— **Offence — Description of — Search warrant — Grounds of suspicion to be sub-**

mitted to magistrate — Execution of warrant by prosecutor.]—

Fanning v. Gough, 4 E.L.R. 483 (P.E.I.).

— Prohibition Act — Conviction — Third offence — Proof of previous convictions.]—

In re Higgins, 2 E.L.R. 179 (P.E.I.).

—Third offence—Use of previous convictions.]—Previous convictions may be used as evidence upon which to base a conviction for a third offence against the provisions of the Liquor License Act, as often as such offence is charged and proved. It is not now necessary, under the statute (s. 131), to ask the defendant whether he has been previously convicted, unless he is present in person. Where, at the conclusion of each of several cases tried before him, the magistrate decided to convict, but, at the instance of defendant's counsel, refrained from imposing sentence, and drawing up the formal conviction, until the county court judge should have decided a question, raised on the trial, as to the use of previous convictions. Held, dismissing defendant's motion to quash, and ordering a writ of procedendo, that the magistrate was not precluded from proceeding with the convictions at a later stage. The Queen v. McBerney, 29 N.S.R., 327, distinguished.

Rex v. Bigelow, 36 N.S.R. 554, 8 Can. Cr. Cas. 132.

—Provincial agent for British distiller—Receiving and forwarding orders—Acceptance at head office.]—

See PRINCIPAL AND AGENT.

Craigellachie Distillery Co. v. Bigelow, 37 N.S.R. 482, 37 Can. S.C.R. 55.

—Commissioners—Knowingly issuing license contrary to law—Mens rea.]—A member of a board of license commissioners who, with a knowledge of all the facts, issues a license contrary to the provisions of the Liquor License Act, Con. Stat. N.B. 1903, c. 22, is guilty under s. 59 of "knowingly" issuing a license contrary to law, though there is no evidence of a corrupt motive or criminal intent.

The King v. Ritchie; Ex parte Blaine, 37 N.B.R. 213, 11 Can. Cr. Cas. 193.

—License granted subsequent to 1st of May—Special grounds—Petition—Order revoking license.]—At a meeting for that purpose, for which notice had been given, a tavern license was granted under the Liquor License Act by commissioners under the Act to one D., on the 8th of August, 1904, for the year ending the 30th of April, 1905, on a petition of D., dated the 2nd of July, 1904, the chairman objecting on the ground that they had no authority to grant a license after the 1st of May, except on special grounds, and that no such grounds were either stated in the petition or shown at the time; on an application to a County Court Judge to revoke the license under s. 31 on these grounds, an order was made revoking the license, the judge refusing to admit evidence tending to show that special grounds for the granting of the license existed, and were acted upon by the commissioners, holding that he, and not the commissioners, is the authority who determines as to the sufficiency of the special grounds, and whether the grounds alleged are special grounds within the meaning of the Act; also, on the ground that the petition for a license subsequent to the 1st of May should allege the special grounds upon which the application is based:—Held, on making absolute the order nisi to quash the order revoking the license, that the commissioners, and not the Judge are to determine the sufficiency of the special grounds and whether the grounds alleged are special; and that the petition need not allege the special grounds upon which the application is based.

The King v. Wilkinson ; Ex parte Duguay, 37 N.B.R. 90.

—Extension of license—Revocation of—Second extension—Power of commissioners.]—The license commissioners, under the Liquor License Act (Con. Stat. 1903, c. 22), have no power to extend the duration of an existing license under s. 23 for a greater period than three months of the next ensuing license year, or to grant a second extension. The power of revocation, under s. 31, extends to an extension of the original license by the commissioners under s. 23. Per Gregory, J.:—S. 31 does not give the Judges therein named power to revoke an extension of a license granted by the license commissioners under s. 23, but such power is limited to an original license when proved to have been given contrary to the terms of the Act, or obtained by fraud.

The King v. Wilkinson; Ex parte Cormier, 37 N.B.R. 53, 12 Can Cr. Cas. 339.

—Summons—Mistake in place of trial.]—The defendant was served with a copy of a summons under the Liquor License Act, to appear at a magistrate's office in the parish of P. In the original summons the place was stated to be in the parish of A., and in fact the magistrate's office was in A. The constable made affidavit that he served a true copy of the original summons. At the trial the defendant's counsel appeared in answer to a summons for another offence returnable before the same magistrate at the same time and place. He also had authority to defend this case but he did not appear in it or defend. The magistrate understood the defendant's counsel appeared in both cases and granted an adjournment of both. After conviction:—Held, that in absence of an affidavit that the defendant

was misled by the mistake the conviction would not be set aside.

The King v. McQuarrie; Ex parte Giberson (No. 2.), 39 N.B.R. 371, 16 Can. Cr. Cas. 70.

—Summons—Time of service.]—Where a summons to answer an offence under the Liquor License Act, C.S. 1903, c. 22, was served personally on the evening of April 14, returnable at 10 a.m. April 16, and on the return of the same the defendant appeared by counsel and procured an adjournment to April 19, the Court refused to set aside the conviction subsequently had on the ground that the defendant did not have a reasonable opportunity of appearing and defending. The conviction as first made was defective by reason of not stating the place of the offence but the place was stated in the information and summons and in the magistrate's minutes. The magistrate having returned an amended conviction upon certiorari:—Held, such amendment was proper since the facts appearing in the magistrate's minutes warranted the conviction in its amended form.

The King v. McQuarrie; Ex parte Giberson (No. 1.), 39 N.B.R. 367, 16 Can. Cr. Cas. 66.

—Penalty by imprisonment—Error in conviction—Amendment ordered.]—Where the magistrate, on a conviction for an offence against the Liquor License Act, imposed the proper money penalty, but affixed a term of imprisonment not authorized, the Court ordered an amendment of the conviction by inserting the term of imprisonment applicable under the statutory provision.

The King v. Power, 43 N.S.R. 235.

—Stated case—Sale by steward of incorporated club.]—An information was laid before the stipendiary magistrate of the city of Halifax, by the license inspector for the said city, charging defendant with having unlawfully in said city kept intoxicating liquors for sale within the space of six months previous to the laying of the information. A summons was issued, and on its return defendant appeared and pleaded not guilty. The stipendiary magistrate at defendants request, stated a case for the opinion of the Court, upon the point whether the serving of liquor by the steward of an incorporated club to bona fide members (in which liquor the steward had no pecuniary interest, and which was bought by the funds of the club) amounted in law to a "keeping for sale" by said steward, within the prohibition contained in s. 87 of the Nova Scotia Liquor License Act:—Held, quashing the case stated, that in order to give the Court jurisdiction to hear the case there must be a conviction, order, determination or other proceeding heard and determined which the person aggrieved complains of, and it was impossible to say whether such was the case in the present instance, the point being stated at the defendant's request and apparently before any determination by the magistrate. Also, that in stating a case under the statute, the findings and conclusion of the magistrate upon the whole evidence must be set forth, and not merely the evidence. Also, that the application for a stated case must be made in writing, and that, as in the present case, the inference was the other way, there was a defect going to the jurisdiction of the Court which could not be waived.

The King v. Gaines, 43 N.S.R. 253.

—Illegally keeping for sale—Nova Scotia Liquor License Act—Presumption raised by evidence and statute.]—Appeal from the Judge of the County Court for district No. 4, affirming a conviction made by the stipendiary magistrate for the Town of Truro for keeping liquor for the purpose of sale, barter and traffic therein, without the license therefore by law required. The evidence showed that defendant occupied a house in the Town of Truro, opposite a building occupied by his son-in-law as an hotel where liquor was believed to be sold illegally. Defendant had previously occupied the hotel himself, and had been convicted of unlawful selling, and was believed to be selling in collusion with his son-in-law to whom he had rented the premises, the liquor being kept on defendant's premises and carried across the street to the hotel as required. On making a search of defendant's premises, the inspector found a quantity of liquor concealed in a hole below the floor of a room occupied as a bed room, and also in a valise in a wood shed back of the house, which was found to be locked at the time of the search and which defendant declined to open. In both places he found a large quantity of straw wrappers, such as are used for packing bottles, and in the wood house some empty liquor cases. There was also evidence, that, as the inspector left, defendant said there was a barrel that he had not got, though this remark was not heard by the inspector and was denied by defendant:—Held, that the evidence of search, coupled with the provisions of the Act, R. S. (1900) c. 100, s. 165, sub-s. 2, was ample to justify the conviction unless displaced. That defendant had to overcome the presumption raised against him, and to explain the circumstances to the satisfaction of the Judge, and having failed to do so, the Judge could properly find as he did and the Court would not disturb the conviction.

The King v. McNutt, 38 N.S.R. 339, 11 Can. Cr. Cas. 26.

—Prohibition Act—Social club—Prosecution against steward—Bona fides of club—What constitutes a sale in violation of the Act.]—

Rex ex rel. Jenkins v. Doyle, 9 E.L.R. 97 (P.E.I.).

—Liquor license—Refusal of city to grant—Discretion.]—

Re Pistoni and Depenti, 8 E.L.R. 191.

—N. S. Liquor License Act—Seizure of liquors without warrant by inspector and action for damages.]—

Monaghan v. McLean, 9 E.L.R. 14 (N.S.).

—Liquor law—Illegal sale charged—Order of acquittal—Defendant once in jeopardy.] —1. Where a magistrate has decided a case ostensibly upon the merits in favour of the accused and the statute under which the prosecution is brought allows no appeal, a certiorari will not be granted to quash the order of acquittal, with a view to reopening the case, on the ground of the wrongful refusal of the magistrate to compel a witness to answer a material question. 2. Except where it is otherwise provided by statute, a person who has been regularly tried and acquitted by a competent tribunal having full cognizance of his case, is not liable to be again tried for the same offence, and this rule applies to an acquittal under a section of a provincial liquor law (the Prohibition Act, P.E.I., 1900), under which fine and imprisonment may be imposed.

The King v. Reddin, 16 Can. Cr. Cas. 163 (P.E.I.).

—Justice informant and prosecutor in pending action against defendant—Petition against granting licenses—Circulation of by justice—Bias—Disqualification—Commitment for less than prescribed term of imprisonment — Conviction — Amendment.]—D., the defendant, was twice convicted for offences against the Liquor License Act. In the first case C. was the informant and prosecutor; in the second he was the convicting magistrate:—Held, that while the first case was pending before this Court on certiorari C. had no jurisdiction to try the information in the second case. The convicting magistrate was not disqualified by reason of his having circulated and obtained signatures to a petition praying that no licenses be granted in the parish where the defendant lived, and in which he was the sole applicant for a license. A conviction ordering the defendant to be imprisoned for sixty days in default of payment of a fine can not be supported under a section of the Act which authorizes imprisonment for not less than three months in case of such default. Semble, the Court will not amend a summary conviction when by so doing it has to exercise a discretion confided to the justice.

The King v. Chares; Ex parte Daigle, 37 N.B.R. 492.

—Sale at retail without license—Conviction in absence of defendant—Reasonableness of service.]—Information was laid before the stipendiary magistrate for the Town of Truro, charging defendant with having sold liquor at retail without license, defendant having been previously convicted of first and second offences of the same nature. A summons was issued on the 20th day of June, 1905, requiring defendant to appear at the Town Court room at 10 o'clock on the following morning to answer the charge against him, and to be further dealt with. A copy of the summons was served by a constable on the defendant personally on the same day on which the summons was issued, and defendant failing to appear was convicted in his absence. The conviction was attacked on the ground that defendant was not served until the night of the day on which the summons was issued, and that he had no time to consult counsel:—Held, that the question of the reasonableness of the service was one for the Justice under all the circumstances of the case, and that on the facts stated there was evidence to justify him in coming to the conclusion that a reasonable time had elapsed between the time of service and the time fixed for the trial, and in proceeding with the case in defendant's absence. Per Russell, J. That if defendant required further time it was his duty to have appeared, and to have made his application to the Justice, and that it was not permissible for him to ignore the summons and afterwards ask the Court to quash the conviction.

The King v. Craig, 38 N.S.R. 345, 10 Can. Cr. Cas. 249.

—Sale without license—Occupant—Sale without authority.]—A livery stable is a place within the meaning of s. 99 of the Liquor License Act (Con. Stat. 1903, c. 22), in which proof of a sale by a person employed by the occupant may make the occupant liable to a penalty under the Act, though there be no proof that the offence was committed with his authority or by his direction.

The King v. McQuarrie; Ex parte Rogers, 37 N.B.R. 374, 11 Can. Cr. Cas. 257.

—Contract by correspondence—Knowledge of seller that illicit re-sale intended.]—

See SALE OF GOODS.

—Sale contrary to Liquor License Act—Summons to answer—Uncertainty of—Amendment in absence of accused.]—Where a party is summoned to answer a charge of selling liquor contrary to the Liquor License Act on a certain day of the month and on a day of the week which would not be the day of the month named, he is bound to attend on the day of the month named, disregarding the day of the week, and may be properly convicted in default of appearance. A summons charging a sale on the 24th may be amend-

ed to a charge for a sale on the 20th, and a conviction made for a sale on that day in the absence of the accused.

Ex parte Tompkins, 37 N.B.R. 534, 12 Can. Cr. Cas. 552.

—Report of inspectors—License Commissioners — Jurisdiction — Writ of prohibition.]—License commissioners under the Liquor License Act (C.S. 1903, c. 22), have no jurisdiction to grant a certificate for a license unless the inspector has reported the applicant to be a fit and proper person to have a license, and the other requirements provided for in s. 11 of the Act have been complied with. A writ of prohibition is the proper remedy to restrain the issuing of a license where the commissioners acted without jurisdiction, and may be issued after the certificate for a license had been granted.

Ex parte Demmings, 37 N.B.R. 586.

— Appeal — How proceedings may be brought up—Certiorari.]—Where a party prosecuting an appeal under the Liquor License Act (Con. Stat. 1903, c. 22) was unable to get the proceedings certified by the clerk of the County Court as provided by s. 105, had them returned under a writ of certiorari, the Court heard the matter as an appeal under the section. No appeal lies from a decision of a Judge of a County Court, under s. 105, from an order made under habeas corpus proceedings discharging a prisoner in custody for default of payment of fines imposed for offences against the Liquor License Act.

McCrea v. Watson, 37 N.B.R. 623.

—Justice of the peace—Disqualification—Penalty for offence.]—A justice of the peace who accepts the offices of clerk of the peace and clerk of the County Court is not disqualified from trying an offence charged under the Liquor License Act on the ground that the offices are incompatible. A justice appointed for a county has jurisdiction to try in a parish of the county an offence committed in another parish in the county. Section 62 of the Liquor License Act, authorizing as a penalty in default of the fine imposed for a first offence imprisonment for a period of not less than three months, is not ultra vires.

The King v. Plant; Ex parte Morneault, 37 N.B.R. 500.

—Solemn declaration accompanying petition.]—A petition to have a vote taken under the Liquor License Act, C.S. 1903, c. 22, as amended by 9 Edw. VII. c. 16, s. 4, was received by the town clerk of Campbellton, with a solemn declaration folded therein but not attached in any way. The first page of the petition was marked "B" and the declaration referred to it as "hereto annexed marked 'B'";—Held, this was a sufficient compliance with the Act.

The King v. Town of Campbellton; Ex parte Cormier, 39 N.B.R. 593.

—Tavern license—Selling liquor in quantities exceeding 1 quart.]—The holder of a tavern license under the Liquor License Act, C.S. 1903, c. 22, who is guilty of selling liquor in quantities exceeding 1 quart, has not a "license therefor as by law required" and it therefore liable to the penalty imposed by s. 62 of the Act.

Poitras v. The King, 39 N.B.R. 323.

—Selling without license—No review.]—If the convicting magistrate had jurisdiction there is no right of review from a summary conviction for selling without license contrary to the N.B. Liquor License Act, s. 62.

Rex v. Carleton, ex parte McCrea, 38 N.B.R. 42.

—Rejection of evidence—Minute of adjudication not necessary—Name of informant not stated—Excessive costs.]—On the trial of an information for an offence against the Liquor License Act the counsel for the defendant proposed to ask him as to what took place between him and a witness for the prosecution. On objection the evidence was rejected. It did not appear, and the counsel on the argument was unable to state what was proposed to be proved:—Held, no ground under the circumstances for quashing the conviction. Quære, if an objection that evidence was improperly rejected is open to the accused on certiorari where an appeal is given. If the conviction is complete there is no necessity for a minute of the conviction. It is not necessary to state in the conviction the name of the informant. The Court will not interfere with a conviction on the ground that the costs are excessive, where it is not shown in what particular they are excessive. Signing a petition praying that no license be issued to a party subsequently charged with an offence against the Act does not disqualify a magistrate so signing from trying the charge.

The King v. Davis; Ex parte Vanbuskirk, 38 N.B.R. 335, 13 Can. Cr. Cas. 234.

—Second offence—Must be for offence after date of first.]—A conviction under the Liquor License Act, Con. Stat. 1903, c. 22, can not be had for a second offence without proof of conviction of a first offence committed before the date of the commission of the second offence.

The King v. O'Brien; Ex parte Chamberlain (No. 1), 38 N.B.R. 381.

—Information and conviction for a third offence—Proof —Amendment — Awarding distress not authorized.]—Where the accused was charged under the Liquor License Act, Con. Stat. 1903, c. 22, with a third offence, and the conviction stated it

was for a third offence, but was in other respects in the form of a conviction for a first offence, and the only proof was of a first offence, and the prosecution on the trial asked to have a conviction entered for a first offence:—Held, on application to quash, that the conviction might be amended under s. 99 of the Act. Where the conviction ordered a distress in default of payment of the penalty imposed, which order is not authorized by the Act, it was treated as surplusage and struck out of the conviction. The convicting magistrate, under s. 74 (2), has power to award in addition to the costs, the charges of commitment and conveying of the defendant to gaol.

The King v. O'Brien; Ex parte Chamberlain (No. 2), 38 N.B.R. 385.

—Limitation of licenses—How apportioned among several wards of city.] The number of licenses that may issue in the city of Saint John under the Liquor License Act, C.S. 1903, c. 22, is subject to the limitation that they shall in no case exceed seventy-five, exclusive of hotel licenses, and that they shall be apportioned among the several wards in which licenses may issue in a fixed proportion according to the scale provided by sub-s. 1 of s. 19 of the Act.

Jamieson v. Blaine, 38 N.B.R. 508.

– Penalty—Mode of enforcing when none provided by Act—Summons—Reasonable time between issue and return.]—A conviction under s. 67 of the Liquor License Act for selling liquor to a minor which imposes a fine, and in default of payment distress, but which does not award imprisonment in default of sufficient distress is bad. Per Hanington, J.:—A justice has no jurisdiction to hear a complaint unless there is evidence before him to show that the defendant was served with the summons a reasonable time before the return. A summons issued at ten o'clock in the morning, returnable the same day at one, does not allow the defendant a reasonable time to appear and defend, and a conviction in default of appearance founded on such a proceeding should be quashed on certiorari.

The King v. Wathen; Ex parte Vanbuskirk, 38 N.B.R. 529.

– Penalty—Mode of enforcing when none provided by Act.]—A conviction for selling liquor to a minor under s. 67 of the Liquor License Act, C.S. 1903, c. 22, imposing a fine and in default of payment distress, but which does not award imprisonment, is bad. S. 67 not providing any mode of enforcing the penalty authorized, the conviction should follow the form prescribed in s. 22 of the Summary Convictions Act, C.S. 193, c. 123.

The King v. Davis; Ex parte Vanbuskirk, 38 N.B.R. 526.

—Summary conviction—Appeal from stipendiary magistrate by way of case stated.]—Notwithstanding s. 127 of the Summary Convictions Act, which makes the conviction final "except as in this chapter otherwise provided," an appeal lies from a stipendiary magistrate to the Supreme Court, by way of case stated, where the point sought to be raised is not frivolous and is of an arguable character.

The King v. McNutt, 42 N.S.R. 180.

—Words "liquor" and "liquors"—Percentage of alcohol in drinkable liquid.]—The Liquor License Act, R.S.N.S. c. 100, s 2 (g), defines "liquors" and "liquor" to mean and include all drinkable liquids containing alcohol. Defendant was convicted for keeping for sale without license in contravention of the provisions of the Act a beer, sold under the name of "pilsner beer" which was shown by the evidence to contain alcohol in quantities varying from 2.27 to 4.71 per cent. in volume, which would be the equivalent of from something under 2 to 3½ per cent. by weight:—Held, that the presence of alcohol in this quantity brought the beer in question within the definition of "liquor" contained in the statute. Also, the intention of the statute being to require a license in all cases where alcoholic beverages were sold, whether they were intoxicating or not, it was not necessary, under the wording of the Act, to constitute a drinkable liquid a liquor that it should contain enough alcohol to render it intoxicating. Also, that the power to enact such a law was clearly within the legislative authority of the provincial legislature.

The King v. Bigelow, 41 N.S.R. 499.

--Third offence—Appeal to County Court—Deposit of money in lieu of bond.]—Defendant was convicted of a third offence against the Liquor License Act and was adjudged to be imprisoned for a period of thirty days. Notice of appeal to the County Court for district No. 4 was given, and a sum of money was deposited in place of the bond required in such cases:—Held, affirming the judgment of the Judge of the County Court, that in the absence of the bond the Court had no jurisdiction to hear the appeal. Whitman v. The Union Bank, 16 Can. S.C.R. 410, distinguished.

The King v. Fraser, 42 N.S.R. 202.

--Petitions to have vote of ratepayers—Proof of genuineness of signatures.]—One of several petitions under 7 Edw. VII. c. 46, s. 1, amending the Liquor License Act, C.S. 1903, c. 22, s. 21, was accompanied by a mere certificate as to genuineness of signatures, etc., and another by a certificate purporting to have been sworn to, stating that the names in the petition were genuine, and that the petitioners signed themselves or gave authority to

some member of their family, or to the party certifying, to sign for them.

Ex parte Stavert, 39 N.B.R. 6.

—Conviction—Costs—Mileage fees.]—Upon a conviction under the Liquor License Act, C.S. 1903, c. 22, for unlawful selling no costs can be taxed for serving the defendant with notice of adjournment of hearing. A conviction will not be set aside because a magistrate taxed witnesses' mileage fees relying on his own knowledge of distances and without affidavits, there being no evidence that the mileage was incorrectly allowed, and the magistrate having sworn that he was acquainted with the witnesses and familiar with the distances they had to travel. A constable is entitled to five cents per day for attendance upon the trial.

The King v. Bassett; Ex parte Davidson, 39 N.B.R. 271.

—Resolution of council granting license—Refusal of inspector to deliver.]—D. made application for a license to sell intoxicating liquor in the city of H. under the provisions of the Liquor License Act, for the year 1908-1909. The application was investigated by the license inspector, and, upon his report, the city council granted the license applied for. Defendant, as agent of D., tendered the amount of the license fee and the bond required, but the inspector declined to deliver the license, and caused defendant to be summoned and convicted for selling without license:—Held, 1, after the city council had authorized the issue of the license, the signing of the same by the mayor and inspector was a mere ministerial act, and it did not lie with them, or either of them, to defeat the will of the council by refusing to sign or deliver the license, and that there was error in the conviction under the facts shown. 2. Where the city council grants a license illegally, express power for the cancellation of the license is contained in the statute, but there is nothing in the scope of the statue to justify the officer entrusted with the formal duty of carrying out the council's instructions in saying he has any control as to the question of license of no license.

The King v. Mackasey, 43 N.S.R. 169.

—Presentation of petition to warden—Liquor License Act.]—M. was elected councillor for the parish of St. L. in October, 1907, and was appointed warden of the county in January, 1908. On September 29, 1908, he resigned his position of councillor, but afterwards and before December 29, 1908, was elected councillor by a newly created parish in the same county, and in January, 1909, was reappointed warden:—Held, M.'s resignation as councillor operated as a resignation of his position of warden, as the warden must be a councillor under the Municipalities Act, C.S. 1903, c. 165, and therefore presenting a petition to him on December 29, 1908, would not be sufficient under the provisions of the Liquor License Act, C.S. 1903, c. 22, s. 21, amended 7 Edw. VII. c. 46.

Ex parte Stavert, 39 N.B.R. 239.

—Selling by licensee after hours—Statutory presumption from light in bar-room—Penalty imposed less than minimum.]—(1) Under the New Brunswick Liquor License Act, the minimum penalty for selling by a licensee after hours must be imposed although the conviction is founded upon the statutory presumption of sale because of a light in the bar-room. (2) A summary conviction for a penalty less than the statutory minimum will be set aside on appeal under the New Brunswick liquor law.

The King v. McIntyre, 14 Can. Cr. Cas. 43.

—Evidence of sale.]—The only point relied upon by defendant on appeal from a conviction for a violation of the Liquor License Act was that there was no evidence that the sale of the liquor in question took place in the town of B. as alleged. The purchaser of the liquor swore that she bought the article from defendant and that it was delivered at her house in B. by the defendant's team, and another witness, the policeman of the town, swore that defendant's factory and residence were in the town of B., and that he put up bottled drinks there which were sold and delivered in the town of B.:—Held, that the evidence was sufficient to support the conviction, and that the judgment of the County Court Judge to the contrary should be set aside and the conviction made by the stipendiary Magistrate of the town restored.

The King v. Wilson, 43 N.S.R. 482.

—Sale—Evidence.]—Defendant was charged with keeping intoxicating liquors for sale, contrary to the provisions of the Nova Scotia Liquor License Act. The evidence showed that there was a barrel of beer in the back room of defendant's house, that there were glasses there, and that there were persons drinking there at the time charged. It further appeared that the front room was occupied by a person said to be a shoemaker, and the latter person served and sold there and in a middle room, beer which he brought from the back room:—Held, that under the Act s. 156, defendant was to be taken as the person who kept the liquor for sale, and the occupant of the front room as a person who was suffered to be upon the premises or acting for defendant. Held, that there was sufficient evidence to convict, and that the judgment of the County Court Judge setting aside the conviction must be reversed, and the conviction of the magistrate restored.

The King v. Passerini, 43 N.S.R. 448.

—**Hotel proprietor—Sale to bona fide guest.**]—Where the evidence showed that K., the person to whom liquor was supplied by defendant, an hotel proprietor, left his home in the morning before breakfast, on his way to S., and had breakfast at defendant's hotel, and at the same time obtained liquor for which he paid defendant:—Held, that, on the facts stated, K. must be regarded as a bonâ fide guest within the meaning of the Act, R.S. 1900, c. 100, and that the conviction must be set aside. Semble, that defendant might have been convicted if he had been charged under s. 73 of the Act for selling "otLerwise than during regular meals."

The King v. Byng (No. 1), 43 N.S.R. 43.

—**Hotel proprietor—Sale to guest.**]—In order to be a bonâ fide guest at an hotel, within the meaning of the Liquor License Act, R.S. 1900, c. 100, by reason of obtaining a meal at the hotel, the person to whom the meal is supplied must have resorted to the hotel for the primary purpose of obtaining in good faith the meal. Where liquor was supplied by the proprietor of the hotel to two persons, one of whom was a guest only in the sense that he got a glass of beer and a sandwich with it, while the other got whiskey and some bread with it, suggested by the proprietor in order to qualify:—Held, that the conviction was properly made.

The King v. Byng (No. 2), 43 N.S.R. 40.

Western Provinces.

— Local option by-law — Separate petitions — Proof of signatures — Substantial compliance with statutory requirements.] — On an application to quash a local option by-law passed under the provisions of ss. 61 to 73 inclusive of the Liquor License Act, R.S.M. (1902), c. 101:—Held, that none of the following objections to the proceedings were fatal to the by-law:—1. That, instead of one petition, about 13 papers, all with the same printed heading, each having a number of signatures, were tied up in a roll, the sheets not fastened together, and presented to the council, it being admitted that the heading of each was sufficient for a petition. 2. That there was no entry in the minutes of the proceedings of the council showing receipt of the petition, such receipt having been recited in the by-law. 3. That there was no proof that the petitions altogether had been signed by one-fourth in number of the electors. It was for the council to satisfy itself that this condition had been complied with, and it must be assumed that it performed its duty in that respect. 4. That, instead of preparing and posting up "a list of those entitled to vote on such by-law," as required by s. 67 of the Act, the clerk of the municipality posted up and supplied merely copies of the last revised list of electors of the municipality for the year certified by him to be true copies thereof. Under s. 63 of the Act the two lists would contain the same names. 5. That the certificate of the clerk as to the result of the voting, by mistake, referred in the body of it to the by-law by a wrong number. The heading of the certificate, however, sufficiently showed what by-law was referred to. *6. That, instead of summing up the votes on the day appointed by the by-law, the clerk, on account of the non-receipt of one of the ballot boxes, adjourned the proceeding to a future day, for which there is no statutory authority. 7. That the by-law received its third reading on 27th December, 1904, and, although passed in the afternoon of that day, was declared to be in force on that day, that is, as alleged, from the beginning of that day. When there has been a virtual compliance with the statute and the departures complained of have been rather from the letter than from the spirit of the enactment, the Court has a discretion in determining whether there has been a sufficient compliance, and whether effect should be given to the objections on an application to quash. White v. East Sandwich (1882), 1 O.R. 530, and Young v. Binbrook (1899), 31 O. R. 108, followed.

Re Caswell and South Norfolk, 15 Man. R. 620.

— Local option by-law—Notice of by-law.]—1. The notice given by the council under s. 66 of the Liquor License Act, R.S.M. (1902), c. 101, must, among other things, state that the by-law or a true copy of it can be seen at the office of the clerk until the day of the taking of the vote and the absence of such statement in the notice will be fatal to the by-law on an application to quash it. 2. If, on account of an application for a recount of the votes, the council postpone the further consideration of the by-law until after the result of the recount is known, they must either formally adjourn such further consideration to a named day or they must afterwards give such notice of the time and place when the third reading is to be moved that parties opposed to it may be in a position to attend and urge their views and, if the third reading takes place without such notice being given, the by-law will be quashed. Re Mace and Frontenac (1877), 42 U.C.R. 85, and Hall v. South Norfolk (1892), 8 M.R. 430, followed. 3. The third reading of such a by-law even after it has been carried by the votes of the electors, is not an empty formality, as the councillors have still to exercise their judgment upon it, and might, if they choose, then finally refuse to pass it. 4. Under s. 427 of the Municipal Act, R.S.M. 1902, c. 116, a Judge, on quashing such a by-law for illegality, as in this instance, has no discretion to refuse costs to the applicant.

Re Cross and Town of Gladstone, 15 Man. R. 528 (Richards, J.).

— Brewer — License under Inland Revenue Act — Provincial license.] — A brewer, although holding a license under the Inland Revenue Act to carry on business as such, may not sell beer within the Province unless he has first obtained a license under the Provincial Liquor License Act.

Rex v. Neiderstadt, 11 B.C.R. 347 (Irving, J.).

— Keeping liquor for sale — Bar appliances — Finding of liquor.] — (1) The finding in a house, room or shop, of glasses and bottles containing beer is prima facie evidence under s. 114 of the Territories Liquor License Ordinance (C.O. 1898, c. 89) of liquor being there kept for sale, unless the occupant of the house proves the contrary. (2) The finding of a bar or other appliances enumerated in s. 114 of the Territories Liquor License Ordinance in an unlicensed place, is proof that there exists in such place such appliances, and the word "exists" as used in said section means "is." (3) Where there was ample evidence to warrant the conviction made by a justice of the peace of keeping liquor for sale and no evidence was adduced by the defence in rebuttal of the charge, the Court will not on a stated case hold the conviction bad because of the admission of irrelevant testimony.

The King v. Nugent (N.W.T.), 9 Can. Cr. Cas. 1.

— Person entitled — No license to partnership.] — The B.C. Municipal Clauses Act, s. 171, sub-s. 4, does not authorize the issue of a liquor license to a partnership, as the word "person" does not include a firm.

Re Wah Yun & Co., 11 B.C.R. 154.

—Local option—By-law to repeal.]—It is no objection to a petition under s. 74 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII. c. 31, s. 4, for repeal of a local option by-law, that most of the signatures are on separate sheets of paper pinned to the one containing the heading and some of the signatures, although no portion of the petition appears upon such added sheets, unless it is shown that such were not attached to the first one at the time the signatures were made thereon. Adams v. Woods, 19 Man. R. 285, was distinguished, as in that case a number of the sheets attached had been mutilated by cutting off the headings before presentation to the council.

Moore v. McKibbin, 17 Man. R. 461.

— Local option by-law — Changes in name and boundaries of municipality after passage of by-law.] — The Act 53 Vict. c. 52, assented to 31st March, 1890, making changes in names and boundaries of the municipalities into which the Province was divided, provided, by s. 81, that if, in any of the territory changed as to its municipal situation by the provisions of the Act, a by-law under the local option clauses of the Liquor License Act should be in force at the time of the coming into force of the Act, such by-law should continue to affect such territory the same as if the Act had not been passed. The village of Napinka was in 1890 part of the rural municipality of Brenda, in which a local option by-law had been passed forbidding the receiving of any money for licenses under the Liquor License Act; but, by the said Act, 53 Vict. c. 52, the said village became part of the newly-created municipality of Winchester, and again in 1896 it was made part of a municipality then created under the old name of Brenda:—Held, that the said local option by-law was still in force in that village, notwithstanding the changes in name and boundaries of the municipalities referred to. Doyle v. Dufferin (1892), 8 Man. R. 286, followed. Held, also, that the by-law was valid although it contained an additional provision, unauthorized by the statute, purporting to prohibit the granting of any licenses within the limits of the municipality. Application for mandamus to license commissioners to grant a license to sell liquor in Napinka refused without costs.

Rex v. The License Commissioners; In re Anderson, 14 Man. R. 535 (Killam, C.J.).

—Local option by-law—Detaching signatures from headings of petitions.]—A number of petitions to the council of the municipality asking for the passage of a local option by-law under s. 62 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by s. 2, of c. 31 of 9 Edw. VII. were signed by persons aggregating more than twenty-five per cent. of the resident electors whose names appeared on the last revised municipal voters' list, but, before being handed to the clerk, the printed headings of all but one of the petitions were cut off, and the rest of the sheets of paper containing only the signatures pasted successively below the signatures on the one petition not thus mutilated. These latter signatures were not themselves sufficiently numerous:—Held, following Re Williams and Brampton (1908), 17 O.L.R. 398, that the document presented to the council was not such a petition as the Act requires and that an injunction should issue, on the application of an owner of a licensed hotel, to prevent the reeve and councillors from submitting a by-law to the electors as prayed for. Little v. McCartney (1908), 18 M.R. 323, distinguished.

Adams v. Woods, 19 Man. R. 285.

—Local option by-law—Petition to council for submission of by-law.]—A petition to the council of a municipality to submit to the vote of the electors' local option by-law under s. 62 of the Liquor License Act, R.S.M.

1902, c. 101, as re-enacted by 9 Edw. VII. c. 31, s. 2, filed with the clerk in one calendar year with the intention that it should be acted upon in that year, but not so acted upon, may be acted upon as a valid petition for the submission of such a by-law in the following year even if a portion of the territory of the municipality in which some of the petitioners resided has, in the meantime, been incorporated into a separate village, provided that there still remain on the petition enough names of persons resident in the reduced municipality.

Hatch v. Rathwell, 19 Man. R. 465.

—Local option by-law—Several petitions made into one.]—A number of separate petitions for the submission of a local option by-law under s. 62 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII. c. 31, s. 2, containing signatures of more than the required number of the resident electors, were received by the clerk of the municipality, who handed them back to the person presenting them ,to carry out a suggestion as to how they should be put together. The latter then made the many petitions into one by cutting off the headings from all but one and putting all the signatures after the one heading left. He then left this with the clerk:—Held, that the first reception of the petition by the clerk was not the receipt by him contemplated by the statute and that only the petition as afterwards filed could be considered as having been presented to the council, that such mutilated petition was not such a petition as the Act requires, and, therefore the injunction issued by the Judge appealed from, to prevent the submission of the by-law by the council, should stand. Two of the headings cut off as above described were altogether insufficient as petitions under the Act and, although the number of the signatures to these imperfect petitions could not, as a result of the mutilation, be definitely ascertained, it was believed by the Judge appealed from that there was not the necessary percentage of the electors on the remaining petitions, and he held, that everything should be presumed in odium spoliatoris and that his finding should be that there were not enough signatures to uphold the petition.

Larkin v. Polson, 19 Man. R. 612.

—Local option by-law — Application to quash for defects.]— A by-law of a municipality requiring the assent of the ratepayers, which has in fact been submitted to them and received their assent, cannot, under s. 428 of the Municipal Act, R.S.M. 1902, c. 116, be quashed on application to the Court after one year from its passage, although it had not been signed by the reeve or sealed with the corporate seal, and the proceedings attending its submission were in other respects informal and defective. In re Vivian and the Rural Municipality of Whitewater (1902), 14 Man. R. 153, not followed.

Re Houghton and Municipality of Argyle, 14 Man. R. 526 (Killam, C.J.).

— Wholesale liquor license — Refusal of to Japanese — Change of licensing board.] — The Vancouver Licensing Board refused to consider an application for a wholesale liquor license because the applicant was a Japanese. An application for a mandamus was refused by Irving, J. Applicant appealed to the Full Court, and at the time of the hearing of the appeal the personnel of the board had been changed:—Held, that the board should have considered the application regardless of the fact that he was a Japanese, but as the personnel of the board had been changed, no order would be made.

Re Kanamura, 10 B.C.R. 354.

— Liquor License Ordinance — Partners — License to one member of vendor firm — Illegal sale.] — Where a firm sold intoxicating liquors in quantities for which, under s. 78 of the Liquor License Ordinance (C.O. 1898, c. 89) action may be brought, but the only license under which the firm purported to sell was one issued to one of the members of the firm in his own name:—Held. (1) That the plaintiffs could not recover in respect of the liquors; but the action being upon a bill of exchange, and an additional open account, judgment was given for the portions of each which were not for intoxicating liquors. (2) A composition arrangement made with a creditor induced by a misstatement by the debtor to the creditor of the amount of assets and liabilities, will be set aside if repudiated on the discovery of the falsity of the statement, and before any benefit has been taken under the arrangement, even though the misstatement be not shown to have been fraudulently made.

Plisson v. Skinner, 5 Terr. L.R. 391.

— Liquor License Ordinance — Bill of exchange given for legal and illegal items — Recovery as to part.] — On an overdue bill of exchange accepted by defendants, and also for goods sold and delivered. One Ellison and several other persons were carrying on a business at Indian Head, under the name and style as above. The license, however, to sell liquor, was granted to one Ellison and not to the plaintiffs as a firm. The bill of exchange was for goods sold, $411.34, of which $327.34 were intoxicants. The defendants, the plaintiffs and certain other creditors of the defendants, together with one Dundas, mutually agreed that the defendants should assign to Dundas certain property at a certain valuation, and the creditors should share pro rata. At the trial the following facts were proven, the acceptance by the defendants of the bill of exchange, also the sale and delivery of goods. The fraud of the defendants in

falsely representing to the plaintiffs, that their total indebtedness was $6,000, whereas, the fact was it was double that amount; and that after the plaintiffs had entered into the arrangement, and before they had received any benefit therefrom, they rescinded the agreement. Ss. 13, 19 and 81 of the Liquor License Ordinance, provide that licenses may be issued to a co-partnership, and that every license for the sale of liquor shall be held to be a license to the person therein named, and for the premises therein mentioned, and shall remain valid so long as such person continues to be an occupant of such premises, and the true owner of the business; and no person shall sell any liquor without first having obtained a license:—Held, (1) following Browne v. Moore, 32 S.C.R. 93, that where by law sales of liquor without license are prohibited, recovery for such sales cannot be enforced, and that therefore recovery on the bill of exchange in so far as the consideration is for sales of liquor, cannot be supported or enforced, but the prohibition will not extend beyond liquor sold, and the other sales included in the bill of exchange and the open account, not liquors are enforceable. (2) The contract between the plaintiffs and defendants, and several other creditors of defendants, and Dundas, was entered into by the plaintiffs by misrepresentation of a material fact. The plaintiffs having, on discovering this and before receiving any benefit, repudiated the same, the agreement must be rescinded.

Indian Head Wine Liquor Co. v. Skinner, 39 Can. Law Jour. 125 (Richardson, J.).

— Renewal of license — Discretion of license commissioners — Refusal of rehearing.]—

Re Ross & McCool, 5 W.L.R. 561 (B.C.).

— Conviction — Appeal — Defect in form or substance — Legal merits.]—

Sing Kee v. McIntosh, 10 W.L.R. 103 (B. C.).

—Renewal of license — Powers of license commissioners — Appeal to County Court Judge.]—

Re Fernie Liquor Appeal, 8 W.L.R. 394 (B.C.).

— Hotel license granted by commissioners —Number of licenses — Householders — "Population actually resident" — Floating population.]—

Re Bell Liquor Appeal, 7 W.L.R. 250 (B. C.).

— Cancellation of hotel license — Limitation of number of licenses — Evidence as to population.]—

Re Yale Hotel License, 6 W.L.R. 769 (Alta.).

—Allowing intoxicating liquors to be drunk on premises of restaurant keeper — Liquor not furnished or procured by keeper of house.]—

R. v. Ma Hong, 10 W.L.R. 262 (Alta.).

— Municipal by-law — Validity—Powers of license commissioners — Wholesale license — Discretion.]—

Re Dundass and Municipality of Chilliwack, 1 W.L.R. 94 (B.C.).

—British Columbia Liquor License Act — Brewer licensed under Dominion Inland Revenue Act — Sale of beer without provincial license.]—

R. v. Neiderstadt, 2 W.L.R. 272 (B.C.).

— Sale in prohibited hours — Conviction of licensee — Vancouver Incorporation Act, 1900, ss. 161, 162 — By-laws passed by board — Conflict with municipal by-laws— Unlawful act of employee.]—

Rex v. Roberts, 9 W.L.R. 421 (B.C.).

— Interpretation — "Allowing" gambling on licensed premises — Knowledge of licensee.]—

Rex v. Whelan, 9 W.L.R. 424 (B.C.).

— Conviction — Form of, for several offences.] — Where a liquor license statute expressly provides that several charges may be included in the one information, and the magistrate adjudges the accused guilty upon each charge, it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by the one conviction adjudging a forfeiture in respect of each offence.

R. v. Whiffin, 4 Can. Cr. Cas. 141, 3 Terr. L.R. 3.

— Prohibition of intoxicating liquor—Bill of exchange — Consideration.] — The mere fact that the consideration of a bill of exchange is intoxicating liquor does not of itself render the bill void under the N. W. T. Act as originally enacted. Where by a clause in an Act of Parliament the Courts are deprived of jurisdiction which they would otherwise have, and that clause is by itself repealed, such clause is to be treated as if it never existed, and a retrospective jurisdiction immediately attaches.

Trumbell v. Taylor (No. 2), 3 Terr. L.R. 313.

— Hotel license granted by commissioners— Appeal — Proof of number of licenses.]—

Re Hurel & Handley, 6 W.L.R. 765 (B.C.).

—Refusal by license commissioners of application for wholesale license.]—

Re Bell, 3 W.L.R. 489 (Terr.).

—Wholesale licenses — Limitation as to number.]—

Re Carosella, 6 W.L.R. 765 (B.C.).

— Liquor License Ordinance — Appeal — Affidavit of merits — Jurisdiction.] — Ch. 32 of Ordinance of 1900, s. 22, amending the Liquor License Ordinance (C.O. 1898, c. 89), requires that a special affidavit of the party appealing shall be transmitted with the conviction to the Court to which the appeal is given:—Held, against the contentions, (1) that this provision is applicable only where the appeal is based on a denial of the facts established in evidence, and not where a question of law arising on such facts is involved; and (2) that the provision is ultra vires of the Legislative Assembly of the Territories — that there was no jurisdiction to entertain an appeal where this provision had not been complied with.

The King v. McLeod, 4 Terr. L.R. 513.

—Local option by-law—Form of ballot—Failure to keep polls open during prescribed hours.]—1. The use of the form of ballot prescribed by s. 4a of c. 31 of 9 Edw. VII. amending s. 68 of the Liquor License Act, R.S.M. 1902, c. 101, at the voting on a local option by-law, together with the directions for the guidance of voters in the form prescribed by c. 391 and schedule F. of the Municipal Act, R.S.M. 1902, c. 116, is not a fatal objection to the by-law, notwithstanding the inconsistency of the two forms. 2. The first publication of the notice of the voting on a local option by-law required by s. 66 of the Liquor License Act having been on the 14th of October, this was not "as soon as possible" after the second reading, which had taken place on the preceding 5th of June, and the by-law, although carried, should be quashed because that section had not been complied with. 3. The deliberate closing of one of the polls for about an hour upon an adjournment for lunch, though with the consent of all present and in pursuance of a local custom, was held fatal to the by-law in the absence of satisfactory evidence that the result of the voting had not been affected thereby. 4. A local option by-law may be given its third reading without waiting for the time for applying for a recount to elapse. Re Coxworth and Hensall (1908), 17 O.L.R. 431, followed.

Hatch v. Oakland, 19 Man. R. 692.

—N.W.T. Liquor License Ordinance — Keeping bar open during prohibited hours — Want of allegation and proof of accused being a licensee.] — Upon a charge of having had a barroom open and sold liquor during prohibited hours the prosecution must either allege or prove that the defendant was a licensee.

The Queen v. Davidson, 4 Terr. L.R. 425.

— Liquor License Ordinance — Appeal from conviction — Affidavit negativing guilt — Statutory requisites—Jurisdiction — Waiver.] — A Territorial Ordinance enacting that no appeal shall lie from a conviction under a Territorial Ordinance unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit before the justice who tried the cause, that he did not by himself or otherwise, commit the offence, is not ultra vires of the Legislative Assembly. The omission to make such affidavit within the time prescribed is fatal to the jurisdiction of the Court to which the appeal is given, and is an omission which cannot be waived so as to confer jurisdiction.

Cavanagh v. Mellmoyle, 5 Terr. L.R. 235. 6 Can. Cr. Cas. 88.

— Liquor License Ordinance (N.W.T.)—Application by Attorney-General to expedite hearing—"Court to which such appeal is made" — Prior conviction.] — Notice having been given of an appeal from a conviction for an infraction of the Liquor License Ordinance (a consequence of which conviction was a forfeiture of the license of the person convicted), to "the presiding Judge sitting without a jury, at the sittings of the Supreme Court for the Judicial District of Western Assiniboia, to be holden at the Town of Regina, on Tuesday, the 25th day of March, 1902," the Attorney-General applied to a Judge under Ordinance 1901, c. 33 (amending the Liquor License Ordinance), s. 21, sub-s. 3, to expedite the hearing:—Held, that the appeal was to the Supreme Court for the judicial district named, generally, and not merely to a Court coming into existence only on the day mentioned, and that a Judge had jurisdiction to hear the application. Held, on the hearing of the appeal, that s. 64, sub-s. 5 of the Liquor License Ordinance was intra vires, although the effect might be to inflict imprisonment (on non-payment of fine) upon a person who had not personally violated the Ordinance. Held, also, that forfeiture of license results under s. 82 from a second or any subsequent offence against s. 64, notwithstanding the convictions occurred in different licensing years.

The Queen v. McLeod, 5 Terr. L.R. 245.

— Saloons — Bar-rooms — Sunday closing by-law — Validity of — R.S.B.C. 1897, Cap. 144, s. 50.] — A municipality has no power under s. 50, sub-ss. 109 and 110 of the Municipal Clauses Act to pass a by-law closing any kind of licensed premises, except saloons. A municipality is not empowered, by s. 7 of the Liquor Traffic Regulation Act, to pass any closing by-law, the intention of the section being to prohibit the sale during inter alia such hours as may be prescribed by the municipality under the authority of some other statute. Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad.

Hayes v. Thompson, 9 B.C.R. 249 (Hunter, C.J.).

— Manitoba Liquor Act 1900 — Powers of legislature.] — The Manitoba Liquor Act

of 1900 for the suppression of the Liquor traffic in that province is within the powers of the Provincial Legislature, its subject being and having been dealt with as a matter of a merely local nature in the province within the meaning of sub-s. 16 of s. 92 of the British North America Act, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly with business operations outside the province. Re Liquor Act, 13 Man. R. 239, reversed.

Attorney-General of Manitoba v. Manitoba License Holders' Association, [1902] A.C. 73.

— Findings of fact — Scienter — Mens rea.] — The applicant was convicted, under the N.W.T. Act, s. 95, for having in his possession intoxicating liquor without the special permission in writing of the Lieutenant-Governor. On a motion for a certiorari to quash the conviction: — Held, (1) following Barber v. Nottingham & Grantham Ry. Co., 15 C.B.N.S. 726, and R. v. Grant, 14 Q.B. 43, that where the charge is one, which, if true, is within the magistrate's jurisdiction, the findings of fact by him are conclusive. (2) That, as the statute does not express knowledge by the accused of the intoxicating character of the liquor, to be an essential element of the offence, first, it was not necessary for the prosecution to allege or prove it; secondly, that it was necessary for the accused to prove not merely that he had no such knowledge, but that he had been misled without fault or carelessness on his part.

The Queen v. O'Kell, 1 Terr. L.R. 79.

— Opinion of Court rendered under R.S.M. c. 28, not a judgment — Amount in controversy.] — Held, following Union Colliery Co. v. Attorney-General of British Columbia (1897), 27 S.C.R. 637, that the opinion of the Court (reported 13 Man. R. p. 239), rendered under R.S.M. c. 28, upon a constitutional question submitted by an Order of the Lieutenant-Governor in Council, was not a judgment, decree, order or sentence within the meaning of the Imperial Order in Council of 26th November, 1892, relating to to appeals from the Court of Queen's Bench for Manitoba, and that such Court has no jurisdiction to grant an application for leave to appeal to His Majesty in Council under said Order from such an opinion. Held, also, that, although it was shown that the enforcement of the Liquor Act would deprive the Province of a revenue far exceeding £300 per annum, and would prejudicially affect the very large investments of persons engaged in the liquor traffic, it could not be said that any questions respecting property or civil rights to the value of £300 were involved in the decision sought to be appealed from.

In re The Liquor Act, 13 Man. R. 323. (Leave to appeal was subsequently granted by the Privy Council; see Attorney-General v. License Holders, [1902] A.C. 73.)

— Conviction involving forfeiture of license —Appeal therefrom — Effect thereof upon forfeiture.] — Held, that where a licensee is convicted under s. 122 (3) of the Liquor License Ordinance, of supplying liquor to an interdicted person, with a knowledge of such interdiction, the effect of such conviction being that "his license shall be forfeited," an appeal from such conviction is a stay of proceedings and suspends all the consequences of the conviction, including the forfeiture of the license.

Simington v. Colbourne, 4 Terr. L.R. 372, 4 Can. Cr. Cas. 367.

—Application to cancel license—Judicial division lying partly in one judicial district and partly in another.]—Under section 119 of the Liquor License Act, R.S.M. 1902, c. 101, if the licensed premises do not lie within the Judicial District for which the County Court Judge is Judge, he has no jurisdiction to entertain an application to cancel the license, although he is the Judge for a County Court Judicial Division composed for the most part of territory in his judicial district with the addition of a number of townships in the judicial district in which are the licensed premises.

Re Somerville, 19 Man. R. 355.

— Local option — Voting.] — Although an elector deposits a ballot at the voting on a local option by-law submitted under the Liquor License Act, R.S.M. 1902, c. 101, if such ballot is afterwards rejected, he has not voted within the meaning of s. 63 of the Act, and he should not be counted among those who vote in ascertaining whether the necessary three-fifths of those who vote have voted in favour of the by-law.

Re Swan River By-law, 16 Man. R. 312.

— Convicting by-laws — Offence committed by employee.] — By a by-law passed in November, 1900, the Licensing Board, pursuant to ss. 161 and 162 of the Vancouver Incorporation Act, 1900, defined the conditions governing the sale of liquor within the municipality. The Board again dealt with the subject in August, 1905, forbidding the sale of liquor "from or after the hour of 11 o'clock on Saturday night till six of the clock on Monday morning thereafter," and provided that "such portions of any and all by-laws heretofore passed regulating the sale of intoxicating liquors in the City of Vancouver as conflict with the provisions of this by-law are hereby repealed." Sub-s. 19 of s. 125 of the Vancouver Incorporation Act, 1900, empowers the city council to pass by-laws for "the closing of saloons, hotels and stores and places of business during such hours and on Sunday as may be thought expedient." In pursuance of this sub-s., the council, in May, 1902,

passed a by-law preventing the sale of liquor between the hours of 11 o'clock on Saturday night and six o'clock on Monday morning:—Held, that the council, in passing this last mentioned by-law, had gone beyond the powers meant to be conferred by sub-s. 19 of s. 125.

Re Roberts, 14 B.C.R. 76.

—Local option by-law—Voting—Form of ballot paper—Inconsistent directions—Facsimile ballot.]—Upon an application to quash a local option by-law:—Held, that, although the legislature, in amending the Liquor License Act in 1909 by prescribing a new form of ballot paper, did not amend schedule F. to the Act, containing directions to voters and a facsimile ballot paper, the municipal officers were justified in substituting the proper form of ballot as prescribed by the amending Act, and would also have been justified in changing the words of the directions, but the by-law was not invalid because they did not do so. Re Hatch and Rural Municipality of Oakland, 14 W.L.R. 309, and Ward v. Owen Sound, 15 O.W.R. 443, followed. 2. That the notice required by s. 66 of the Liquor License Act to be published in the Manitoba Gazette and a local newspaper "as soon as possible," was published in time, the second reading having been on the 5th October, the publications in the Gazette on the 16th, 23rd, and 30th October, and the 6th and 13th November, and in a local weekly newspaper on the 14th, 21st, and 28th October and the 4th and 11th November. The publications might have been a week earlier in each case, but "as soon as possible" did not mean that the clerk should neglect his other duties and devote himself to the preparation and publication of this notice; he must publish it as soon as possible, following the ordinary routine of official duty. And the municipal officers were not bound to select as their medium a daily newspaper because of earlier publication, the weekly circulating more largely in the municipality. 3. That the by-law was not illegal because the proclamation published pursuant to s. 376 (b) of the Municipal Act stated in one paragraph that "in the event of a poll being required, the said poll will be taken at the following places"—naming them; another paragraph containing an explicit notice of the voting on the by-law. 4. That the by-law was not illegal because it was given its third reading before the time for applying for a recount had elapsed. In re Coxworth and Village of Hensall, 17 O.L.R. 431, approved and followed. 5. Without considering whether s. 376 (b) of the Municipal Act was made applicable by s. 68 of the Liquor License Act, that the requirement of s. 376 (b), that before the final passing of the by-law the council shall publish in a newspaper in at least one number of such paper each week for 3 successive weeks, and once in the Manitoba Gazette, at least 2 weeks in advance of the day of voting, a notice signed by the clerk, etc., was complied with by the publications in October and November (set out in paragraph 2 of this head-note), the voting taking place on the 21st December; and that, in construing sub-s. (b) of s. 376, the provisions of sub-s. (a) are not to be considered, in view of the new section substituted for s. 65 of the Liquor License Act by s. 4 of c. 26 of the Acts of 1908. 6. That an objection that one of the polling places was not opened until after 11 o'clock on the day of polling should not be considered, the only evidence in support of the fact being an affidavit of the applicant on information and belief. 7. That the admitted fact that another poll was not opened until after 10 o'clock (9 being the hour for opening) did not invalidate the by-law, the deputy returning officer having made an honest effort to comply with the by-law, but having been delayed by stress of weather, and it not being shown that the result was affected. And semble, that s. 89 of the Municipal Act, fixing the hours of voting, is directory only. All that is required is a substantial, not a literal, compliance. 8. That effect should not be given to an objection based on the fact that the by-law did not fix a time and place for the appointment of scrutineers, as required by s. 377 of the Municipal Act it being shown as a fact that scrutineers were appointed and did act.

Re Shaw and Portage La Prairie, 14 W.L.R. 542.

— Liquor License Ordinance — Payment towards municipal revenue — Municipal corporation — By-law.] — Where, under s. 46, Liquor License Ordinance, an incorporated city had passed a by-law requiring each licensee to pay towards its municipal revenue a sum equal to the territorial license fee the amount so fixed is not automatically increased in proportion to the increase in the amount of the territorial fee effected by a statute subsequently passed amending s. 46 by increasing the territorial (or provincial) fees.

Goode v. City of Edmonton, 1 Alta. R. 259.

— Hotel license — Appeal to County Court Judge — Trial de novo — Number of householders.] — The onus of proving that the petition called for by s. 22 of the Liquor License Act, 1900, does not comply with the provisions of the Act is on the petitioner. Where a man enters into the employment of another person for an indefinite period he thereby becomes, within the meaning of the Liquor License Act, actually resident.

Labelle v. Bell, 13 B.C.R. 328.

— Appeal from commissioners to County Court Judge — Notice of — Signature of notice by party affected — Proof of decision appealed from.] — (1) In an appeal from the decision of commissioners under the Li-

quor License Act, 1900, proof of such decision is not necessary. (2) It is not necessary that the notice of appeal be signed by the party or parties affected by the decision. (3) The appellant is not called upon to prove that the commissioners have exhausted their authority by having granted the full number of licenses. (4) Section 11a of the Act, as enacted by c. 26, 1906, contemplates an actual population of 1,500 before a fourth license may be granted.

Harel v. Handley, 13 B.C.R. 278.

— Loan of liquors by one retail licensee to another — Sale or barter.] — The holder of a hotel license who lends to another hotel licensee liquors in quantities greater than the quantity he is permitted by the Liquor License Ordinance to sell, upon terms requiring the borrower to return goods of like quality and quantity is thereby guilty of an infraction of the Ordinance which imposes a penalty for the infraction, and as the contract is therefore avoided he cannot recover the value of the goods so lent. (2) Such a transaction constitutes a sale or barter and not a bailment.

O'Flynn v. Carson, 1 Sask. R. 47.

— Sunday closing — Saloons — Hotel barrooms.] — A liquor license by-law provided that upon information of an infraction of its provisions by a holder of a license, he might be summoned to attend the next meeting of the Licensing Commissioners to make application for a renewal of his license. It was contended that the holder could not be compelled to make application for a renewal until the expiry of his license:—Held, that the council had authority to pass such an enactment under sub-s. (d) of s. 205, Municipal Clauses Act, c. 32, 1906. Held, also, that a provision to enforce, inter alia, the closing of hotel barrooms during such hours of the night as may be thought expedient, was bad as exceeding the powers conferred by s. 50, sub-s. 122 of said ch. 32. Hayes v. Thompson (1902), 9 B.C.R. 249, 6 Can. Cr. Cas. 227, followed on this point.

Re Moloney and City of Victoria, 13 B. C.R. 194.

— Selling liquor to interdicted person — Defects in conviction.] — On an appeal by defendant from a conviction for selling liquor to an interdicted person:—Held, that the conviction was bad because it did not disclose on its face that the liquor was sold or given "during the period of interdiction," and also because it did not state the period for which defendant should be imprisoned in default of payment of the fine imposed.

Rex v. Harris, 6 Terr. L.R. 249.

— Being in bar during prohibited hours — Act of employee.] — S. 64 of the Liquor License Ordinance, c. 89, C.O. 1898, forbids (1) sale of liquor during prohibited hours; (2) and on election days; (3) being in a bar-room during prohibited hours, and (4) keeping a bar-room open during prohibited hours, and sub-s. 5 provides that any contravention of these provisions by an employee shall be deemed the act of the employer: — Held, that if the act of the employee in being in a bar-room during prohibited hours were to be deemed the act of the employer, then only the employer could be punished, which is not in accordance with the manifest intention of the legislature, which is that those actually present should be punished; and, therefore, the section should be so construed, as to make sub-s. 5 applicable only to sub-ss. 1, 2, and 4. (2) That a bar-room cannot be entered for any purpose during prohibited hours, except to procure liquors to be used by guests at their meals on Sunday.

The King v. Bell, 1 Sask. R. 1.

— Conviction for second offence — Proof of previous conviction — Amendment.] — (1) Where the Court, reviewing the evidence on certiorari, finds that it would not have made any conviction on the evidence before the magistrate, it may quash the conviction for an irregularity, informality or insufficiency appearing therein, notwithstanding Code s. 1124. (2) Where a summary conviction is expressed to be for a second offence under a liquor law, but no evidence was given of a prior conviction, it is doubtful whether there is power on certiorari to amend the conviction under Code s. 1124 by reducing it to one for a first offence.

The King v. Tystad, 15 Can. Cr. Cas. 236 (Y.T.).

—Judgment cancelling liquor license—Effect of appeal—Perfecting security.]—The liquor license in respect to the Richelieu Hotel was cancelled by the judgment of the Court en banc on the 29th March, 1909. From this judgment the licensee appealed to the Supreme Court of Canada. Security upon the appeal to the Supreme Court was perfected on the 19th April, 1909. Pending this appeal the licensee obtained a renewal license. On an application to cancel the renewal license:—Held, that the renewed license had been in fact cancelled by the judgment of the Court en banc. The effect of the appeal and the perfecting of the security was not to revive this license, and there was therefore no license in existence which could be renewed and the renewal license must therefore be cancelled.

Re Richelieu Hotel License, 2 Alta. R. 333.

— Condition precedent to issue of license — Signatories to recommendation — Summary application to cancel license.] — Under c. 7 of the Acts of Alberta of 1908, s. 6, if leave to appeal is given by the Judge, an appeal may be taken from the judgment of a single Judge on an application to cancel liquor license under s. 57 of the Liquor

License Ordinance. The provision of s. 37 of the Liquor License Ordinance that an application for license must be recommended by the signatures of 20 of the 40 householders nearest the hotel, is a condition precedent to the granting of a license outside a city or town, and the License Commissioners may not waive the performance of that condition.

Re Richelieu Hotel License, 2 Alta. R. 64.

— Illegal sale by bartender — Knowledge of employer.] — A hotelkeeper, having delegated authority to his porter or bartender to sell intoxicating liquors on the hotel premises, is responsible for his servant's infraction of the law regulating such sale.

Rex v. Gates, 14 B.C.R. 280.

— Hotel license — Sale of spirits in greater quantities than a quart.] — The defendant, the holder of a hotel license to sell liquor by retail, was convicted of selling liquor in greater quantities than that authorized by the Act. It was shown that one G. applied to the licensee to purchase three quart bottles of whiskey, the quantity which the licensee could, under his license, sell being one quart. The licensee said to G. "one at a time" and gave him one quart, which was paid for. The purchaser understood the licensee to mean that he would sell the three bottles; but separately. Subsequently and at intervals of fifteen minutes each two other bottles were purchased and these were stored in the bar until called for by the purchaser. On appeal:—Held, that the evidence disclosed that the real nature of the transaction was not a separate and distinct sale of separate and distinct quarts, but one sale delivered in instalments for the purpose of evading the Act, and the conviction should therefore be affirmed. (2) That the object of the statute being to prevent the sale of liquor by hotel licensees in greater quantites than one quart, the Court should so construe it as to suppress evasions and defeat attempts to avoid in an indirect manner that which is by the statute prohibited.

Rex v. Stephens, 1 Sask. R. 509.

—Liquor License Act—Powers of city council — By-law prohibiting issue of saloon licenses.]—A portion of a by-law passed by the municipal council of a city repealed a provision of a former by-law limiting the number of saloons in the city to 6, and enacted that "no license for the purpose of vending spirituous or fermented liquors by retail (commonly called saloon license) shall hereafter be issued in the city":—Held, that this portion of the by-law was prohibitive, and, having regard to the provisions of the Liquor License Act, and especially s. 205, that there was power in the council to regulate, but not to prohibit; and this portion of the by-law was quashed. City of Toronto v. Virgo, [1896] A.C. 88, followed.

Re Blomberg and City of Nelson, 15 W.L.R. 375 (B.C.).

—Order cancelling license—Jurisdiction.]—An order of a Judge of the Supreme Court cancelling a license to sell intoxicating liquors in a hotel, upon the ground that the village in which the hotel was situated did not contain 40 dwelling-houses, as required by the Liquor License Ordinance, was set aside on appeal to the Supreme Court en banc, who held (Stuart, J., dissenting) that, on a complaint laid under s. 57 of the Ordinance, the Judge has no authority to inquire whether the provision of s. 37, sub-s. 3, that "no application for a new license shall be entertained in respect of any hotel license in a village containing less than 40 dwelling-houess," has been complied with—in other words, that the decision of the Board of License Commissioners on that matter is final. S. 37 relates to procedure, and is directory only. The reference in s. 57 to "provisions respecting licenses" is confined to those sections of the ordinance coming under the subtitle "Licenses" in the arrangement of the Act. Such particular headings are legitimately taken into account in the interpretation of statutes. Re Yale Hotel License, 6 W.L.R. 769, considered. Re Richelieu Hotel License, 10 W.L.R. 402, not followed. The Supreme Court en banc, being the final Court of appeal in such a case, should decline to follow its own earlier, but recent, decision, if of opinion that that decision was wrong. Order of Harvey, J., reversed.

Re Ryley Hotel Co., 15 W.L.R. 229 (Alta.).

[Leave to appeal to S.C. of Canada granted. Finseth v. Ryley Hotel Co., 43 Can. S.C.R. 646.]

—Local option by-law—Posting up notices of voting—Ballots marked with assistance of deputy.]—1. S. 66 of the Liquor License Act, R.S.M. 1902, c. 101, provides completely for the giving of notice of the voting on a local option by-law under the Act, and there is nothing in the Act which incorporates the provisions of s. 376 of the Municipal Act, R.S.M. 1902, c. 116, so as to require the notices provided for by that section. 2. S. 68 of the Liquor License Act does not incorporate any provisions of the Municipal Act with respect to matters prior to the polling, especially the matter of notice of the voting which is independently and specifically dealt with in s. 66. 3. The vote of an elector who requests assistance in marking his ballot cannot be legally taken without strict compliance with s. 119 of the Municipal Act, and when four votes were so taken without the oath prescribed by that section, a by-law carried by a majority of only two should be quashed, because, without violating the secrecy of the ballot, it could not be shown that a majority of the electors voted for the by-law. 4. The use of the form of ballot prescribed

by s. 4A of c. 31 of 9 Edw. VII., amending s. 68 of the Act, at the voting on a local option by-law, is a sufficient compliance with the statute, although it does not expressly state what is to be the effect of a voter marking his ballot "For license" or "Against license."

Re Municipality of Shoal Lake, 20 Man. R. 36.

—Information—Amendment of, after lapse of time limit.]—An information, under sub-s. 32 of s. 30, of 7 & 8 Edw. VII. amending the Liquor License Act, R.S.M. 1902, c. 101, for consuming liquor in territory under a local option by-law discloses no offence unless it alleges that the liquor was purchased and received from some person other than a licensee under said s. 30, and it becomes a new information if amended by adding such allegation. If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed under the information and prohibition should issue to prevent him from doing so.

The King v. Speed, 20 Man. R. 33, 46 C. L.J. 390, 17 Can. Cr. Cas. 24.

—Local option by-law—Submission to electors—Voting.]—The legislature in passing s. 68 of the Liquor License Act intended that those sections of the Municipal Act which provide for situations not directly covered by the Liquor License Act should be applicable. Summing up is a necessary part of the proceedings in taking the vote upon a by-law submitted to the electors. Section 377 of the Municipal Act provides a just and reasonable method for the appointment of a time and place of summing up, and also that those interested in promoting or opposing the by-law may be present thereat. A local option by-law which did not appoint a time and place for summing up was quashed. S. 66 of the Liquor License Act provides that the council shall, "as soon as possible" after the first and second readings of the by-law, publish a notice in a newspaper, and that such notice shall be published for at least one month before the vote is taken:—Semble, that the statute does not require two such advertisements. Held, that s. 376 (b) of the Municipal Act, providing for the posting up of notices, in 4 conspicuous places, is made applicable by s. 68 of the Liquor License Act to the voting upon a local option by-law.

Re South Cypress Rural Municipality, 14 W.L.R. 299 (Man.).

— Local option by-law — Receipt of petition by municipal council.] — The receipt by the clerk of a municipality of a petition for a local option by-law under s. 62 of the Liquor License Act, R.S.M. 1902, c. 101, as amended by s. 2 of c. 26 of 7 & 8 Edw. VII., is not a receiving of the same by the council within the meaning of the Act, and, when there was no meeting of the council after the petition reached the clerk until the third of October, a mandamus to compel the council to submit a by-law to the vote of the electors should not be granted.

Re North Cypress, 18 Man. R. 315.

— Amendment of information after expiry of time limit for laying charge — Supplying liquor to interdict.] — (1) Where the statutory offence is the furnishing of intoxicating liquor to a person known to the accused to have been interdicted, and a time limit is provided for laying information therefor, an information within the time but omitting to charge knowledge of the interdiction cannot be amended to include such statement after the expiry of the time limit. (2) The original information in such case alleges no offence and is consequently to be treated on amendment as a new information.

The King v. Guertin, 19 Man. R. 33, 15 Can. Cr. Cas. 251.

— Local option by-law — Failure to publish notice.] — The failure to publish the notice of the voting on a local option by-law required by s. 66 of the Liquor License Act, R.S.M. 1902, c. 66, is good ground for an application under s. 427 of the Municipal Act to quash the by-law if afterwards carried and passed by the council at the third reading, but an injunction to prevent the council from submitting the by-law to the vote of the electors will not be granted by reason only of the failure to publish such notice, because of the existence of another adequate remedy in case the by-law should be carried, viz., an application to quash it. Helm v. Port Hope (1875), 22 Gr. 273, and King v. City of Toronto (1902), 5 O.L.R. 163, distinguished on the ground that in those case the councils had no jurisdiction to submit the questions to the vote of the people.

Little v. McCartney, 18 Man. R. 323.

—License fee—By-law passed to operate under Provincial Act passed out not then in force.]—By the Liquor License Amendment Act of 1907, s. 42, the fee payable to the province in respect to a liquor license in the city of Calgary was raised from $200.00 to $400.00. This Act was passed on the 15th March, 1907, and by its terms did not come into force until July 1st, 1907. In anticipation of this Act coming into force the city of Calgary passed a by-law on the 3rd of June, 1907, increasing the liquor license fee payable to the city from $200.00 to $400.00, and before July 1st insisted on payment of $400.00 by the plaintiff before granting certificate that the said license had been paid for the year ending June 30th, 1908:—Held, that the by-law was intra vires and was authorized by the provisions of s. 59 of the Interpretation Act.

Stephens v. City of Calgary, 2 Alta. R. 296.

LIS PENDENS.

—Lis pendens—Motion for discharge—Pending appeal.]—Where the action has been dismissed at the trial, but the plaintiff is appealing from the judgment of dismissal, a Judge in Chambers has no jurisdiction to order the registry of a certificate of lis pendens to be discharged:—Semble, that the defendant should have applied to the Judge at the trial to make the discharge part of the judgment. The defendant's motion to discharge was dismissed, without prejudice to any application to the district registrar for cancellation.

Campbell v. Campbell, 13 W.L.R. 288.

Lis pendens — Identity — Art. 1241 C.C.] —To warrant the exception based on lis pendens it is necessary that there should be identity of the claims under the conditions demanded by Art. 1241 C.C.

Canada Industrial Co. v. Roddick, 3 Que. P.R. 468 (S.C.).

— Demise of Crown — Writ.] — A writ issued in the name of the Sovereign but served and returned after such Sovereign's death, does not thereby become void, and lis pendens may be pleaded to a second action between the same parties for the same cause.

Ryan v. Fortier, 3 Que. P.R. 526 (Cir. Ct.).

— Cancellation — Security on —Judge's discretion as to — B.C. Land Registry Act, ss. 85, 86, and 87.] — On a summons to cancel lis pendens, the Judge being of opinion that the plaintiffs could not succeed in the action, ordered that the lis pendens be cancelled on the applicants giving the nominal security of $1.00:—Held, on appeal, that it was not a case for cancellation of the lis pendens, but that the plaintiffs should be put on terms to speed the action.

Merrick v. Morrison, 7 B.C.R. 442.

— Certificate of lis pendens — Vacating — Registration of order vacating.] — A party by whom or for whose benefit a lis pendens has been registered, may obtain ex parte an order vacating it, and may register such order at any time. Ss. 98 and 99 of the Judicature Act, R.S.O. 1897, c. 51, as to applications for orders vacating a lis pendens upon non-prosecution of the action, and giving the right to register such orders only after the expiration of fourteen days from their making, apply only when the lis pendens has been registered by an opposite party.

McGillivray v. Williams, 4 O.L.R. 454.

— Saisie-arret — Art. 1241 C.C. — Art. 173 C.C.P.] — To be able to plead lis pendens against a second saisie-arret after judgment when the first is pending it is necessary to establish that the seizure under the second writ is for the same debt as that under the first.

Leith v. Hall, 4 Que. P.R. 398 (Sup. Ct.).

— Administrator ad litem — Locus standi —Con. Rules 194, 195. — The only living issue and heir at law of an intestate who had brought this action to set aside on the ground of undue influence a transfer of her property (heretofore made by the intestate to the defendant), applied for an order under Rules 195 or 195 appointing him administrator, or administrator ad litem of the deceased:—Held, that the order could not be made either under Rule 194, for reasons given in Hughes v. Hughes (1881), 6 A.R. 373, 380; nor under Rule 195, which is not applicable to a case of a plaintiff who, without right or title, has commenced an action and then seeks to legalize his illegal act by an order of the Court.

Fairfield v. Ross, 4 O.L.R. 534.

— Judgment of another Province — Verification.] — A judgment rendered in a province of Canada outside of Quebec cannot, in Quebec Province, be deemed a foreign judgment, and the Quebec Courts must take judicial notice of it if the provisions of Art. 211 C.P.Q. have been complied with. The defendant may by a plea of lis pendens attack an action brought in Quebec Province on the ground that an action of the same nature, between the same parties, and based on the same rights, is pending in another Province of Canada. But if the action is only brought to have the judgment obtained in the other province enforced, the fact that plaintiff had set up a similar claim in such other province and that the action thereon was actually pending, will not support the plea of lis pendens, as the Court in such case would not be called upon to decide the merits of the action, but only to pronounce upon the validity of the judgment so rendered.

Blackwood v. Percival, Q.R. 23 S.C. 5 (Sup. Ct.).

— Different causes of action — Art. 1241 C.C.] — In an action for damages for breach of conditions of a lease, the plea of lis pendens cannot be invoked by alleging that an action is pending for damages resulting from resiliation of the lease.

Larue v. Couture, 5 Que. P.R. 460.

— Litige.] — An action which has not been entered in Court does not constitute a litige and cannot be set up to support a plea of lis pendens if the debtor is afterwards sued for the same cause.

Lay v. Cantin, Q.R. 23 S.C. 405 (Cir. Ct.).

— Sale of lands — Registration of certificate of lis pendens.]—

See SALE OF LANDS.

— Contract for sale of land — Registration of — Interest of vendor pending payment— Subsequent registration of lis pendens — Payment of instalments.]—In 1894 a husband conveyed certain lands to his wife and from her by agreement in October, 1896 (registered in March, 1897), plaintiff contracted to purchase one parcel of the land; the agreement provided that the purchase money should be paid by instalments, which were paid until November, 1898, when the wife conveyed to the plaintiff and took his note in payment of the balance. In August, 1897, defendant company commenced an action against the wife to set aside the conveyance to her from her husband as a fraud on his creditors and registered a lis pendens on 24th September, 1897, and by the final judgment in that action the wife was directed to do all acts necessary to make the lands comprised in the impeached conveyance available to satisfy the claims on her husband's estate. Plaintiff on applying to register his title first learned of the action and the lis pendens. Plaintiff sued to have the registration of the lis pendens cancelled:—Held, (1) The estate acquired by the conveyance to plaintiff from the wife remained subject to the rights of the company as they should be determined by the results of its action against the wife. (2) The plaintiff in order to get a title should not be compelled to pay again that portion of the purchase money which he had paid since the registration of the lis pendens. (3) Notice of the company's adverse claim was not imputed to plaintiff by reason of the registration of the lis pendens. (4) Ss. 85-88 of the Land Registry Act providing for the cancellation of a lis pendens are not available in practice where, as in this case, the nature and extent of the interest affected by the lis pendens are not ascertained. (5) The plaintiff was entitled to a declaration of right only and the Court declared that he was within his rights in making the payments before notice of the adverse claim; that the lis pendens did not affect the interest acquired by the plaintiff under his contract and that the defendant company had a charge for the amount of purchase money unpaid. So long as there remains anything to be done to work out the judgment in an action the action is pending. Upon a contract for the sale of land the purchase price of which is payable by instalments the vendor retains an interest in the land proportional to the amount of purchase money unpaid which interest is capable of being affected by lis pendens. Semble, generally a cause of action imperfect at the issue of the writ is not perfected, either at law or in equity, by subsequent events.

Peck v. Sun Life Assurance Company, 11 B.C.R. 215.

— Yukon — Transfer of lands — Notice of lis pendens.]—

See YUKON.

— Party in default — Litigious rights — Right affirmed by a judgment.] — 1. An agreement between the parties to several transactions involving litigation, to do a series of acts, in settlement of their differences, is divisible and a performance of part of them will be held binding and effective, notwithstanding the failure to perform the whole, more particularly as against the party through whom such failure occurs. 2. A right affirmed by a judgment is, by law, excluded from the class of litigious rights, and is not, therefore, subject to the restraints put upon the sale and alienation of such rights.

Armstrong v. Connolly, 14 Que. K.B. 295.

— Pleading — Joint and several debtors.]—An action to recover a sum of money from several joint and several debtors cannot by a plea of lis pendens, be set up in another action for the same amount against a debtor jointly and severally liable with the former, who was not a party to the first.

Bank of Montreal v. Roy, Q.R. 31 S.C. 439 (Sup. Ct.).

— Sale of litigious rights.] — The sale of rights and claims resulting from a conveyance with right of redemption in an immovable in possession of a third party of which the vendor never had possession, made without warranty and for a low price payable after annulment, at the purchaser's suit, of the title of such third party is a sale of litigous rights. Therefore, the third party, on an action for revendication being brought against him, is completely relieved of the obligation to deliver the immovable to the purchaser by reimbursing him for the price he paid with the costs and proper charges.

Latour v. Bélanger, Q.R. 32 S.C. 274 (Ct. Rev.).

LOCAL OPTION.

See LIQUOR LICENSE.

LODGING HOUSES.

By-law — Lodging house keeper — No definition of — How construed.] — Where a by-law requiring lodging house keepers to take out a license did not define what was meant by keeping a lodging house:—Held, that it did not apply to a person not engaged in such occupation for profit.

Re Gun Long, 7 B.C.R. 457.

LORD CAMPBELL'S ACT.

Death of workman—Action by widow—Insurance moneys.]—In an action by the widow and administratrix of a man who

was killed while in the employment of the defendants, under the Workmen's Compensation for Injuries Act, to recover damages as compensation for his death, the evidence showed that the damages, based upon a estimate of the wages for three years of a person in the same grade as the deceased, would amount to at least $2,200. Counsel for the plaintiff, however, in addressing the jury, told them they should deduct from the amount they found on that basis a sum of $1,000 which the plaintiff had received for insurance on the life of the deceased. The jury announced a verdict of $1,200, not saying that they had found $2,200 and deducted $1,000; but the trial Judge asked them if that was what they meant, and they said it was:—Held, having regard to s. 7 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, that the $1,000 ought not to have been deducted; and that, upon the findings of the jury, judgment should be entered for $2,200. Beckett v. Grand Trunk R.W. Co. (1885), 8 O.R. 601, 13 A.R. 174, 16 S.C.R. 713, and Grand Trunk R.W. Co. v. Jennings (1888), 13 App. Cas. 800, specially referred to.

Dawson v. Niagara and St. Catharines R.W. Co., 22 O.L.R. 69.

Damages recovered by administratrix for benefit of herself as widow and of her children under Fatal Accidents Act—Judgment recovered against her as administratrix.]—McEwan v. Speckt, 4 W.L.R. 325 (N.W.T.).

—Pecuniary loss of parents — Reasonable expectation of benefit.]—A lad of twenty, a brakesman employed by the defendants, was killed in a collision upon the railway, by reason of the negligence of the defendants' servants, and this action was brought under the Fatal Accidents Act, R.S.O. 1897, c. 166, by the administrators of his estate, to recover damages for his death, for the benefit of his parents, who lived in England. The claim was made and the assessment of the damages was based upon the principle of the Workmen's Compensation for Injuries Act. The jury found that the estimated earnings of a person in the same grade as the deceased, in the like employment, in this province, for the three years allowed by the statute, would be $1,800, and they assessed the damages at that sum, apportioning them between the father and mother. The evidence showed that the deceased was unmarried; had been about four years in Canada, and about a month in the service of the defendants. He had corresponded with his mother, but had sent his parents no money. He had received a good and rather expensive education at his father's expense, and the father swore to an understanding between son and the parents that the son would, in consideration of the large sum so expended, assist the parents in their old age:—Held, that the plaintiffs' right of recovery was limited in amount to the pecuniary loss which it could be fairly and reasonably found that the parents had suffered by the son's death; and, upon the evidence and in all the circumstances, taking into account the uncertainties and contingencies, there was such a reasonable and well-founded expectation of pecuniary benefit as could be estimated in money so as to become the subject of damages; but, having regard to all these matters, the award of damages was excessive and extravagant, and therefore unreasonable; and there should be a new assessment of damages, unless the parties could agree upon some amount. It is the plain duty of the Court to see that an award of damages, in an action of this kind, which appears to have been arrived at upon consideration not warranted by the evidence, shall not stand.

London and Western Trusts Co. v. Grand Trunk Railway Co., 22 O.L.R. 262.

— Action by foreign administrator — Application for leave to sue in forma pauperis.] — In an action brought under the Fatal Injuries Act plaintiff who was a sister of the deceased, as well as of the administratrix, applied for leave to sue in forma pauperis:—Held, refusing the application and affirming the judgment of the Chambers Judge, that plaintiff was not within the exception made in the case of a person who is both executor and a beneficiary. Per Drysdale, J., in the judgment appealed from, an application made by a Scotch administrator whose letters have been recognized and re-sealed by the Probate Court of this province for leave to continue the action in forma pauperis, ought not to be allowed where such application is not made until after the statute has run against the administrator in this province.

Walker v. Allan Line Steamship Co., 44 N.S.R. 410.

—Death caused by motor vehicle—Presumption of negligence.]—S. 33 of the Manitoba Motor Vehicles Act, 7 & 8 Edw. VII. c. 34, applies to actions under the Fatal Accidents Act, R.S.M. 1902, c. 31, where the death of a person has been caused by an injury sustained from a motor vehicle upon a highway. The only effect of s. 38 is that a presumption is afforded that there has been negligence, and it is for the defendant to rebut that presumption. Therefore, the plaintiffs, suing as the administrators of the estate of a man who was injured upon a highway by the defendant's motor vehicle, and died from his injuries, were entitled to the benefit of the presumption. And, held, upon the evidence, and having regard to ss. 12, 13, 22, and 39 of the Motor Vehicles Act, that the defendant had not discharged the onus that the statute had placed upon him—that there was negligence on the part of the defendant. The deceased had a right

to expect that any person driving a motor vehicle along the highway would comply with the statute and otherwise exercise a proper degree of care; and it had not been made to appear that he himself was guilty of any want of care. The introduction into street traffic of the automobile, combining speed with great weight and size, has brought about new considerations; and the legislature has deemed it necessary to interfere for the protection of pedestrians and vehicular traffic of other kinds; hence the Motor Vehicles Act. The rule that persons lawfully using a highway are entitled to rely on warnings required by statute, as from railway engines, is applicable where the statute requires from motor vehicles warning by light and sound. The persons on whose behalf the action was brought, the father sister, and child of the deceased, were held to have a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased; and damages were assessed in their favour at $3,000.

Toronto General Trusts Corporation v. Dunn, 15 W.L.R. 314 (Man.).

—Action by parents of deceased workman—Expectation by parents of benefit.]—In an action for damages resulting from the death of a workman, the employers admitted liability under the Employers' Liability Act, but disputed the right of the parents to sue as defendants, or that they had any reasonable expectation of benefit from the continuance of his life. There was evidence that the deceased had sent money on two occasions to his parents, but they had in the first instance assisted him by advancing money for his passage to Canada:—Held, on appeal, that the parents had failed to show that they had any reasonable expectation of benefit from the son had he lived. The proceedings at the trial showed that there had been no attempt, by commission or otherwise, to prove the financial condition of the parents. Held, that a new trial should not be granted to enable the plaintiffs to make out a stronger case.

Brown v. British Columbia Electric Railway, 15 B.C.R. 350.

—Death of son—Reasonable expectation of pecuniary benefit.]—In an action under C.O. 1898, c. 48, brought on behalf of the mother of a man in the employment of the defendants, who was killed, as was alleged, through the negligence of the defendants, the mother herself was not a witness at the trial, but the plaintiff, another son, testified that she was about 70 years old and in good health; that she lived in Ontario, where she owned a house and lot; that an unmarried son and daughter lived with her; that she had several other sons and daughters, all married and living away from her; and that she had no means of support, except what she received from her children. The deceased was 30 years old, unmarried, and earning about $100 a month. The plaintiff said that the deceased sent his mother money from time to time, and that she looked to him more than to the others; but he admitted that he knew this only through his mother or the deceased. As to one occasion, about three months before the death, the plaintiff said: "Times were not very good, and he was sending some money, and he wanted to send $35, and he asked me if I had any. He said he had $25, and whether I had $10. I had a letter from mother after that, saying she had received it. There was no other evidence of importance. The jury found a verdict for the plaintiff with $1,500 damages:—Held, that the jury had no proper evidence on which to estimate the damages, and they must have guessed at the amount awarded; but, further, there was no proper evidence of any reasonable expectation of pecuniary benefit to support a verdict of even nominal damages. The only evidence of any payment made by the deceased to his mother was hearsay, and inadmissible for the purpose of proving actual contribution to her support; and it was not to be inferred that she had an expectation of future contributions from the single fact that at one time he wished to send one, especially when the circumstances suggested that it was an individual case and not likely to recur; nor, if such an expectation could be inferred, would it be a reasonable one, on that evidence. The evidence, so far as it showed intention, was properly received, but was not sufficient to warrant a finding of a reasonable and well-founded expectation of pecuniary benefit capable of estimation in money. Judgment of Stuart, J., 11 W.L.R. 608, reversed.

Moffitt v. Canadian Pacific Railway Co., 13 W.L.R. 244.

—Failure to connect negligence with death.]—In an action brought to recover damages for the death of a man by the negligence of the defendants, it appeared that he had been a passenger upon a train of the defendants, and was left by the servants of the defendants alone, while asleep and under the influence of strong drink, in a coach placed in a dangerous position upon a bridge unprotected by a railing or otherwise. When last seen alive, he was asleep in the coach. His body was found in the river, some miles below the bridge, a few days later. Whether he fell from the bridge accidentally, or threw himself or was thrown therefrom, or whether he met his death otherwise than by falling from the bridge, was left open to doubt. The only evidence tending to show that he fell from the bridge was that of a call-boy employed by the defendants, who stated that, when returning across the bridge to the coach about an hour after the deceased was last seen, he heard a splash as if made by a heavy body falling into the water under the bridge:—Held, assuming that the defendants owed a duty to

the deceased, and that there was negligence on their part, that the plaintiff had failed to show with any reasonable degree of certainty that such negligence caused the death of the deceased; the manner and cause of his death were matters of mere conjecture; and the plaintiff was properly nonsuited. McArthur v. Dominion Cartridge Co., [1905] A.C. 72, and Grand Trunk R. W. Co. v. Hainer, 36 S.C.R. 180, distinguished. Wakelin v South Western R. W. Co., 12 App. Cas. 41, Young v. Owen Sound Dredge Co., 27 A.R. 649, and other similar cases, followed. Judgment of Harvey, J., affirmed.

Beck v. Canadian Northern Railway Co., 13 W.L.R. 140.

—Action for damages of appellants' son—Negligence by respondents—Misdirection as to contributory negligence by deceased.]—In an action for damages for the death of the appellants' son while acting as engineer of the respondents' lumber train, the respondents were charged with negligence in respect to the train having been equipped with defective brakes and an incompetent brakesman, while the deceased was charged with contributory negligence in jumping from the train. The jury found for the appellants, but a new trial was ordered by the Supreme Court. One Judge was dissatisfied with the verdict on the ground of misdirection in regard to contributory negligence, and another Judge held, contrary to both his colleagues, that the damages were excessive:—Held, that the order must be reversed. It was too late for the respondents to rely on misdirection which they had not expected at the trial or in the notice of appeal or in oral argument before the Supreme Court. There were no sufficient grounds for a new trial on the head of excessive damages.

White v. Victoria Lumber and Manufacturing Co., [1910] A.C. 606.

—Seizure—Exemption—Damages for negligence.]—The sum which a person who causes the death of another by negligence is condemned to pay to the victim's parents as provided in Art. 1056 C.C. is an alimentary allowance awarded by the Court within the meaning of Art. 599, par. 4, C.P.Q., and, therefore, is exempt from seizure under execution.

Lagainère v. Desjardins, O.R. 37, S.C. 513.

—Action for death happening out of the jurisdiction — Necessity for administration.]—Allen Tait Johnson while engaged as a switchman on defendants' railway at Port Arthur, Ontario, met with injuries which resulted in his death. The plaintiff, his widow, was appointed administratrix of his estate by a Manitoba Surrogate Court and brought this action for damages claiming both at common law and under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178:—Held, following Couture v. Dominion Fish Co., 19 M.R. 65, that the plaintiff could not sue under the corresponding Ontario Act without having been first appointed administratrix by an Ontario Court and that, as the injury took place in Ontario, the Manitoba Act could not apply and there being no such right of action at common law, the entry of a nonsuit by the trial Judge was right.

Johnson v. Canadian Northern Ry. Co., 19 Man. R. 179.

—Accident—Cause of death—Negligence of victim.]—In a trial by a jury with an assignment of facts in an action based on the liability of a builder for death caused by the victim coming into contact with a crane the arm of which had, in turning, touched electric wires charged with a heavy voltage, a finding by the jury that the fault attributable to the defendant was "not having taken necessary precaution to prevent the arm of the crane approaching the electric wires" is sufficiently explicit to comply with the requirements of art. 483 C.P.Q., through the nature of the precautions that should have been taken is not indicated. The presiding Judge must, after the verdict, render judgment at once or after deliberation or reserve the case of the opinion of the Court of Review and application by motion or otherwise is not necessary to enable him to do so. The spontaneous and voluntary act of a passer-by who rushes to the aid of a workman whom he believes to be in danger, and is struck by electricity in the manner above mentioned, cannot be imputed as the cause of his death by the person responsible for the accident.

Martineau v. Dumphy, Q.R. 19 K.B. 339.

—Action against resident of Province for death happening out of the jurisdiction—Administration.]—The plaintiff sued as administrator of the estate of his deceased wife appointed by the proper Court of the Province of Manitoba, of which they were residents, for damages for the death of his wife in the North West Territories alleged to have been caused by the negligence of the defendants whose domicile was also in Manitoba:—Held, (1). If the alleged wrongful act or negligence was not actionable where it took place it would not be actionable in Manitoba, even though the defendants were domiciled there. (2). The rule actio personalis moritur cum persona would apply and no action could be brought in the Territories for such wrongful act or negligence, unless Lord Campbell's Act or some statute equivalent thereto were in force there. 3. Such equivalent statute, viz.: An Ordinance respecting Compensation to the Families of Persons killed by Accidents, printed at page 195 of the General Ordin-

ances of the North West Territories of Canada, 1905, requiring that such action shall be brought by and in the name of the executor or administrator of the deceased, it must be assumed that the Legislature meant the executor or administrator appointed as such under the laws in force in the North West Territories, and the plaintiff, not having received such appointment, could not maintain the action. Doidge v. Mimms, (1900) 13 M.R. 48, followed, 4. Section 2 of chapter 49 of 7 and 8 Edward VII. (D), giving jurisdiction to the superior Courts of Manitoba and other Provinces to try civil cases with respect to persons and property in a certain portion of the Territories, does not authorize the Court here to apply the laws of Manitoba in determining rights arising in the Territories, but the Court must, while applying its own practice and procedure, decide such cases in accordance with the laws in force in such Territories.

Couture v. Dominion Fish Co., 19 Man. R. 65.

—Damages—Funeral expenses.]—The funeral expenses of the deceased victim of a délit or quasi-délit form part of the damages recoverable under Art. 1056 C.C., when the plaintiff is compelled by law to pay them.

Montreal Street Ry. Co. v. Brialofsky, Q.R., 19 K.B. 336.

—Alimentary provision—Non-seizability.] —An indemnity to a father for the death of his son, who, he stated, had been his sole means of maintenance, granted by judgment in an action against the responsible party, is in the nature of "the alimentary support judicially adjudged" of Art. 599 C.P.Q., and is, therefore, non-seizable in execution.

Carrière v. Leroux, Q.R. 19 K.B. 249.

Fatal Accidents Act — Death of beneficiary — Survival of action.] — Upon the death before judgment of the sole beneficiary on whose behalf an administrator has brought an action under the Fatal Accidents Act, R.S.O. 1897, c. 166, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative. Judgment of Ferguson, J., 32 O.R. 234, reversed.

McHugh v. Grand Trunk Railway Co., 2 O.L.R. 600 (C.A.).

— Administrator — Fatal Accidents Act, R. S.O. 1897, c. 166 — Security for costs.] — An administrator appointed for the purpose of bringing an action for the benefit of another under s. 3 of the Fatal Accidents Act, R.S.O. 1897, c. 166, is not a mere nominal plaintiff bringing such action for the benefit of somebody else, in the sense of the rule which entitles a defendant to security for costs upon showing that such nominal plaintiff is also insolvent.

Sharp v. Grand Trunk Ry. Co., 1 O.L.R. 200.

— Government railway — Accident to the person — Negligence of Crown's servants — Action by parent of deceased — Pecuniary benefit — Damages.] — 1. In the case of death resulting from negligence, and an action taken by the party entitled to bring the same under the provisions of R.S.N.S. 1900, c. 178, s. 5, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. 2. Such party is not to be compensated for any pain or suffering arising from the loss of the deceased, or for the expenses of medical treatment of the deceased, or for his burial expenses, or for family mourning. Osborn v. Gillett (L.R. 8 Ex. 88), distinguished.

McDonald v. The King, 7 Can. Exch. R. 216.

— Rights of administrator — Rights of relatives — Time limit — Stay of proceedings.] — An unmarried man having come to his death by reason of injuries inflicted by the defendants, two actions were brought to recover damages occasioned by his death. The first in point of time was brought by the paternal grandfather and grandmother of the deceased, and the second by his mother, who had obtained letters of administration to his estate after the bringing of the first action. Upon a motion by the defendants to stay one or other of the actions:—Held, that, while the grandfather and grandmother could legally proceed with their action under R.S.O. 1897, c. 166, although brought within six months of the death, so long as there was no executor or administrator, yet an administratrix having been appointed and an action brought by her within the six months, she was entitled to proceed with it; and the first action was the one to be stayed. Lampman v. Township of Gainsborough (1888), 17 O. R. 191, and Holleran v. Bagnell (1879), 4 L.R. Ir. 740, explained and followed. Held, also, that the administrator would have the right in her action to claim damages sustained by the personal estate of the deceased. Leggott v. Great Northern R.W. Co. (1876), 1 Q.B.D. 599, followed.

Mummery v. Grand Trunk, Whalls v. Grand Trunk, 1 O.L.R. 622.

— Negligence — Onus of proof.] —

See NEGLIGENCE.

(Young v. Owen Sound Dredge Co., 27 Ont. App. 649.)

— Action for causing death through negligence — Pecuniary loss to surviving relative — Damages assessed on wrong principle.] — In an action brought under Con. Stat. c. 86 (Lord Campbell's Act), for the

benefit of the father of the deceased, evidence was given to show that the father, who was a brass founder, and about seventy years old, had practically become unable to earn his own livelihood, although his prospects for some years of future life were good; that the deceased, who was 26 years of age, had always lived with his father, and for many years had paid various sums—sometimes as much as thirty dollars per month—for his board and lodging, though there was no evidence to show what such board and lodging were worth; that for the fifteen months immediately preceding his death he had ceased to pay anything, because having gone into business on his own account, his father wished him to keep the money to put into the business; that the son was sober, industrious, a good man of business, and affectionate to his father. When the son went into business for himself the father advanced him $700. After his death the business was closed up and the stock-in-trade, etc., sold, which sale realized $1,100. Of this $700 went to creditors other than the father, leaving only $400 to satisfy the father's claim of $700. The learned Chief Justice, who tried the case, having left it to the jury in general terms to estimate what, if any, pecuniary damage the father had sustained by the death of his son, a verdict was found for the plaintiff for $3,500:—Held, (per Hannington, Landry, Barker, VanWart, and McLeod, JJ.), that the amount of the verdict showed either the charge was too general in its terms or the jury misunderstood the principles upon which damages should be assessed in cases such as this, and, therefore, that there must be a new trial on the question of damages, and, further, as the evidence of negligence on the part of the defendants was not altogether satisfactory, and the finding of the jury on the question of the damages did not entitle their opinion on the question of negligence to much weight, that there must be a new trial on this point as well. It having been urged on behalf of the plaintiff that he was entitled to retain a verdict for $300 at least, that being the balance due the father upon his $700 loan, as the jury would have a right to infer that the son, if he had lived, would have paid the debt in full. Held, as before, that as such claim had not been mentioned in the particulars delivered under the Act, and was not referred to either in the plaintiff's opening, the Judge's charge, or in any other part of the case, it was impossible to say that the jury in assessing the damages had included this item, therefore, even admitting this claim to be a proper element of damage in cases under the Act, it must be submitted to the consideration of another jury; further held, as before, that outside of the debt above referred to there was sufficient evidence to go to the jury of a pecuniary loss to the father by the death of the son. Per Tuck, C.J.: That as the jury had either misunderstood or wilfully disregarded the charge in question of damages, there must be a new trial, and that the evidence of negligence should be submitted to another jury as well.

Runciman v. The Star Line Steamship Co., 35 N.B.R. 123.

— Railways — Negligence — Orders to engine drivers — R.S.O. 1897, c. 166.] — The defendants were erecting an interlocking apparatus at a point of their main line where there was a siding, whereby the switch could be worked and a signal shown to indicate how it was set, by lowering the upper or lower arm of the signal as the case might be. The plaintiffs' husband, an experienced engine driver in defendants' employ, having been informed before starting with his train that the apparatus was in working order and that all trains were to be governed by the rules applicable in such cases, approaching the spot, saw the signal with both arms down, intimating that the interlocker was out of order, but nevertheless proceeded, and the switch not being fastened in any way the train was derailed and he was killed. As a matter of fact, the apparatus was not in working order, a switchman of the defendants being at the spot with flag signals to use in case of necessity, but he failed to warn the deceased. The defendant's rules governing engine drivers provided that they should stop when in doubt as to the meaning of a signal, also that a signal imperfectly displayed must be regarded as a danger signal, and that in case of doubt they were to take the safe course and run no risk. Employees were also specially instructed that if an interlocker was out of order, trains were to be flagged through. The plaintiff brought this action for damages under R.S.O. 1897, c. 166:—Held, that although there was a plain defect in the condition of the way which was the cause of the derailment of the engine, that the plaintiff was properly non-suited, in that her husband, had he survived, could not have maintained an action, having negligently disobeyed his orders as contained in the rules, by proceeding with his train in spite of the condition of the signals.

Holden v. Grand Trunk R.W. Co., 5 O.L. R. 301 (C.A.); 2 Can. Ry. Cas. 352.

— Damages — Apportionment of between widow and children.] — An action brought against a railway company by a widow on behalf of herself and four infant children, aged respectively seven, five, three and one year, to recover damages for the death of her husband through the company's negligence, was settled by the company paying $4,800. On application to a Judge the amount was apportioned by giving the widow $1,200 and each of the children $900, the widow also to be paid for the children's maintenance, $200 a year for three years, the fact of the widow having already re-

ceived $1,000 for insurance on the husband's life being taken in consideration in apportioning her share.

Burkholder v. Grand Trunk Railway Co., 5 O.L.R. 428; 2 Can. Ry. Cas. 5.

— Damages — Death of husband — Life insurance policy — Art. 1056 C.C.] — The fact that a widow may have at the death of her husband the amount insured upon his life under a policy of insurance is no reason why she may not claim damages from the person responsible on account of having caused his death. See also Grand Trunk R.W. Co. v. Miller, Q.R. 12 K.B. 1, since reversed on appeal to the Supreme Court of Canada.

Konwaketasion v. Dominion Bridge Co., 5 Que. P.R. 320.

— Action before administration.] — An action was brought to recover damages because of the death of a workman, the plaintiff alleging that she was his widow. Her status was put in issue, and she obtained letters of administration as the deceased's widow and by amendment claimed also as administratrix:—Held, that having failed to prove her status as widow she could not succeed as administratrix, the rule that letters of administration relate back to the time of the bringing of the action not applying where the person setting them up was not really entitled to obtain them. Trice v. Robinson (1888), 16 O.R. 433, distinguished.

Doyle v. Diamond Flint Glass Company, 7 O.L.R. 747 (Idington, J.).

— Death — Absence of direct evidence as to cause of injury — Inference.] — An appeal by the defendants from the judgment of the Divisional Court reported 7 O.L.R. 340, dismissed.

Billing v. Semmens, 8 O.L.R. 540 (C.A.).

— Widow's action for death of husband — Dilatory exception—C.C. 1056—C.P. 177.]— In an action by a widow for damages caused by the death of her husband, the defendant cannot ask that the proceedings be suspended until the children of the deceased have been made parties to the suit.

Thomson v. Singer Manufacturing Co., 6 Que. P.R. 358.

— Convicting claims.] — A woman claiming to be the widow of a man killed owing as alleged to the negligence of the defendants, brought an action against them with her two children as co-plaintiffs to recover damages. Subsequently another action was brought by another woman also claiming to be the deceased's widow, to recover damages for the benefit of herself and child, her marriage having taken place after an alleged divorce of the first plaintiff:—Held, that only one action would lie under the Act; that that action would be for the benefit of the persons in fact entitled; and that, there being no doubt as to the right of the children in the first action, that action should be allowed to proceed and the rights of all parties worked out in it, the second action being stayed; the plaintiff in the second action to be represented by counsel at the trial if desired. Judgment of Falconbridge, C.J.K.B., reversed.

Morton v. Grand Trunk Railway Company, 8 O.L.R. 372 (D.C.).

— Fatal Accidents Act — Status of widow —Grant of administration pendente lite — Workmen's Compensation Act — Rights of mother — Expectation of benefit.] — An action was brought to recover damages for the death of a workman employed by the defendants, owing to their alleged negligence. The plaintiff alleged that she was the widow of the deceased, but this was denied. She obtained, as widow, pendente lite, letters of administration to the estate of the deceased, and amendments were made by which she claimed as administratrix for her own benefit as widow and for the benefit of the mother of the deceased. The defendants denied negligence, denied the plaintiffs' status as widow and administratrix, and also set up a release of the cause of action. The trial Judge found against the plaintiff's status and in the defendants' favour on the facts as to the obtaining of the release. The jury found negligence, and assessed the damages at $1,500 apportioning the sum equally between the plaintiff and the mother:—Held, that there was evidence upon which the jury were justified in finding that the man's death arose from the negligence of the defendants without blame on his part; and therefore that there should not be a non-suit or a new trial upon this branch of the case; Meredith, J., dissenting, and being of the opinion that there should be a new trial upon the whole case. (2) That the release given by the plaintiff should not, on the evidence, be held binding on her; Anglin, J., hesitating. (3) That, on the evidence, the mother had no sufficient interest in her son's life or expectation from him to give her a right of action in respect of his death; and there should be a new assessment of damages unless the plaintiff was content to accept $750. (4) That there should be a new trial upon the question of the plaintiff's right as widow and administratrix, evidence having been discovered since the trial going to show that the plaintiff was the true widow. (5) That if the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action. Trice v. Robinson (1888), 16 O.R. 433, and Murphy v. Grand Trunk R.W. Co., unreported decision of a Divisional Court, 27th May, 1889, applied and followed. Judgment of Idington, J., 7 O.L.R. 747, reversed.

Doyle v. Diamond Flint Glass Co., 8 O.L.R. 499 (D.C.).

—Railway — Disorderly passenger — Expulsion from train—Fatal Accidents Act.]— A passenger travelling from Detroit to Buffalo on defendants' train, who was somewhat excited from liquor, but physically capable of taking care of himself, was guilty of several disorderly acts, amongst others of molesting fellow-passengers. He was put off the train at Bridgeburg, a station near the Canadian end of the International Railway Bridge crossing the Niagara River, and about a mile distant from his destination. He followed the train on foot and after a scuffle with the bridge guard jumped or fell off the bridge into the river and was drowned:—Held, that the defendants were justified in putting him off the train, and were neither obliged to put him under restraint and carry him to Buffalo, nor to place him in charge of some one at Bridgeburg. On the evidence it was impossible to say whether the deceased fell off the bridge accidentally or threw himself off; or that his death was the natural or probable result of his being removed from the train. Held, also, that there was no evidence of any negligence on the part of the defendants to be submitted to a jury. Judgment of Britton, J., 7 O.L.R. 690, reversed.

Delahanty v. Michigan Central R.W. Co., 10 O.L.R. 388, C.A.

— Damages — Death of son.] — The father who sues for compensation for the death of his son by defendant's fault cannot claim as damages, the sums he would have paid for the son's maintenance, education and the like.

Beaudet v. William Grace Co., 7 Que. P. R. 82 (Sup. Ct.).

— Negligence — Accident — Cause of — Failure to disclose.] — The defendants were the owners of a tug which had been laid up for the winter in a harbour alongside of their dock, being a place accessible to, but not frequented by, the public. The tug accidentally filled with water and sank, breaking the ice, and leaving open water above the deck, over which fresh ice formed. This was cut away by defendants with the object of raising the tug, and, while in this condition, the body of the plaintiff's husband was found lying on his back with his feet and legs on the surrounding ice and his head in the water. It appeared that on the evening before the finding of the body the deceased was in a state of intoxication. To a question put to the jury, whether deceased by means of ordinary care could have avoided the accident; and how he could have so avoided it, they answered, "Yes, he might have taken another road; or, if sober, on a bright night, he might have avoided the hole":—Held, that no negligence on the part of the defendants was established, for it was quite as reasonable to conclude that deceased voluntarily sat down on the edge of the hole and perished from exposure, as that he walked into the hole. Held, also, that the answer of the jury to the question put to them was not one in favour of contributory negligence.

Plouffe v. Canada Iron Furnace Company, 10 O.L.R. 37 (Britton, J.).

— Loss of child — Right of mother while father living — Excessive damages — Reasonable expectation of pecuniary benefit.]— The mother of the deceased is a person for whose benefit an action can be brought under the Fatal Accidents Act, although the father is living. Damages assessed by a jury at $3,000 for the loss of a daughter seventeen years old by reason of the negligence of the defendants, were held to be excessive, and a new trial was directed unless both parties would agree to have the damages fixed at $1,500. Order of a Divisional Court, 11 O.L.R. 158, reversed.

Renwick v. Galt, Preston and Hespeler Street R.W. Co., 12 O.L.R. 35 (C.A.).

— Damages — Excessive amount.] — Damages to the amount of $2,100 were recovered by the plaintiff suing as the father and administrator of his deceased son, 22 years of age, who was killed through defendant's negligence. The son's occupation was principally that of a labourer, the highest rate of wages received by him being for a few days at the rate of $35 a month. His mother was dead and his father had married again. He lived with a widowed sister, but was on good terms with his father and stepmother, whom he visited once or twice a month, on such occasions giving his father from $2 to $4, and once $5. His habits were good and he was of a generous disposition. Evidence was received of his intention of helping his father to build a house, of assisting him in paying off a mortgage of $650 on his property, as well as a debt of $400, which he owed another son, and for which the father had given his promissory notes:—Held, that the evidence of such expressed intention was properly admitted, not necessarily as showing a promise to make the payments, but of his being well disposed to his father; the amount awarded the plaintiff for damages, however, was clearly excessive, and a new trial was ordered unless the parties agreed to a reduction of the damages to $500.

Stephens v. Toronto Railway Company, 11 O.L.R. 19, 5 Can. Ry. Cas. 102 (C.A.).

— Joint and several liability — Cause of death — Measure of damages — Division of damages awarded en bloc to several minors.] —1. When legislative authority is given to do a thing in one of two or more ways, the selection or adoption of the way is subject to the ordinary rules of prudence with respect to liability for the consequences. So, where a company for electrical purposes is empowered by its charter to construct and lay its wires over or under the streets, it cannot arbitrarily do the one thing or the other, and if it lay, over ground, wires

charged with so heavy a voltage that, as a matter of ordinary prudence, they should be laid under ground, it will be liable in damages for loss and accidents caused thereby. 2. Where a death is caused by electricity so carried on the wires of the company flowing into a derrick, brought in contact with the wires by another party to whom it belongs, it is a question for the jury to find whether the death is imputable to the joint fault of the company and of the owner of the derrick, or, exclusively, to the sole fault of either of them. Therefore, if the finding is that the company alone is at fault, the Court, whatever may be its own view of the evidence on the point, cannot interfere and will reject a motion by the company for a judgment non obstante veredicto, nor for a new trial, against the ground. 3. In assessing the damages caused by the death of a husband and father to his widow and children, a jury is not restricted to a consideration of the wage-earning capacity of the deceased; they are justified in making a further allowance for any material aid and assistance, apart from money, which the plaintiffs might have expected from him, had he lived. 4. A plaintiff who moves for judgment on a special verdict that one of two defendants is liable, to the exclusion of the other, for the cause of action, cannot at the same time move for a judgment non obstante veredicto, nor for a new trial, against the other defendant. 5. When a block sum has been awarded by the verdict of a jury as damages to several minor children whose individual claims must be different by reason of the difference in their age, the Court will reserve their right to have the amount divided between them accordingly.

Dumphy v. Montreal Light, Heat and Power Company, 28 Que. S.C. 18 (C.R.).

— Damages — Misdirection.] — In a case of damages for tort tried before a jury the verdict will not be set aside on the ground of misdirection by the Judge, because he told them they might if they chose allow the full amount of the loss which the plaintiff contended he had sustained, or the amount which, from actuarial tables, would be required to yield an annuity equivalent to and representing the full loss.

Sadlier v. Grand Trunk Railway Co., 28 Que. S.C. 501 (C.R.).

— Liability for non-performance of statutory duty—Contributory negligence of fellow-workmen or of mere strangers — Marriage, evidence of.] — Action brought by administratrix of Prosper Daye, killed in explosion in defendants' mine, under C. O. 1898, c. 48. There was evidence of plaintiff's that she was married to Daye in Belgium, was living with him to time of death, and that he was the father of her children, oldest aged 17 years; that he was killed by explosion of gas in defendants' Canmore mine in June, 1900; that ventilation was defective and not as required by s. 39, Rule 1 of C.O. 1898, c. 16; that mine was not inspected as required by Rule 3 of last cited section; that the mine was gaseous; that on morning of the accident there was gas present in explosive quantities for two or three hours prior to the explosion; that the manager knew of the presence of gas; that two fellow workmen of deceased had opened their safety lamps; there was no evidence to rebut presumption of marriage, and no evidence of inspection of the lamps as required by Rule 8 of s. 39 above, or that the explosion arose from any act or default of deceased: — Held (per McGuire, C.J., trial Judge), 1. That the oral evidence of the widow was sufficient proof of marriage according to the general rule that cohabitation and reputation is sufficient evidence of marriage, though in cases of bigamy, divorce and petitions for damages for adultery, stricter proof is required. 2. That, having found the effective and proximate cause of death to be an explosion due to the fault and negligence of defendants and their breach of duty imposed by the Ordinances C.O. 1898, c. 16, they were not relieved if there was contributory negligence on the part of a fellow workman of accused or of a mere stranger. 3. That by reason of Ord. c. 13 of 1900, if negligence was proved there was no reason to inquire whether it was that of a fellow workman. On appeal to Court en banc. Held. 1. That marriage was sufficiently established by Mrs. Daye's evidence; that strict proof was not required; that the fact that the alleged marriage took place in a foreign country did not affect the question, as the lex fori governs questions of proof. 2. That there was sufficient evidence to support the findings of the trial Judge; that the findings were sufficient to render the defendants liable. Appeal dismissed with costs.

Daye v. W. H. McNeill Co., 6 Terr. L.R. 23.

— Damages — Solatium.] — The father of a child killed in an accident on a tramway has no right of action against the company liable therefor except for actual damages proved. He cannot recover sentimental damages or indemnity in solatium doloris.

The Quebec Railway, Light and Power Co. v Poitras, Q.R. 14 K.B. 429.

— New trial — Quantum of damages.] — The Court of Appeal pronounced judgment on the 4th April, 1905, dismissing the defendant's appeal except upon the question of damages. It was held that the damages assessed by the jury were excessive, and a new trial was ordered unless the plaintiff would consent to a reduction. The certificate of this judgment not having issued, the Court on the 2nd June, 1905, reconsidered the matter, and, acting under Rule 786, directed a new trial confined to

the question of the amount of damages:—Held, following Watt v. Watt, [1905] A. C. 115, that the Court has no jurisdiction, with the defendants' consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages.

Hockley v. Grand Trunk Railway Co., 5 Can. Ry. Cas. 122 (C.A. Ont.).

— Quebec Civil Code, Art. 1056 — Construction — Contract that deceased shall have no claim — "Satisfaction" means real and tangible indemnity.]—The right of action conferred by Art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by the fault of his employer is an independent and personal right, and not derived from the deceased or his representatives. Robinson v. Canadian Pacific Railway Co. (1892), A.C. 481, followed:—Held, that the deceased could not be said to have obtained "satisfaction" from the respondent company within the meaning of that article unless he had obtained a real and tangible indemnity for the fault in question. Where the deceased, as a condition of his employment, became a member of an insurance and provident society, a by-law of which provided that in consideration of the respondents' subscription thereto no member thereof or his representatives shall have any claim against the respondents for compensation on account of injury or death from accident; and it appeared from the society's provisions for sick allowance and insurance, that the respondents contributed only to the former, the latter being a scheme for mutual life insurance. Held, that, assuming this by-law to be valid, the deceased had not obtained satisfaction within the meaning of Art. 1056. The insurance money did not proceed from the respondents, and had no relation to its offence, and was equally payable in case of natural death. Reg. v. Grenier (1899), 30 Sup. Ct. Can. 42, overruled.

Miller v. Grand Trunk Railway Company (1906), A.C. 187, 15 Que. K.B. 118.

— Negligence — Contract against liability—Art. 1056 C.C.] — An agreement by which an employee renounces his right of action against his employer for liability for injuries sustained by reason of quasi-offences is not a bar to the right of action given to his widow and children by Art. 1056 C.C.

Laplante v. Grand Trunk Railway Co., Q. R 27, S.C. 456 (Sup. Ct.).

— Tort occasioning death — Indemnity to parents and children of deceased — Right of action.] — In case of death caused by a tort, no more than one action can be brought against the tort-feasor in behalf of those entitled to indemnity, and such an action brought by one of them, even though the judgment rendered therein does not determine the proportion of the indemnity which the others are to receive, is a bar to a subsequent action brought by one of the latter.

Bouthillier v. Central Vermont Railway Co., 28 Que. S.C. 472 (Dunlop, J.).

— Master's responsibility for negligence causing death of employee.] —

See MASTER.

— Railway — Contributory negligence.]—

See RAILWAY.

Wallman v. C.P.R., 16 Man. R. 82.

— Fatal Accidents Act — Foreigner — Action for benefit of.] — The administrator within this province of a foreigner who was killed in an accident here through his employer's negligence is entitled, under the amendment to the Fatal Accidents Act, as embodied in s. 2 of the R.S.O. 1897, c. 166, to maintain an action on behalf of the deceased's family, foreigners residing out of Canada, for the recovery of damages sustained by reason of his death.

Gyorgy v. Dawson, 13 O.L.R. 381 (Mulock, C.J.).

— Damages — Insurance.] — The defendant in an action for damages in consequence of the death of plaintiff's son by the alleged negligence of the former who only contests the action in respect to the amount of damages to be recorded cannot set up, in diminution thereof, the payment to plaintiff of insurance effected by the deceased in his favour which only came out during the trial and was not alleged in the defence pleaded.

Quebec Central Railway Co. v. Gillanders, Q.R. 15 K.B. 414.

— Allegation as to loss of maintenance.] — In an action in damages brought by the father for the death of his child, it is not irrelevant to allege that he and his wife have suffered loss and damage by the death of their child, through loss of maintenance which they were entitled to expect from him.

Anderson v. Protestant Board of School Commissioners, 8 Que. P.R. 341.

— Death of minor son — Cost of education.] — The maintenance and education of a minor son being obligations imposed by law upon the father, he cannot in an action in damages for the death of his son, recover the amounts so disbursed in connection therewith.

Clough v. Fabre, 9 Que. P.R. 18.

— Claim of sister — Death of brother — Art. 1056 C.C.] — By the terms of Article 1056 C.C., the only persons who have a right of action for the death of a person resulting from a quasi delict, are his consort, and ascendant or descendant relatives; the brothers and sisters have no such right of action.

Gohier v. Allan, 8 Que. P.R. 129.

— **Measure of damages.]** — In an action by a husband as administrator of his wife under the Act "respecting compensation to relatives of persons killed by wrongful act, negligence or default," C.S. 1903, c. 79, damages based on a claim of $15 per month for loss of prospective services of the wife for a period of five years may be recovered and are assessed on a proper principle.

Collins v. City of Saint John, 38 N.B.R. 86.

— **Death of person operating calcium light in theatre — Employment by playing company — Agreement between company and owners of theatre — Division of gross receipts.]** — A theatrical company agreed to present a certain play at the defendants' theatre on a date specified, and the defendants agreed to furnish the theatre and all the properties contained in the theatre for the period of the engagement, and also to "furnish electric current for the company's calciums." It was agreed that there should be no other entertainment in the theatre during the engagement, and that the gross receipts should be shared so that 70 per cent. should go to the playing company. The plaintiff's son was employed by the company to operate, and did operate, a calcium light belonging to them; he was under the charge and direction of their electrician; the company's servants had entire and sole control of the stage and its surroundings, including the place where the lamp was operated. The plaintiffs' son was killed by the action of electricity while operating the lamp:—Held, that the effect of sharing the gross receipts was but another mode of paying rent for the premises, and did not indicate that any partnership existed; and the defendants, having no right of control, were not jointly liable with the company, nor in any way liable for the death of the plaintiffs' son.

Bradd v. Whitney, 14 O.L.R. 415.

— **Claim of damages — Finding of jury set aside — New trial.]** — Plaintiff claimed damages under Lord Campbell's Act for the loss of his son who was killed by a fall of stone in defendant's mine. The jury, in answer to a question submitted by the trial Judge, found that the specific act of negligence that caused the injury was the failure of defendant to properly examine the face of the wall from which the rock fell. There was uncontradicted evidence on the part of defendant that several of the officials of the company, before starting work, went carefully over the banks and walls for the purpose of ascertaining whether they were safe: — Held, in view of this evidence, that the finding of the jury was not justified, and that there must be a new trial. Also, that the jury having placed their verdict on this one ground which could not be justified under the evidence, the Court could not give a wider scope to their answer so as to embrace other acts of negligence pointed out, or to rectify the error or misunderstanding of the jury.

McDougall v. Ainslie Mining & Ry. Co., 42 N.S.R. 226.

— **Contracting — Superintending the work.]** —Where work is done for a municipal corporation under a contract, the corporation is not responsible for damages for the death of an employee of the contractor from the negligent manner of doing the work, though the corporation employs its own engineer to superintend the work.

Dooley v. City of Saint John, 38 N.B.R. 455.

— **Action by executor or administrator under Lord Campbell's Act (C.O. 1898), c. 48 —Letters of administration to an infant — Right to sue — Practice — Next friend — Irregularity.]** — "The Ordinance respecting juries" was not brought into force in Alberta by reason of the repeal of the North-West Territories Act by R.S.C. (1906), Schedule "A" (R.S.C. vol. 3, p. 2941). The effect of 6-7 Edw. VII. (Dom.), c. 44, considered. Independently of the effect of the Alberta Act was not to repeal the former North-West Territories Act, but to prevent its remaining in force proprio vigore; and to continue (sec. 16) in force, the law therein contained as a body of law, in the same manner as the common and statute law of England, as it stood on July 15th, 1870, was introduced into the Territories. If an infant sues, without naming a next friend, it is a mere irregularity, and may be waived by an unconditional appearance of the defendant. But quite independently of waiver there must in every case be some stage at which it is too late to take advantage of a mere irregularity. In any case the Judge can deal with it under Rule 538. Letters of administration granted to an infant are not void, but voidable; and semble, until revoked the infant can sue, qua administrator, and need not be represented, when so suing, by a next friend. In an action for negligence, it is not improper to receive evidence as to what may have been done by the defendants subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there be no other evidence of negligence the case should be withdrawn from the jury. It is within the discretion of the trial Judge to submit special questions to the jury or not; but in either case the jury may render a general verdict. The words "the Court may give such damages," in C.O. (1898), c. 48, s. 3, means the Judge at trial, or the Judge and the jury, as the case may be.

Toll v. Canadian Pacific Railway Co., 1 Alta. R. 318.

— **Action for damages — Insurance.]** — In an action in damages by parents for the

death of their minor son by an accident resulting from negligence the defendants cannot set up as a defence the receipt by plaintiffs of insurance on the son's life.

Gauthier v. Bouchard, 9 Que. P.R. 385.

— Death of young child caused by negligence — Pecuniary loss of parent.] — A verdict of a jury for $300 damages for the death of the plaintiff's child, aged four years, in an action under the Fatal Accidents Act, was upheld by a Divisonal Court, and by the Court of Appeal (Moss, C.J.O., and Maclaren, J.A., dissenting), where it appeared that the child was healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age could be said to have. The question is for the jury, upon the evidence; pecuniary benefit or advantage need not have been actually derived by the parent previous to the death; the probabilty of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration.

McKeown v. Toronto R.W. Co., 19 O.L.R. 361.

— Negligence— Unfenced machinery.] — While B. was carrying a bag out of the defendant's grist mill by an ordinary means of exit he passed near a vertical shaft which was in motion, and in some way his overcoat was caught by the shaft and he was whirled around and instantly killed. Between the shaft and the smutter, where B tried to pass, was a passage of about six feet in width. The shaft, which was unguarded, was three inches in diameter, and had been mended some years before with a chain and some wire to secure a coupling. This increased its diameter by several inches, and there was evidence that a hook on the end of the chain and a piece of the wire were left protruding, though this was contradicted. There was no witness of the accident, and the jury found that there was no negligence on the part of the defendant, and that there was contributory negligence on the part of B.:—Held, that the verdict was such as the jury, reasonably viewing all the evidence, might properly find.

Berthelot v. Salesses, 39 N.B.R. 144.

— Death of adopted child — Fatal Accidents Act.] — The death of an adopted son, though caused by negligence, gives no right of action to the adoptive parent under the Fatal Accidents Act, R.S.O. 1897, c. 166, s. 1, sub-s. 2.

Blayborough v. Brantford Gas Co., 18 O. L.R. 243.

— Damages — Death of minor.] — In an action by parents claiming damages for the death of their minor child the plaintiffs may allege that they were damnified by the death on account of prospective pecuniary advantages to them if he had lived.

Perrault v. City of Montreal, 10 Que. P.R. 361.

— Expense incurred prior to death — Allegating beneficiaries in declaration.] — A declaration by executrices under Lord Campbell's Act, C.S. 1903, c. 79, claiming damages for negligence causing death and for expenses incurred and pecuniary loss sustained by deceased prior to his death, and stating that the action is brought for the benefit of deceased's sisters is bad on demurrer, sisters not being beneficiaries under the Act. The provisions of the Workmen's Compensation for Injuries Act, C.S. 1903, c. 146, place a workman who has been killed by the negligence of his employer in the same position as a stranger, but give his personal representatives no other or better right than they would have if he was a stranger.

Murray v. Miramichi Pulp and Paper Co., 39 N.B.R. 44.

— Solatium doloris — Child killed by a tramway.] — (1) In an action in damages by a father for the killing of his son by a tramway, it is illegal to allege that "plaintiff and child's mother did suffer terrible anguish by reason of the death of said child and that his body was terribly mutilated." (2) But preuve avant faire droit will be ordered on the allegation that "by reason of the darkness, the motorman and conductor of the car could not see the boy."

Linner v. City of Montreal, 11 Que. P.R. 61.

— Action for damages against resident of province — Death happening out of the jurisdiction.] — Action by plaintiff as administrator of his deceased wife to recover damages for her being burnt to death in a fire which occurred on a steamer owned and operated by the defendant company while such steamer was at Warren's Landing in the North-West Territories of Canada. The statement of defence admitted the truth of the allegation in the statement of claim that the plaintiff was the administrator of the estate and effects of his deceased wife, but such administration had only been granted in and for the Province of Manitoba, and the defendants applied for and obtained leave to amend their defence by setting up that the plaintiff had not been appointed such administrator by or under the authority of the North-West Territories of Canada wherein the plaintiff's alleged cause of action had arisen and that the plaintiff had no status or right to bring the action and the alleged cause of action was not and never had been vested in him.

Couture v. Dominion Fish Co., 18 Man. R. 468.

— Fatal Accidents Act — Excessive damages — Death of wife and mother.] — In

an action under the Fatal Accidents Act, R. S.O. 1897, c. 166, to recover damages for the death of a married woman, 62 years of age, the jury awarded $3,325, apportioning $325 to the executors of her husband who survived her, $800 to a daughter 36 years of age, $700 to a son 27 years of age, Held, that damages recoverable being entirely pecuniary, the above (except as to the executors), considering the ages and circumstances of the children, and the age and financial ability of the mother, were grossly excessive, and the case must go to a new assessment.

Ronson v. Canadian Pacific R.W. Co., 18 O.L.R. 337.

— Liability of railway.]— See RAILWAY.

— Liability of electric railway.]— See ELECTRIC RAILWAY.

— New trial.— See APPEAL.

Harris v. Jamieson, 39 N.B.R. 17.

LORD'S DAY ACT.

See SUNDAY.

LOTTERY.

Agreement to operate lottery — Illegality.] — 1. No action can be maintained for the recovery of money under a contract for the operation of a lottery scheme which would contravene the criminal law. 2. Where in a civil action it appears that the plaintiff entered into a conspiracy with the defendant to commit an unlawful act and that the action is brought to recover money paid in furtherance of such conspiracy, it is the duty of the Court ex mero motu to notice the illegality, although not formally pleaded. 3. Such an illegality cannot be cured by the defendant's pleas or attempted waiver. 4. Where there are two agreements, both of which are in furtherance of the unlawful scheme, the second being in form a contract of loan, but collateral and auxiliary to the first which provides for the operation of the lottery, both agreements are invalid and unenforceable.

St. Jean-Baptiste Association of Montreal v. Brault, 30 Can. S.C.R. 598, 4 Can. Cr. Cas. 284.

— Taxation — Legislative power.] — The date on which a tax, sous forme de permis, imposed on every person or company carrying on the business of a lottery, should be paid is sufficiently indicated when the by-law declares that this license is a tax that is payable yearly within the delays prescribed by the city charter, that it will expire on the first day of May following the date on which it was granted and will be renewed each year on demand. A tax cannot be called exorbitant when it does not exceed the amount fixed by the charter for the particular class of cases to which it applies. The legislature can authorize the imposition of taxes, sous forme de permis, on persons or companies carrying on the business of lotteries.

Society of Que. Schools for Poor Children v. City of Montreal, 19 Que. S.C. 148 (Ct. of Rev.).

—Newspaper prize competition — Estimate of number of votes.] — A competition for a prize offered for the nearest estimates of the number of votes to be cast at a coming election and the sale of certificates of admission thereto in consideration of money paid or services performed, does not constitute a lottery offence under Code s. 205.

The King v. Johnston, 7 Can. Cr. Cas. 525.

—Crim. Code, s. 205—Device to evade the law against lotteries.]—Crown case reserved. The accused was convicted in November, 1900, before Richards, J., and a jury, under Crim. Code, s. 205, for having advertised a proposal or scheme for disposing of a horse, buggy and harness by lot, and also for having unlawfully disposed of a number of tickets, lots or cards as a means of or device for disposing of the same property by lot. The modus operandi advertised and practised was that each purchaser of goods to the value of $5 was given a ticket; and, upon a drawing by lot among the holders of such tickets, the winner was to get the horse, buggy and harness if he could shoot a turkey at a distance of fifty yards in fine shot, it being provided that a lady winner could choose a substitute to shoot for her. The case stated that the evidence showed that any person could easily shoot a turkey under the circumstances:—Held, that it was a question for the jury whether the interposition of the condition as to the shooting was intended as requiring a real contest of skill, or merely a device for covering up a scheme for disposing of the property by lot; that the verdict involved a finding, that it was merely a device, that the evidence justified that finding, and that the conviction should be affirmed.

Regina v. Johnson, 14 Man. R. 27, 6 Can. Cr. Cas. 48.

— Bonds with chances of winning prizes.] —The accused had made sales of certain securities called "Bon Panama," which had originally been issued in Paris, France, in 1889, by the Panama Canal Company under the authority of the laws of France. These bonds promised the repayment of 400 francs in the year 1988, and carried with them the chances of getting prizes varying in amount from 500,000 francs to 1,000

francs given to the holders of the lucky numbers by drawings to take place at frequent intervals during the life of the bonds. The accused, in canvassing purchasers of the bonds, held out as an inducement the chance of winning one of these prizes, and the belief that there was such a chance influenced the purchasers in paying the price which they gave for the bonds: — Held, that the accused was rightly convicted of selling lottery tickets contrary to s. 236 of the Criminal Code.

Rex v. Picard, 17 Man. R. 343, 13 Can. Cr. Cas. 298.

LUMBERMEN.

Liability of — Riparian rights — Tolls.]— See WATERS.

Neely v. Peter, 4 O.L.R. 293.

—Timber rights.]— See TIMBER.

LUNACY.

Habeas corpus—Jurisdiction—Lunatic.] —The lunatic who wishes to be set at liberty on the ground that he has recovered his reason may apply for the writ of habeas corpus in the district in which the place in which he is confined is situate. The proceedings to be set at liberty being personal to one confined for insanity, they need not be taken by his curator; the interdict may himself apply for the writ of habeas corpus.

Leduc v. Brothers of Charity, 11 Que. P.R. 138.

Application for declaration of lunacy — Conflict of evidence — Expert testimony.]— Upon an application under sub-s. 1 of s. 6 and sub-ss. 1 and 5 of s. 7 of the Lunacy Act, 9 Edw. VII. c. 37, for an order declaring F. to be a lunatic, the Court, the evidence being conflicting, directed an issue to try the alleged lunacy. S. 10 of the Evidence Act, 9 Edw. VII. c. 43, applies to the calling and examination of witnesses at a trial; upon an application such as this, any number of affidavits of medical experts might be received. Under sub-s. 2 of s. 7 of the Lunacy Act, it was ordered that the issue should be tried without a jury, unless the alleged lunatic should demand a jury in the manner mentioned in s. 8, and the trial Judge should so order. Costs of the application to be disposed of by the trial Judge.

Re Fraser, 1 O.W.N. 1105 (Sutherland, J.).

—Marriage of alleged lunatic—Action to declare marriage void.]—Plaintiff, a retired farmer, over 80 years of age, it was said, went through a form of marriage with defendant, a woman about 30. Catharine McCormick (a daughter of plaintiff's cousin German) brought action, as his next friend, alleging that plaintiff was of unsound mind, and charging defendant and her father, a retired Presbyterian minister of experience as an editor, with conspiracy and forcing an entrance into plaintiff's house, etc., and asked to have said ceremony declared a nullity and void. Defendants moved under Con. Rule 261 to have the action dismissed as frivolous and vexatious. Riddell, J., held (16 O.W.R. 164, 1 O.W.N. 800, 843), that if the plaintiff was non compos mentis the action should not be dismissed, and he ordered a stay of proceedings until further order, on an undertaking that the next friend should take proceedings to have plaintiff declared of unsound mind. The Divisional Court (16 O.W.R. 164; 1 O.W.N. 894), by consent of counsel varied the order of Riddell, J., by directing that the next friend of the plaintiff have liberty to have medical experts examine the plaintiff as to his sanity, and the appellants undertake to facilitate such examination, such examination to take place within one week, and to be upon forty-eight hours' notice to counsel for the appellants. The proceedings under the Lunacy Act, 1909, if any, to be launched by the respondent within four days after the medical examination. The costs of this appeal to be costs in the proposed application for a declaration of lunacy as between appellants and respondent. Sutherland, J. (16 O.W.R. 786, 1 O.W.N. 1105), granted an order directing a trial of an issue whether or not Michael Frazer was, at the time of such inquiry, of unsound mind and incapable of managing himself or his affairs. The Divisional Court (16 O.W.R. 959, 2 O.W.N. 26), affirmed above order. Britton, J., tried the issue and found Michael Frazer sane at the time of the inquiry, and dismissed the action.

McCormick v. Frazer, 17 O.W.R. 383, 2 O. W.N. 241.

—Motion for order superseding order declaring lunacy—Appointment of expert.]— Petitioner presented two affidavits stating that he was not a lunatic, and was perfectly capable of conducting his own affairs, etc., and asked for an order superseding an order declaring him insane:—Held, that the affidavits were not sufficient to warrant an order of supersedeas as the practice required the Judge to examine the lunatic so as to satisfy himself. Order made that petitioner be examined by Dr. Clark as an expert, that supplemental evidence from medical men and others acquainted with petitioner, be received and notice given to his next of kin, and then if the Court is satisfied that petitioner has recovered, the order will be vacated and full civil capacity granted.

Re Robinson, 1 O.W.N. 893, 16 O.W.R. 220.

—Action by guardian of lunatic—Note given for sale of goods before guardian

appointed—Consideration.]—The plaintiff, the brother of a lunatic, sold certain property of such lunatic to defendant, taking a promissory note in payment expressed to be payable to plaintiff for the lunatic. The note being dishonoured, plaintiff sued to recover, and the action was dismissed. The plaintiff was then appointed guardian of the estate and brought a new action as guardian, but did not notify the defendant of his appointment or ratify the transactions occurring prior to his appointment:—Held, that if the note when given was not valid, the plaintiff could not, upon being appointed guardian, recover upon it, in any event not unless he had ratified the sale and notified the defendant of such ratification and of his appointment.

Davis v. Reynolds, 2 Sask. R. 221.

Death of lunatic — Confirmation of report — Discharge of committee.] — Before the confirmation of the Master's report appointing a committee of the person and estate of a lunatic and propounding a scheme for her maintenance, the lunatic died: — Held, notwithstanding the death, that an order should be made (the executors of the deceased consenting) confirming the report and for the discharge of the committee and the surrender of his bond.

Re Garner, 1 O.L.R. 405.

— Lunatic wife — Admission to asylum — Removal by wife's relatives — Subsequent alimony action.] — A husband on two occasions procured the release of his wife from the provincial lunatic asylum, where he had obtained her admission as a lunatic. After her second release she grew worse, becoming violent and dangerous, and he again applied for her admission, which was refused, the authorities declining to receive her except as a "warrant patient," whereupon he took proceedings under s. 12 of R.S.O. 1897, c. 317, which resulted in her being committed to gaol as a dangerous lunatic, from whence she was transferred to the asylum. The wife's relatives then applied to the Lieutenant-Governor and obtained her release, and she went to live with them, and claimed alimony in this action:—Held, that an action therefor would not lie.

Hill v. Hill, 2 O.L.R. 289.

—Detention in an asylum — Prisoner acquitted on account of insanity.]—(1) A warrant may be issued by the Lieutenant-Governor of the province for the detention in an asylum of a prisoner acquitted on account of insanity at the time of the offence (Revised Criminal Code, sec. 969), although found sane at the time of trial.

Re Alexandre Duclos, 8 Que. P.R. 372, 12 Can. Cr. Cas. 278.

—Contracts — Interdiction.]—Proof that a woman had been interdicted for insanity which had been apparent for a year or two, and that her condition had been well known during the six months preceding the interdiction will justify the avoidance of deeds executed by her within such interval, especially if they are against her interest.

Désy v. Bérard, Q.R. 16 K.B. 113.

— Money in Court — Payment out — Life-tenant — Foreign guardian—Maintenance.] —During the infancy of the defendant $2.000 was paid into Court, to one-half of which she was entitled on attaining majority, and to the other half after the death of her mother. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign Court, the mother applied for payment out of the whole fund, having given in the foreign Court specific security for the amount:—Held, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safeguard it, or it might be paid out to the applicant upon substantial security being given. Held, as to the other half, that, being actually in the hands of the Court, it was subject to the jurisdiction of the Court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the Court — whatever sum should be shown to be necessary for maintenance being paid to the foreign guardian.

Re Thompson, Thompson v. Thompson, 19 Ont. Pr. 304.

— Interdiction — Proceedings to set aside interdiction notwithstanding opposition of curator — Failure of — Right of advocate or notary to costs of proceedings — Arts. 83, 334, C.C.] — Held (affirming the judgment of the Superior Court, Archibald, J., 16 C.S., p. 565), an advocate or notary, acting upon the instructions of an interdict for insanity, and in good faith, believing that the cause of interdiction had ceased, but acting without the consent and contrary to the instructions of the curator, is not entitled to recover from the curator in his said quality the costs of such proceedings, which were unsuccessful because it was held that the cause of interdiction had not ceased. Semble, a judgment setting aside the interdiction would have a retroactive effect to the date of the cessation of the cause of interdiction, and would necessarily validate an agreement by the interdict to pay the costs of the proceedings to obtain the removal of the interdiction.

Bouchard v. Bastien, 19 Que. S.C. 507 (C. R.).

— Alimony — Action by lunatic — Right to maintain — Summary judgment — Con. Rule 616.] — On a motion to the Court of Appeal for leave to appeal from the judg-

ment of the Divisional Court, affirming the decision of Meredith, C.J.C.P., 2 O.L.R. 289, 1901, C.A. Dig. 278. Held (1) that the plaintiff in the action was not entitled to alimony, and (2) that on a motion for summary judgment under Rule 616 he could pronounce judgment dismissing the action; and leave to appeal was refused.

Hill v. Hill, 3 O.L.R. 202 (C.A.).

—Appointment of committee—Security and undertaking.]—

Re Simpson, 7 W.L.R. 36 (B.C.).

— Lunatic — Placing in asylum — Certificates — Mandamus — Arts. 3195a et seq., 3228b R.S.Q.—55 and 56 Vict. c. 30 (Que.).] —The father of a lunatic who has not the means to pay the whole cost of his residence, maintenance and treatment in an asylum can, by mandamus, compel the Mayor and secretary-treasurer of the municipality in which the lunatic lives to sign in good faith and to the best of their knowledge, and to attest, the certificates required by Arts. 3195a et seq. R.S.Q. amended by 55 & 56 Vict. c. 30 (Que.), for placing such person in a lunatic asylum; and the provisions of Art. 3228b. R.S.Q., which render these officers liable to a fine of $20 in case of their refusal to sign and attest these certificates does not exclude the recourse by way of mandamus to compel them to do so.

Cournoyer v. St. Martin, 21 Que. S.C. 305 (Sup. Ct.).

—Care of lunatic — Lunatic's estate — Committee's duty as to — Schemes for maintenance — Taxation of costs.] — The rule has for many years been that when the Court intervenes in respect to the property of persons not sui juris, the moneys shall not be left to private investment, but shall be paid into Court and become subject to its general system of administration, by which the interest will be punctually paid and the corpus will always be forthcoming when needed. The general rule to be observed by local officers when it is advisable that the estate should be realized and turned into money, is that the fund so realized shall be paid into Court; and when part of the estate is converted and part kept for the abode of a lunatic or otherwise, the scheme for dealing with the whole shall be reported to the Court that proper directions may be given. In two cases where Local Masters had reported schemes for the maintenance of lunatics and made provision for the moneys of the estates being collected by the respective committees and thereafter for their investment by the committees on securities of different kinds at their discretion, and in one case had taxed the costs and inserted the amount in the report: — Held, that it is imperative that the costs in lunacy matters be taxed by the proper officer in Toronto, as the Local Master has no authority to tax them. And, held, that the moneys in the hands of the committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court.

Re Norris; and Re Drope, 5 O.L.R. 99 (Boyd, C.).

— Admission to lunatic asylum — Certificate of mayor.] — The mayor of a municipality is not obliged to sign the certificate, Form E., of the Act respecting lunatic asylums, without satisfactory proof that the person whose confinement in an asylum is requested has been domiciled in the municipality for at least four months.

Torrance v. Weed, Q.R. 24 S.C. 364 (Sup. Ct.).

— Partition — Proof of unsoundness of mind of defendant by affidavit.] — Unsoundness of mind of defendant in a partition suit may be proved by affidavits under Supreme Court in Equity Act, 53 Vict. c. 4, s. 80. Application refused in a partition suit, that costs of appointing guardian ad litem of defendant, a person of unsound mind, not so found, and of proving her unsoundness of mind by affidavits, be borne by defendants' share in estate.

Masters v. Masters, 2 N.B. Eq. 486.

— Lunatic — Civil liability — Setting fire to barn.] — A lunatic is civilly liable in damages to persons injured by his acts, unless utterly blameless. Where a lunatic defendant had set fire to a barn, and the evidence showed that, while not responsible to the extent of an ordinary man, he was not utterly unconscious that he was doing wrong:—Held, that he was liable for the damage done.

Stanley v. Hayes, 8 O.L.R. 81 (Boyd, C.).

— Criminal charge — Preliminary enquiry.] —(1) A remand by a magistrate in a preliminary enquiry must be made by warrant if made for more than three clear days, and it is essential that the accused should be personally present before the magistrate. (2) A remand for eight days for the purpose of a medical examination of the accused as to sanity cannot be made on the mere suggestion of the police officer without bringing the accused personally before the magistrate.

Re Sarault (Que.), 9 Can. Cr. Cas. 448.

— Exhibits — Inscription de faux.] — The documents required by Art. 3196 R.S.Q. for the reception of a lunatic into an asylum, although sworn to before a justice of the peace, are not authentic exhibits which can be attached by inscription de faux.

Rousseau v. Sisters of Charity, Q.R. 27 S.C. 166 (Sup. Ct.).

— Repairs to estate — Collection of rents —Agent.] — The committee of the estate of a lunatic may be empowered to make

needed repairs to the estate and to employ an agent at a fixed salary to collect rents.

Re McGivery, 3 N.B. Eq. 327.

— Petition for declaration of lunacy — Service out of the jurisdiction — Dispensing with personal service.] — A petition for a declaration of lunacy may be served out of Ontario under 3 Edw. VII. c. 8, s. 13 (O.). And where the supposed lunatic was confined in an asylum outside of Ontario, and ar order was made by the Master in Chambers authorizing service there upon the supposed lunatic and the medical superintendent of the asylum, and the latter alone was served, because he was of opinion that service might dangerously excite the former, an order was made dispensing with personal service and confirming the service made. Quære, as to the jurisdiction of the Master in Chambers under Rule 42, to make an order for service out of the jurisdiction of such a petition.

Re Webb, 12 O.L.R. 194 (Mabee, J.).

— Appointment of guardian — Married woman — Capacity to act.] — Where a married woman possessed of property in her own right and otherwise qualified is appointed guardian of the person and estate of a person of unsound mind the appointment will not be set aside on the sole ground of her being a married woman. Since the Married Woman's Property Act, R.S. (1900), c. 112, many of the objections formerly urged against the appointment of a married woman as trustee have been swept away and a married woman may now accept a trust by virtue of her power to contract as a feme sole.

Re Ruth Woolner White, 42 N.S.R. 248.

— Consent of next friend.] — The English rule requiring that, where the consent of the next friend of the plaintiff is necessary, it must be filed before the issue of the writ of summons is in force in the Territories, and default is not cured by filing a consent filed subsequently to the issue, but avoids all the proceedings in the action.

Short v. Spence, 6 Terr. L.R. 267.

— Lunatic — Detention in asylum — Informalities in certificate — Habeas corpus.] —Where the discharge of a person detained in a lunatic asylum as a lunatic was moved for, under a writ of habeas corpus, by reason of alleged informalities in the certificates, on which the alleged lunatic had been admitted; but it appearing from the affidavit filed by the superintendent and others in the asylum that it would be dangerous to allow him to be at large, the Court directed the trial of an issue as to his sanity; the application for the discharge to stand over, pending the result of the issue or other order of the Court. Re Shuttleworth (1846), 2 Q.B. 651, approved.

Re Gibson, 15 O.L.R. 245 (C.A.).

— Prisoner acquitted on ground of insanity —Further detention.] —

Re Duclos, 12 Can. Cr. Cas. 278, 1907, C.A. Dig. 147, since reported 32 Que. S.C. 154.

— Maintenance of insane — Collector of revenue — Action against municipality — Formalities.] — The right of the collector of the revenue to recover from municipal corporations the amount they are required to contribute towards the burial expenses of the insane is subject to the strict observance of the formalities prescribed for the burial of the latter (R.S.Q. Arts. 3195 et seq.). Hence, an action against the corporation of a county to recover its share of the expenses of burial of insane persons without production of the certificate according to forms E. and I. (R.S.Q. 3195a.) of the major of a councillor and of the secretary-treasurer of each municipality in the county should be dismissed.

Fortier v. County of Quebec, Q.R. 33 S.C. 97 (Sup. Ct.).

— Interdict — Application to revise or annul.] — The revision or annulment of an interdict on account of idiocy can only be granted on application of the party himself or one of his relations. An exception to the form presented by the defendant, a debtor to the estate, asking that the action be dismissed for irregularities in the proceedings for interdiction will be dismissed.

Chevalier v. Swan, 9 Que. P.R. 98 (Sup. Ct.).

—Committee of estate — Moneys advanced on mortgage of lunatic's lands — Accounting.] — By an order made in 1892 the wife of the plaintiff was declared a lunatic, and a reference was directed to appoint a committee, who was to give security and pass accounts at least once a year. The defendants' predecessors were (on consent) appointed committee without security, and a report was made in 1893, which showed the lunatic's estate to consist of a life interest in money in Court and incumbered land, with houses built thereon. The report also showed that the committee had agreed to advance moneys to pay off the mortgages and for purposes of maintenance, which they did, taking an assignment of the mortgages. The lunatic died in 1899; and the plaintiff in 1906 began an action for redemption against the defendants, as successors of the original committee and assignees of the mortgagees. At the same time an appointment was issued in the lunacy matter for the defendants to bring in and pass their accounts before the referee; and the action was referred to him for trial. The committee had not passed their accounts previously. In 1908 the then committee had, without any authority from the Court, expended money in building a stable on the lunatic's land and in other

ways. The committee looked upon the estate as hopelessly insolvent, and regarded themselves as mortgagees in possession. On the passing of the accounts the referee disallowed all payments made by the committee other than for taxes, insurance premiums, interest on mortgages, and minor repairs, and also refused to allow them remuneration for their services, and refused them their costs of accounting, and so reported:—Held, by Meredith, C.J.C.P., on appeal, directing a reference back, that the defendants should be allowed for the expenditure upon the stable, if, upon the facts as found, a case should be made which would have been sufficient to have obtained an order permitting the expenditure to be made, had an application been made to the Court for authority to incur it; that the fact that the committee did not pass their accounts annually was not alone sufficient ground for charging them with sums with which they would not otherwise have been chargeable, or for disallowing sums which they would have been otherwise entitled to have allowed to them; and that the order on appeal should not prejudice the right of the defendants to claim that they were not to be chargeable as committee, but as mortgagees in possession. This order was affirmed by a Divisional Court. Semble, per Boyd, C., that, had there been no question to go back to the referee as to allowance for improvements, his ruling as to the costs of accounting should not have been disturbed; the onus was still on the committee to satisfy the referee that costs should be given and other allowances made, and how far given and made, notwithstanding the disregard of the order directing an annual passing of accounts.

Re Breen, 18 O.L.R. 447.

— Improvident contract — Voluntary gift — Insanity of grantor.] — William Davidson died in 1890, leaving real estate consisting of a homestead and lot "A," all of which he left absolutely to his wife Helen Davidson, and appointed her and the defendant William Ferguson executors. In 1898 James Davidson, son of William and Helen Davidson, being indebted to the defendants William Ferguson and Philip Arsenault, became insolvent and assigned to Philip Arsenault. Nearly all the creditors, including William Ferguson and Philip Arsenault, agreed to compromise at ten cents on the dollar, but James Davidson made a secret agreement with William Ferguson and Philip Arsenault that they should be paid in full. By arrangement between James Davidson, William Ferguson and Philip Arsenault, William Ferguson for James Davidson purchased the assets from Philip Arsenault as assignee for $1,000.00, and for the securing William Ferguson the balance advanced and balance of his old debt against James Davidson, Helen Davidson in 1899, being then about seventy-six years of age, without any independent advice, executed to William Ferguson a mortgage of lot "A" for $822.90. William Ferguson gave James Davidson a power of attorney to deal with these assets, who in the name of William Ferguson sold and converted them into money to an amount greater than the mortgage. In December, 1899, James Davidson arranged that his mother should sell to Philip Arsenault the said lot "A" for $600, $200 of it to go on Philip Arsenault's old account against James Davidson, and $400 by notes made by Philip Arsenault in favour of William Ferguson, and which the latter took on his account against James Davidson. Both the mortgage and deed were written by James Davidson, and Helen Davidson had no independent advice and had become of feeble intellect. In March, 1900, Helen Davidson made a will leaving all her property to her son James and his family. William Ferguson drew this will, is named in it an executor, and had full knowledge of its contents. In December, 1902, James Davidson being indebted to William Ferguson to the amount of $1,250.97, Helen Davidson, at the request of William Ferguson and James Davidson, gave a mortgage of the homestead to William Ferguson for $1,250.97 to secure that amount, which was shown by the evidence to be the total sum due from James Davidson to William Ferguson at that time. Helen Davidson lived practically all the time with James Davidson, and he had great influence over her, with fact was well known to both William Ferguson and Philip Arsenault:—Held, that the first mortgage to Ferguson, made in March, 1899, was discharged and must be set aside, as the amount which it had been given to secure had been paid in full. Held, that the conveyance to Arsenault, made in December, 1899, must be set aside, as obtained through undue influence and pressure on the part of James Davidson, and solely for his benefit; and on the ground of the mental weakness of the grantor, and that she had no independent advice; that Arsenault, as he knew the relation which James Davidson occupied with regard to the grantor, and all the circumstances in connection with the transaction, stood in no better position than James Davidson would stand, and was bound by, and responsible for, any acts committed by Davidson, or omitted to be done by him. Held, that the second mortgage to Ferguson, made in December, 1902, must be set aside, as obtained through undue influence and pressure on the part of James Davidson and William Ferguson, and solely for their own benefit; that Ferguson had the same knowledge of all the facts as Arsenault, and was bound in the same way by the acts and omission of James Davidson; that the grantor had no independent advice, and was so deranged mentally as to be incapable of transacting business.

McGaffigan v. Ferguson, 4 N.B. Eq. 12.

— **Action by guardian of lunatic — Note given for sale of goods before guardian appointed — Ratification.**] — The plaintiff, the brother of a lunatic, sold certain property of such lunatic to defendant, taking a promissory note in payment expressed to be payable to plaintiff for the lunatic. The note being dishonoured, plaintiff sued to recover, and the action was dismissed. The plaintiff was then appointed guardian of the estate and brought a new action as guardian, but did not notify the defendant of his appointment or ratify the transactions occurring prior to his appointment:— Held, that if the note when given was not valid, the plaintiff could not, upon being appointed guardian, recover upon it, in any event not unless he had ratified the sale and notified the defendant of such ratification and of his appointment.

Davis v. Reynolds, 2 Sask. R. 221.

END OF VOLUME I.